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COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

Registrar's Stamp

COURT OF APPEAL FILE NUMBER:	
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	Edmonton
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, C T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND, INTER VIVOS SETTLEMENT, CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE 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 TWINN, 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 (the "OPTG")
STATUS ON APPEAL:	Not a Party to the Appeal
STATUS ON APPLICATION:	Not a Party to the Application

INTERVENOR:	THE SAWRIDGE BAND (the "SB")
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:	Application
DOCUMENT:	**MEMORANDUM OF ARGUMENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT:	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

and

CONTACT INFORMATION OF ALL OTHER PARTIES:	DENTONS LLP 2900 Manulife Place 10180-101 Street NW Edmonton, AB T5J 3V5 Attention: Doris Bonora & Erin Lafuente Phone: 780 423 7188 Fax: 780 423 7276 Counsel for the Sawridge Trustees PARLEE MCLAWS LLP 1700 Enbridge Centre 10175-101 Street NW Edmonton, AB T5J 0H3 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 T0G 2A1

Contents

I. Introduction

1. This application concerns a decision to make a solicitor (Ms. Kennedy) personally liable for an award of costs on a solicitor and own client indemnity basis. The amount of the costs has not been settled but the amount claimed is in excess of $200,000. In this application the solicitor seeks advice and direction whether an appeal from the decision requires permission pursuant to Rule 14.5(1)(e) of the *Alberta Rules of Court* and, if so, for such permission. Given the relevant deadlines the Applicant has filed a Civil Notice of Appeal but also brings this Application in case permission is required under the Rules.

II. Advice and Direction Sought: Permission is not required for an appeal of a decision awarding costs against a solicitor personally

2. In his decision Case Management Justice (the "CMJ") found Ms. Kennedy had engaged in "a serious abuse of the judicial system" because: (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."[1] On the basis of that finding the CMJ ordered that Ms. Kennedy be personally liable, jointly and severally with her client Maurice Felix Stoney, for the solicitor and own client indemnity costs the CMJ had ordered against Mr. Stoney in a prior case management decision. The CMJ also directed that a copy of his judgment be delivered to the Law Society of Alberta for its review.

3. The issue on which advice and direction is sought is whether this decision is "as to costs only" within the meaning of s. 14.5(1)(e) of the *Rules*.

4. The Applicant submits that it is not. An award of costs against a solicitor personally is made pursuant to Rule 10.50 which Appears under Division 4 of Part 10 of the Rules. Division 4 is entitled "Sanctions" and permits an award only where there has been a finding of "serious misconduct". The serious nature of such an award was expressed by McLachlin J (as she then was) in *Young v. Young,* [1993] 4 SCR 3 at para. 136 where she observed "...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 cases." More recently, in *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin,* 2017 SCC

[1] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 at para 150 (*Sawridge #7*) **[Appendix 1]**

26, Gascon J observed at para. 25: "Only serious misconduct can justify such a sanction against a lawyer." He went on to observe 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."

5. Given these preconditions to the imposition of the sanction of personal liability for costs, the Applicant submits such a decision cannot be construed as being "as to costs only". In this case, the decision also involved the additional step of a referral to the Law Society of Alberta with respect to Ms. Kennedy's conduct. Accordingly the Applicant submits the decision in question does not fall within the scope of section 14.5(1)(e), and that permission to appeal is not required.

III. Application for permission: If permission is required permission should be granted

The Test for Permission

6. A party seeking permission to appeal a costs award must demonstrate:

   a. a good arguable case having sufficient merit to warrant scrutiny by this Court;

   b. issues of importance to the parties and in general;

   c. that the costs appeal has practical utility; and

   d. no delay in proceedings caused by the costs appeal.[2]

The Applicants submit each of these requirements is met in the present case.

a.) There are good arguable issues on appeal

Issue 1: The busybody finding was wrong

7. The CMJ held Ms. Kennedy "did not have instructions or a legal basis" to file the Stoney Application on behalf of "Maurice Felix Stoney and his brothers and sisters" and thus had engaged in unauthorized "busybody litigation"[3] deserving of sanction.

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[2] *Bun v Seng*, 2015 ABCA 165 at paras 4-5 **[Tab 1 of Authorities]**
[3] *Sawridge #7* at para 137-138 **[Appendix A]**

8. The CMJ noted that this was not a class action scenario, nor was there any documentation to establish that Maurice Stoney applied or was appointed as a litigation representative for his siblings under Rules 2.11-2.21.[4] The CMJ expressed serious concern that Ms. Kennedy had exposed Mr. Stoney's siblings to potential costs liability.[5]

9. In fact, the Stoney Application was being advanced as a representative action, which is authorized by Rule 2.6. Under Rule 2.6, where numerous persons have a common interest in the subject of an intended claim one of those persons may make the claim for the benefit of all. A representative action does not require court approval and "is good unless and until set aside."[6] In such an action, only the representative faces potential costs liability pursuant to Rule 10.32.

10. The nature of the Stoney Application as a representative action was part of the record before the Court. It was clearly stated by Ms. Kennedy when Mr. Stoney was questioned on his Affidavit by counsel for the Sawridge Trustees:

> MS. LAFUENTE: And this is a representative action?
>
> MS. KENNEDY: Yes. On behalf of a family, yes. That's the way you go. Each of them have exactly the same characteristics. They're all members of the same family. They all have the same interest.[7]

11. In addition, the Sawridge Trustees recognized the nature of the Stoney Application as a representative action in their written submissions, and objected to Mr. Stoney as representative on the basis that not all siblings "share the same facts on their application for membership."[8] This objection was not noted or addressed in the CMJ's decision.

12. With respect, the CMJ did not correctly appreciate the nature of the application before him and addressed his mind to an irrelevant consideration when he asked whether Mr. Stoney's siblings had retained Ms. Kennedy. In a representative pleading it is the representative who retains counsel, as Mr. Stoney did here. Although not strictly required, the affidavits filed by the

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[4] *Sawridge #7* at para 136 **[Appendix A]**
[5] *Sawridge #7* at para 139-140 **[Appendix A]**; see also *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 (*Sawridge #6*) at paras 8-12 **[Tab 2 of Authorities]**
[6] *Lameman v Canada (Attorney General)*, 2007 ABCA 180 at para 2 **[Tab 3 of Authorities]**; *Western Canadian Shopping Centres Inc. v Bennett Jones Verchere*, 1998 ABCA 392 at paras 11 and 14, var'd other grounds 2001 SCC 46 **[Tab 4 of Authorities]**
[7] Affidavit of Priscilla Kennedy, Exhibit D (Transcript of Questioning) at pages 66-67
[8] Affidavit of Priscilla Kennedy, Exhibit F (Written Submissions of Sawridge Trustees) at para 31

family members demonstrated family endorsement of Mr. Stoney's representative status.[9] The CMJ's finding that Ms. Kennedy engaged in "busybody" litigation deserving of sanction because she did not have direct instructions from family members was in error.

Issue 2: The finding that the Stoney Application constituted serious abuse was wrong

13. In concluding the Stoney Application was a serious abuse the CMJ fundamentally misconstrued the argument which formed the basis for the Stoney application.

14. The CMJ concluded Ms. Kennedy's arguments in ***Sawridge #6*** were effectively the same as the arguments she advanced unsuccessfully on behalf of Mr. Stoney and his cousins, Ms. Huzar and Ms. Kolosky, in a 2012 Federal Court application. (Mr. Stoney's siblings were not parties to either of the prior Federal Court proceedings.) That application was for judicial review of the SB's decision to reject applications for membership in the SB.[10] In that decision Barnes J. found that the under the terms of the *Indian Act* Mr. Stoney and his cousins did not fall within the class of persons to whom the *Act* gave an "acquired right" – in effect an automatic right – to membership in the SB. Rather he fell within the class of persons whose membership fell to be determined by the SB itself pursuant to its membership code. The CMJ concluded the same argument was simply being repeated before him.

15. This conclusion was based on a misunderstanding of Ms. Kennedy's submissions. While the claim of Mr. Stoney and his siblings to beneficiary status warranting their addition to the proceedings as parties or intervenors arises from their assertion of band membership, the basis of that assertion before the CMJ was one on which no court has adjudicated. That basis may be summarized as follows:

- There is no dispute that the parents of Mr. Stoney and his siblings were members of the SB or that Mr. Stoney and some of siblings were also registered as members of the band at birth. However Mr. Stoney's father sought enfranchisement (effectively the voluntary relinquishment of his Indian status) and as a result he, his wife and his children all lost their Indian status and

[9] Affidavit of Priscilla Kennedy, Exhibit I
[10] *Sawridge #7* at para 127 **[Appendix A]**

membership in the SB. The remainder of Mr. Stoney's siblings did not acquire Indian status or membership at birth as a result of their father's enfranchisement.

- As found by Barnes J., children in the position of Mr. Stoney and his siblings do not enjoy an acquired (automatic) right to membership under a straightforward reading of the membership provisions of the *Indian Act* However there is an alternative constitutional basis upon which such an acquired right might be found, as follows;
- Under s. 35 of the *Constitution Act, 1982* the existing treaty rights of aboriginal peoples are recognized and affirmed. Membership in a band is such a right. The loss of (or failure to acquire) band membership by children such as Mr. Stoney and his siblings arose from the enfranchisement provisions of the *Indian Act* which constituted a burden on their treaty rights. When that burden was removed by Bill C-31 which repealed the enfranchisement provisions the treaty right reasserted itself and with it those children's entitlement to band membership.
- Since the reassertion of the treaty right occurred as of the date Bill C-31 took effect, on April 17, 1985, and the SB did not establish its membership code until, at the earliest, July 8, 1985, there was no impediment to the children's claim of entitlement to band membership.

16. The Applicant submits this is an argument that was not raised, argued, or decided in any of Mr. Stoney's prior litigation concerning his band membership. The Applicant recognizes it may be found that this could have or should have been argued in prior proceedings. Nonetheless the Stoney Application was based on issues which have never been addressed by the Courts. The Applicant submits her duty as an advocate required she make this argument.

17. The Applicant submits the fact the application in ***Sawridge #6*** was conducted entirely in writing may have contributed to the errors referred to herein. The absence of oral submissions means the CMJ did not have the benefit of the opportunity to ask questions, clarify submissions and clear up misunderstandings by hearing directly from Ms. Kennedy. While an oral hearing did occur in Sawridge #7 it was on fairly short notice, the Court had already reached tentantive

conclusions regarding Ms. Kennedy conduct,[11] and the partner from her firm who spoke on her behalf at that hearing acknowledged: "I knew nothing about this litigation until sometime last week." and "By no means am I conversant in the litigation like my friends are." and "I don't do aboriginal litigation at all."[12]

Issue 3: The CMJ applied the wrong test for an award of costs against a solicitor

18. The CMJ found Ms. Kennedy had engaged in conduct deserving sanction despite apparently accepting submissions made on behalf of Ms. Kennedy by the partner of her firm that the Stoney Application "was not made with a bad motive or the intent to abuse court processes."[13]

19. The CMJ based his finding on his interpretation that the recent SCC decision in ***Quebec (Director of Criminal and Penal Prosecutions) v Jodoin***[14] had created "a new basis on which to award costs against a lawyer"[15] that did not require deliberate misconduct or bad faith or patently unjustified actions. The Applicant submits this was a misinterpretation of the test in ***Jodoin***. In ***Jodoin***, the SCC reiterated the exceptional nature of a personal award of costs against a lawyer, then stated:

> [29] .... 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. (emphasis added)

The Court further held that the power to award such costs must be exercised with "restraint and caution"[16]. The Applicants submits the CMJ erred in finding Applicant's conduct fell within the test set out in ***Jodoin.***

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[11] *Sawridge #6,* paras 69-79 **[Tab 2 of Authorities]**
[12] Affidavit of Priscilla Kennedy, Exhibit H (Transcript of Proceedings) at page 3
[13] *Sawridge #7* at para 18 **[Appendix A]**
[14] *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26 (*Jodoin*) **[Tab 5 of Authorities]**
[15] *Sawridge #7* at para 34 **[Appendix A]**
[16] *Jodoin* at para 26 **[Tab 5 of Authorities]**

Issue 4: The CMJ's decision was based on irrelevant considerations and factors wrongly characterized as aggravating

20. In a lengthy passage of his judgement (paragraphs 59 to 70) entitled "The Nuremberg Defence – I was Just Following Orders" the CMJ forcefully asserted a lawyer cannot avoid liability for costs by saying they were only following their client's instructions. At no time did the Applicant seek to justify her actions on this basis.

21. In another passage the CMJ stated that the Stoney application had "a special aggravating element" because it amounted to a challenge to the self-government of an aboriginal community.[17] The Applicant submits this is a serious misinterpretation of the nature of the interests at stake and fails to recognize Mr. Stoney's own status. Maurice Stoney's application was founded in his status as a member of Canada's aboriginal peoples and a status Indian born into membership in the Sawridge Band with his own treaty entitlements. Mr. Stoney lost that membership in the Sawridge Band not as a result of band action but as a result of the effects of federal legislation now repealed because of its discriminatory character. The Applicant submits the CMJ's finding that Mr. Stoney's attempts to pursue his own constitutionally recognized treaty rights constitute an "aggravating factor" because they might conflict with other aboriginal interests is an error in principle.

22. The CMJ also appears to have treated Ms. Kennedy as though she had been "warned or alerted" that her application was abusive and that this provided further justification for the award.[18] While it is true the CMJ has issued warnings, they came long after Mr. Stoney's application had been brought and the submissions completed. In ***Sawridge #4*** the CMJ warned that "[a]ttempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers), on a punitive or indemnity basis."[19] A similarly severe warning was included in ***Sawridge #5***. However, both of these warnings came too late to be effective: ***Sawridge #4*** was issued on April 28, 2017, and ***Sawridge #5*** was issued on July 5, 2017, many months after all of the written

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[17] *Sawridge #7* at paras 148-49 **[Appendix A]**
[18] *Sawridge #7* at paras 94-96 **[Appendix A]**
[19] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 at para 30 (*Sawridge #4*) **[Tab 6 of Authorities]**; see also *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 at para 50-53 (*Sawridge #5*) **[Tab 7 of Authorities]**

submissions had been filed in the Stoney Application in accordance with the timelines ordered by the CMJ.[20]

23. While the Sawridge Trustees and the SFN objected to the Stoney Application on the basis that it was a collateral attack, Ms. Kennedy disagreed with this position, as she was entitled to do. Persistence in the face of disagreement with opposing counsel on a legal issue is not a basis for sanctioning a lawyer.

b.) The issues on appeal are important to Ms. Kennedy and in general

24. The importance of the issues on appeal to Ms. Kennedy cannot be overstated. The reputational impact of the CMJ's findings with respect to Ms. Kennedy's conduct is severe, particularly at this late point in Ms. Kennedy's legal career. There has already been significant media coverage of the case,[21] and it can reasonably be anticipated that ***Sawridge #7*** will be studied in Professional Responsibility classes in law schools across the country for years to come. Ms. Kennedy also faces the prospect of having to defend herself before the Law Society of Alberta.

25. The potential financial impact on Ms. Kennedy is significantly harsher than in many cases when a lawyer is ordered to pay costs personally. The costs currently claimed exceed $200,000.[22] It is unknown whether the CMJ contemplated his award of costs for what was an application in writing would approach this level.

26. The importance of the issues in general is also evident. It is clear from the length and breadth of the CMJ's reasons that he intended that his decision set a new standard for the assessment of the conduct of lawyers. His underlying conclusion that the principles enunciated by the SCC in *Hyrniak v Mauldin* should inform the test for whether lawyers should be personally liable for costs represents a new direction in the law. The CMJ explicitly acknowledged this new direction when he stated:

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[20] As illustrated in Appendix B hereto, the submissions on the Stoney Application were complete by mid-November, 2016. The CMJ's first warning on this regarding such applications was not made until the end of April, 2017. The lawyer who spoke for Ms. Kennedy at the application also appears to have been under the misapprehension the warning in *Sawridge #5* preceded the Stoney application. See page 3 of Transcript at Exhibit H to the Affidavit of Ms. Kennedy.
[21] Affidavit of Priscilla Kennedy, para 11 and Exhibit K
[22] Affidavit of Priscilla Kennedy, para 10

[50] What is new are the implications that can be drawn from a lawyer's actions or inactions. They, too, must be part of the "culture shift".

This is clearly an issue of general importance that warrants appellate consideration.

27. The CMJ's conclusion that the SCC in ***Jodoin*** mandated "a new basis on which to order costs against a lawyer"[23] is equally a question of general importance. It should be noted that in ***Morin v TransAlta Utilities Corporation*** Graesser J appeared to reach the opposite conclusion, stating ***Jodoin*** "is interesting but does not create a remedy that was not already there in the Rules of Court or at common law in civil proceedings."[24]

28. Finally the CMJ explicitly identified this as a "test example." Appellate intervention is needed to clarify whether anything has changed with respect to the test for awarding costs personally against a lawyer.

c.) There is practical utility to this costs appeal

29. The decision in ***Sawridge #7*** has substantial practical impact on Ms. Kennedy both financially and with respect to her reputation. Appellate review will address those impacts. An appeal will also have practical utility by giving this Court an opportunity to consider and provide guidance on the standard of conduct expected of counsel and when the conduct of counsel may attract personal liability for costs.

d.) This appeal will not delay the proceedings

30. Appellate review of the decision in ***Sawridge #7*** will not affect the ongoing conduct of the underlying proceedings. The issue of Ms. Kennedy's personal liability for costs is ancillary to the main proceedings and, as such, there is no reason to expect the main proceedings before the CMJ would be delayed by Ms. Kennedy's appeal. It should also be noted that Mr. Stoney has already filed his own appeal from the decision in ***Sawridge #6***. Ms. Kennedy and her firm do not represent Mr. Stoney on that appeal.

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[23] *Sawridge #7*, para 34

[24] *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409 at para 39 **[Tab 8 of Authorities]**

IV. Relief sought

31. The Applicant seeks direction that permission to appeal the decision of the CMJ in ***Sawridge #7*** is not required. In the event permission is required the Applicant seeks permission accordingly.

All of which is respectfully submitted this 29th day of September, 2017.

FIELD LLP
Counsel for the Applicant/Appellant

Per: _____
P. Jon Faulds, QC

_____
Kimberly Precht

Appendices

A. Decision proposed to be appealed: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530 (*Sawridge #7*)

B. Table: Chronology of decisions in which Thomas J issued warnings with regards to potential liability for elevated costs and/or actually imposed elevated costs awards prior to *Sawridge #7*

Authorities

1. *Bun v Seng*, 2015 ABCA 165
2. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 (*Sawridge #6*)
3. *Lameman v Canada (Attorney General)*, 2007 ABCA 180
4. *Western Canadian Shopping Centres Inc. v Bennett Jones Verchere*, 1998 ABCA 392
5. *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26
6. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299 (*Sawridge #4*)
7. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377 (*Sawridge #5*)
8. *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409
9. *Stoney v Sawridge Trust*, 2016 ABCA 51

Court of Queen's Bench of Alberta

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

Date: 20170831
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

The Sawridge Band

Intervenor

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

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I Introduction

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

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

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

1. Maurice Stoney is estopped from making this argument via his concession in ***Huzar v Canada***, [2000] FCJ 873 (QL), 258 NR 246 (FCA) that this argument has no legal basis.

2. Maurice Stoney made this same argument in ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253, where it was rejected. Since Mr. Stoney did not choose to challenge that decision, that finding of fact and law has 'crystallized'.

3. In ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2015 ABQB 799 at para 35, time extension denied 2016 ABCA 51, 616 AR 176, I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application by the 1985 Sawridge Trustees.

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

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

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

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

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

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

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

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

II Background

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

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

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

III Evidence and Submissions at the July 28 Hearing

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

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

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

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

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

A. Priscilla Kennedy

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

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

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

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

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

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

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

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

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

B. Sawridge Band

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

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

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

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

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

C. Sawridge Trustees

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

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

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

IV. Court Costs Awards vs Lawyers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Principle 2 on page 5:
>
> > 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; ***Moore v Apollo Health & Beauty Care***, 2017 ONCA 383; ***R v Tossounian***, 2017 ONCA 618.

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

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

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

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

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

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

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

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

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

B. Costs Awards Against Lawyers

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

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

> ... flows the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... [Citations omitted.]
>
> (***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 ***R v Cunningham***, 2010 SCC 10 at para 35, [2010] 1 SCR 331, is careful to distinguish how professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes:

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

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

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

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

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

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

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

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

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

2. The Nuremberg Defence - I Was Just Following Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. No Constitutional Right to Abusive Litigation

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

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

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

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

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

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

[75] Restating this point:

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

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

4. An Exceptional Step

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

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

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

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

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

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

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

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

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

5. Abuse of the Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Knowledge and Persistence

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

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

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

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

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

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

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

7. Examples of Lawyer Misconduct that Usually Warrant Costs

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

a. Futile Actions and Applications

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

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

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

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

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

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

b. Breaches of Duty

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

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

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

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

c. Special Forms of Litigation Abuse

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

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

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

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

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

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

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

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

d. Delay

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

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

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

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

C. Conclusion

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

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

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

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

V. Priscilla Kennedy's Litigation Misconduct

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

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

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

A. Futile Litigation

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

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

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

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

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

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

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

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

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

B. Representing Non-Clients

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Conclusion

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

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

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

E. Quantum of the Costs Award

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

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

VI. Conclusion

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

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

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

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

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

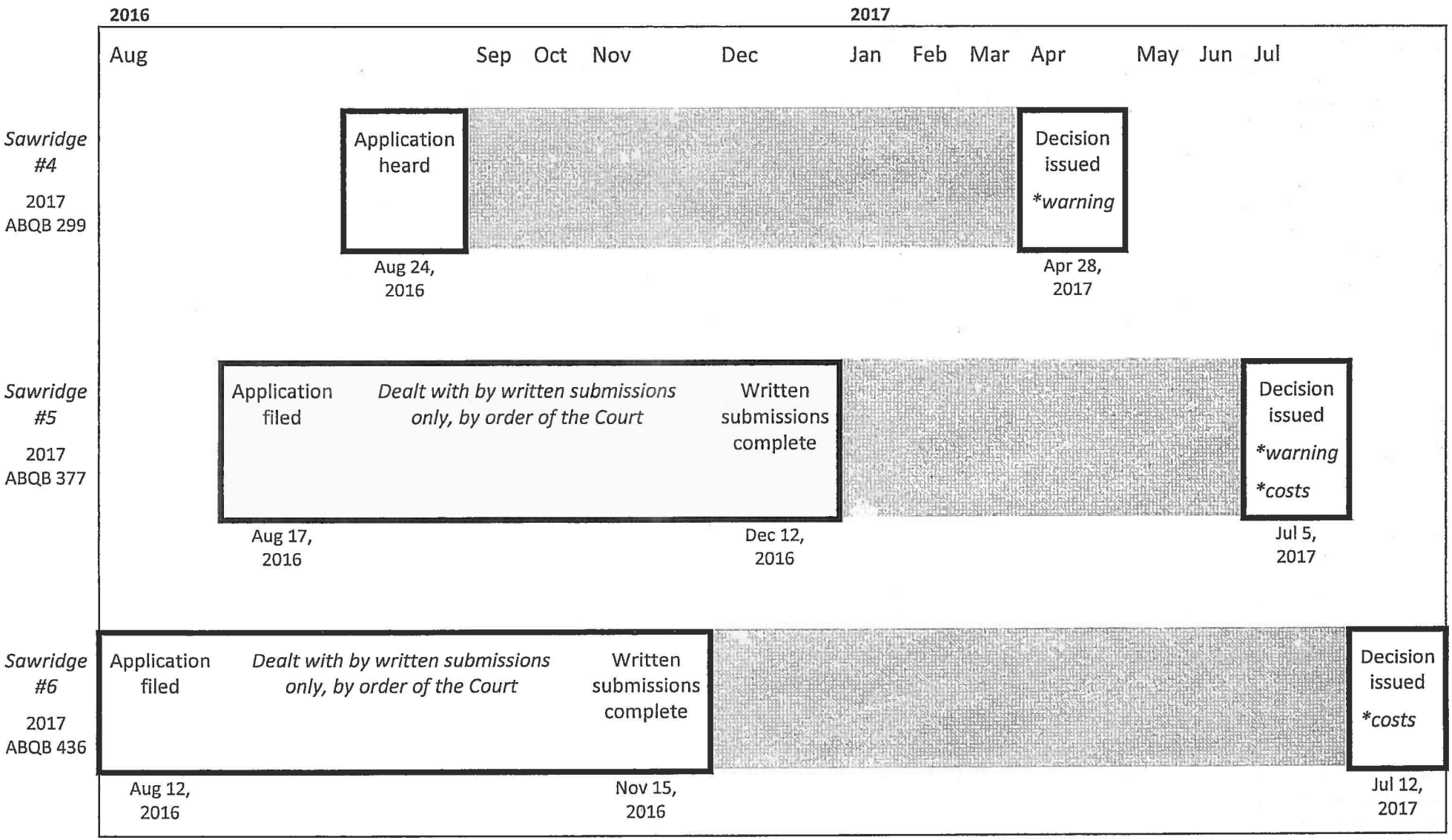
Submissions in writing from:

Donald Wilson
DLA Piper
for Priscilla Kennedy

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

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

Table: Chronology of decisions in which Thomas J issued warnings with regards to potential liability for elevated costs and/or actually imposed elevated costs awards prior to *Sawridge #7*



In the Court of Appeal of Alberta

Citation: Bun v Seng, 2015 ABCA 165

Date: 20150515
Docket: 1503-0107-AC
Registry: Edmonton

Between:

Heang Bun

Applicant
(Appellant)

- and -

Pheap Seng and The Cambodian Canadian Friendship Society of Edmonton and Areas

Respondent
(Respondent)

Reasons for Decision of
The Honourable Madam Justice Ellen Picard

Application for Permission to Appeal

Reasons for Decision of
The Honourable Madam Justice Ellen Picard

[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 at para 9, 521 AR 121; ***Gutierrez v Jeske***, 2005 ABQB 971 at para 4, 396 AR 1. 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 Company***, 2015 ABCA 89 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 at para 42, [2003] 3 SCR 371. 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***, 2004 SCC 9 at para 27, [2004] 1 SCR 303. 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 at para 13, 255 AR 234; ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd***, 2014 ABCA 74 at para 17, 569 AR 308.

[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 heard on May 12, 2015

Reasons filed at Edmonton, Alberta
this 15th day of May, 2015

Picard J.A.

Appearances:

K.C. Ng
for the Respondent (Respondent)

Applicant (Appellant) Heang Bun in Person

Court of Queen's Bench of Alberta

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

Date: 20170712
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

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

Intervenor

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

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Table of Contents

I. Introduction

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

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

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

II. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Maurice Stoney

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

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

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

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

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

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

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

B. Sawridge Band

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

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

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

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

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

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

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

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

C. 1985 Sawridge Trustees

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

VI. Analysis

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Vexatious Litigant Status

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. Costs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

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

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

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

In the Court of Appeal of Alberta

Citation: Lameman v. Canada (Attorney General), 2007 ABCA 180

Date: 20070530
Docket: 0403-0299-AC
Registry: Edmonton

Between:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on Their Own Behalf and on Behalf of All Descendants of the Papaschase Indian Band No. 136

Appellants
(Plaintiffs)

- and -

Attorney General of Canada

Respondent
(Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Third Party)

- and -

Federation of Saskatchewan Indian Nations

Intervener

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Doreen Sulyma

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice F.F. Slatter
Dated the 13th day of September, 2004
Entered the 14th day of December, 2004
(Docket: 0103-03088)

Memorandum of Judgment

The Court:

[1] After we gave reasons for judgment, 2006 ABCA 392, counsel could not agree on four aspects of the formal judgment. After reading written submissions, we rule on them as follows.

A. Representative or Class Actions and R. 42

[2] Only class actions need court approval. A representative action under R. 42 by "numerous plaintiffs" does not. The notice of motion in Court of Queen's Bench sought "an Order pursuant to Rule 42 . . . that the Plaintiffs may proceed by way of representative action . . ." and approving the plaintiffs. The case management judge refused that. The motion was unnecessary, and one which the judge probably could not grant. A representative suit is good unless and until set aside. The cross motion by the Attorney General of Canada was about summary judgment and striking out pleadings, not about R. 42. The comments in the earlier Court of Appeal Reasons (paras. 122, 131-2) merely reflected the existing statement of claim. The appeal from this part of the formal judgment is dismissed, but we do not rule on the merits, because the plaintiffs' R. 42 motion was unnecessary. We heard no arguments on the merits.

B. Temporary Stay

[3] The Reasons say that that was sent back to Court of Queen's Bench to rehear. None of the suit is dismissed or struck out. The plaintiffs can take it all to trial if they wish. The Reasons are clear.

C. Court of Queen's Bench Costs

[4] The Reasons are clear. There is no dispute here anymore. Any Court of Queen's Bench costs order is set aside. In its place is an order that after trial, the trial judge will award and fix Court of Queen's Bench costs. And if no trial is held, then any Court of Queen's Bench judge can award and fix them.

D. Pleadings Closed

[5] An appeal is from the formal Court of Queen's Bench judgment, which here did not deal with the topic. The Court of Appeal Reasons likely make this ***res judicata***, but that is without prejudice to the right of any party to move to amend its pleadings, or the right of any plaintiff to move for leave to file a late Reply.

E. Form of Formal Judgment

[6] We attach a proper form of wording, which the Deputy Registrar may sign without any further approval. We note that both counsel's drafts used headings traditional for an order rather than a judgment.

F. Costs

[7] Success was divided, but the Attorney-General's draft was closer to being correct. The Attorney-General of Canada will recover $1000 costs jointly and severally from the appellants. The third party and intervener will neither pay nor receive costs.

Appeal heard on September 7, 2006

Memorandum filed at Edmonton, Alberta
this 30th day of May, 2007

Côté J.A.

Authorized to sign for: Paperny J.A.

Sulyma J.

Appearances:

E.E. Meehan, Q.C.
R.S. Maurice
M.-F. Major
for the Appellants (Plaintiffs)

M.E. Annich
S.C. Latimer
for the Respondent (Defendant) Attorney General of Canada

D.N. Kruk
A.L. Edgington
for the Respondent (Third Party) H.M.Q. in Right of Alberta

M.J. Ouellette
for the Intervener Federation of Saskatchewan Indian Nations

Appeal No. 0403-0299-AC
Q.B. Action No. 0103-03088

IN THE COURT OF APPEAL OF ALBERTA

IN COURT AT EDMONTON, ALBERTA ON THURSDAY, THE 7TH DAY OF SEPTEMBER, 2006

PRESENT:

THE HONOURABLE MR. JUSTICE J.E.L. CÔTÉ
THE HONOURABLE MADAM JUSTICE M.S. PAPERNY
THE HONOURABLE MADAM JUSTICE D.A. SULYMA

BETWEEN:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on Their Own Behalf and on Behalf of All Descendants of the Papaschase Indian Band No. 136

Appellants
(Plaintiffs)

- and -

Attorney General of Canada

Respondent
(Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Third Party)

- and -

Federation of Saskatchewan Indian Nations

Intervener

JUDGMENT

THIS IS TO CERTIFY THAT THIS APPEAL from the Judgment of the Honourable Mr. Justice F.F. Slatter, dated the 13th day of September, 2004 and entered the 14th day of December, 2004 having come on for hearing before this Honourable Court on the 7th day of December, 2006; **AND UPON HEARING** the submissions of counsel; **AND UPON THE APPEAL BEING HEARD** and decision reserved on the 7th day of September, 2006; **AND UPON THIS COURT** being pleased to pronounce judgment on the 19th day of December, 2006; **AND UPON** further written submissions as to the form of judgment having been filed in the month of April, 2007; **AND UPON** the Court then settling these minutes;

IT WAS ORDERED AND ADJUDGED THAT:

1. No order was made with respect to Paragraph 1 of the appealed Queen's Bench Judgment.
2. The temporary stay contained in Paragraph 2 of the appealed Queen's Bench Judgment was referred back to the Case Management Judge for rehearing in light of the Judgment pronounced December 19, 2006 and of this Judgment.
3. Paragraph 3 of the appealed Queen's Bench Judgment was set aside in its entirety, and the motions to dismiss summarily or to strike out the statement of claim were denied.
4. Paragraph 4 of the appealed Queen's Bench Judgment was set aside.
5. The costs associated with the motions in the Court of Queen's Bench resulting in the appealed Judgment shall be awarded and fixed by the Trial Judge who ultimately hears the trial of the action. If no trial is held, any Court of Queen's Bench Judge may award and fix such Motions Costs.
6. All parties and the Intervener shall bear their own costs in relation to the within appeal.

_____
Deputy Registrar,
Court of Appeal of Alberta

ENTERED this _____ day of
May, 2007

_____
Deputy Registrar,
Court of Appeal of Alberta

Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere, 1998 ABCA 392

Date: 19981211
Docket: 9603-0542

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE IRVING
THE HONOURABLE MADAM JUSTICE RUSSELL
THE HONOURABLE MADAM JUSTICE PICARD

BETWEEN:

WESTERN CANADIAN SHOPPING CENTRES INC. and MUH-MIN LIN and HOI-WAH WU, representatives of all holders of Class "A, Class "E" and "Class F" Debentures issued by WESTERN CANADIAN SHOPPING CENTRES INC.

Plaintiffs
(Respondents)

- and -

BENNETT JONES VERCHERE, GARNET SCHULHAUSER, ARTHUR ANDERSON & CO., ERNST & YOUNG, ALAN LUNDELL, THE ROYAL TRUST COMPANY, WILLIAM R. MACNEILL, R. BYRON HENDERSON, C. MICHAEL RYER, GARY L. BILLINGSLEY, PETER K. GUMMER, JAMES G. ENGDAHL, JON R. MACNEILL

Defendants
(Appellants)

- and -

JOSEPH DUTTON, J.M.D. MANAGEMENT LTD., E.A. SCHILLER AND ASSOCIATES LTD., COMINCO ENGINEERING SERVICES LTD., A.C.A. HOWE

INTERNATIONAL LIMITED, WILLIAM WIESE, CLAUDE RESOURCES INC., JOHN KEILY and RONALD A. MACKENZIE

Defendants
Not Parties to the Appeal

- and -

JOSEPH DUTTON, BENNETT JONES VERCHERE, J.M.D. MANAGEMENT LTD., GARNET SCHULHAUSER, ARTHUR ANDERSON & CO., E.A. SCHILLER AND ASSOCIATES LTD., COMINCO ENGINEERING SERVICES LTD., A.C.A. HOWE INTERNATIONAL LIMITED, ERNST & YOUNG, ALAN LUNDELL, THE ROYAL TRUST COMPANY, WILLIAM WIESE, CLAUDE RESOURCES INC., WILLIAM R. MACNEILL, R. BYRON HENDERSON, C. MICHAEL RYER, GARY L. BILLINSLEY, JOHN A. KEILY, PETER K. GUMMER, JAMES B. ENGDAHL, RONALD O. MACKENZIE, JON R. MACNEILL, WESTERN CANADIAN SHOPPING CENTRES INC., JEAN DESCARREAUX, RONALD G. WALKER, ROMAN SHKLANKA, OVERSEAS INVESTMENTS (1986) LTD., OVERSEAS INVESTMENTS CONSULTING INC., SECURITY PACIFIC BANK S.A., SECURITY PACIFIC BANK CANADA, SECURITY PACIFIC CORPORATION, SINO CANADA IMMIGRATION AND INVESTMENT OFFICE LIMITED doing business as ROTHE INTERNATIONAL CANADA and the said SINO CANADA IMMIGRATION AND INVESTMENT OFFICE LIMITED, INTERNATIONAL IMMIGRATION LTD. doing business as ROTHE INTERNATIONAL CANADA and the said INVESTMENT IMMIGRATION LTD., CIC INTERNATIONAL IMMIGRATION AND INVESTMENT doing business as 21st CENTURY INVESTMENT CONSULTANTS and the said CIC INTERNATIONAL IMMIGRATION AND INVESTMENT, GRACE KU, CLAUDIA WONG, JOSEPH NG, BAKER AND MACKENZIE, BEAUMONT CHURCH, HENRY BEAUMONT, DORA LAM, JOHN DOE alias HATFIELD, ALICE HO, ALLSTATE INSURANCE CORPORATION, GEORGE LEE, PETER YOUNG, JANET LI, FLANAGAN AND ASSOCIATES, F.M. TAM, SARA MU, JAMES HUMPHERIES, JOHN DOE, JANE DOE and ABC CORPORATION

Third Parties
Not Parties to the Appeal

- and -

THE ROYAL TRUST COMPANY

Plaintiff by Counterclaim
(Defendant/Appellant)

- and -

WESTERN CANADIAN SHOPPING CENTRES INC.

Defendant by Counterclaim
(Plaintiff/Respondent)

APPEAL FROM THE WHOLE OF THE ORDER OF
THE HONOURABLE MR. JUSTICE L.D. WILKINS

MEMORANDUM OF JUDGMENT

COUNSEL:

B.R. CRUMP
for the Appellant, The Royal Trust Company

N.C. WITTMAN
for the Appellants, Bennett Jones Verchere and Garnet Schulhauser

R. B. WHITE, Q.C. and M.E. LESNIAK
for the Appellant, Arthur Anderson & Co.

P.J. PEACOCK, Q.C.
for the Appellant, C. Michael Ryer

H.B. MADILL, Q.C. and J. GORMLEY
for the Appellants, James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary Billingsley, R. Byron Henderson

R.B. DAVISON, Q.C. and K.A. SMITH
for the Appellant, Ernst & Young & Alan Lundell

J.R. BLACK and G. HOLAN
for the Appellant, Peter K. Gummer

H.H. DUROCHER
for the Respondents

MEMORANDUM OF JUDGMENT

RUSSELL, J.A. (For the Majority)

[1] This is an appeal from an order dismissing applications to strike out portions of an amended statement of claim under Rule 42 for failing to meet the requirements of a representative action.

[2] The Respondents are 231 foreign investors who lost money through investments under an immigration investment regime created by the Federal Government. On April 26, 1993 an amended statement of claim was issued indicating that two of the investors would sue on behalf the 229 other investors in the form of a representative action.

[3] The Appellants, who are individuals, partnerships and corporations, are the defendants in the representative action. They are being sued because of their participation in the sale of debentures in Western Canadian Shopping Centres (WCSC), a company that was incorporated to provide an avenue for investment in real estate in Saskatchewan as part of the Federal immigration investment regime.

[4] The Federal investment regime allowed foreign investors to obtain immigration visas into Canada by investing a specified amount of money in Canada for a specified period of time. The Respondents all participated in this program through the purchase of debentures in WCSC.

[5] The debentures were offered to the Respondents by the Appellants through various offering memorandum in different locations by different agents. Between December 1, 1988 and February 7, 1990 there were 4 different offering memoranda issued by the Appellants. Each of these offers were the same in basic composition, however, there were changes made in the method that funds could be released to WCSC and the description of the investments that would be sought by WCSC.

[6] After the changes to the memoranda were complete, two other events of significance took place. First, on May 15, 1990, notice was given that WCSC would be investing in a gold mine in Northern Saskatchewan. Second, on December 1, 1990, a decision was made to pool all of the debentures issued up to that point and invest those funds in the gold mine.

[7] As these changes occurred, new investors continued to purchase debentures. As a result, there is some confusion as to which offer each of the 231 investors was responding

to. Also, there is some confusion as to what each investor's understanding was regarding the investments contemplated by WCSC.

[8] On December 30, 1991, it became apparent that the investment in the gold mine had gone bad and that the money had not been properly secured. It is alleged that in dealing with the debenture funds, the Appellants breached their fiduciary duty to the investors by pooling the debentures and by squandering the pooled fund on an improperly secured investment.

Decision Below

[9] In the application below, the Chambers Judge concluded that the court had an independent power under Rule 42 to strike, subject to the same standard of proof applied under Rule 129(1)(a), but not restricted to the pleadings. However, he held that in this case no resolution of facts was required, and that any determination of disputed facts was beyond his purview. Upon reviewing the materials before him, he was unable to conclude that it was plain and obvious that the Respondents' claim failed to meet the requirements of Rule 42. Thus, he held that the existence of a fiduciary duty and the extent of any damages arising from the breach of that duty, should it be shown to exist, were issues of fact best left to the Trial Judge.

[10] The Appellants have asked us to reverse the Chambers Judge's decision and use our own discretion under Rule 42 to strike the pleadings as they now stand.

Analysis

[11] Neither the power of the Court to strike a claim under Rule 42, nor the consideration of evidence outside the pleadings in considering an application under Rule 42 have been challenged in this appeal. The issue before us is whether the Chambers Judge erred in leaving the ultimate determination of whether the Respondents met the requirements for a representative action to the Trial Judge.

[12] In ***353850 Alta. Ltd. v. Horne & Pitfield Foods*** (Alta. M. 31 July '89) JDE 8803 26537, M. Funduk was of the view that an application to strike out a class action should not be left to the Trial Judge. However, that decision appears to have been overruled in ***Pasco v. C.N.R.*** [1989] 2 SCR 1069: Stevenson & Cote, ***Civil Procedure Guide*** 1996, Vol. I, p. 298.

[13] In ***Pasco*** 36 Indian chiefs each commenced an actions on behalf of himself and all other members of his band. They then sought amendments to permit them to advance

those claims on behalf of the members of three Indian nations as well. The appellants objected on the grounds that the proposed amendments were communal in nature whereas the action was framed as a personal one. McLachlin J. stated at p. 1071:

> In our opinion, the issue of authority to bring the claims, like the issue of the personal entitlement, if any, of the members of the Band or Nations is a question of fact or mixed fact and law which is best determined by the trial judge.... Having said that, it appears to us that the possible conflict between the rights alleged on behalf of the Band and the rights alleged on behalf of the Nations may cause problems at the trial and the plaintiffs might well be advised to reconsider its pleadings. However, in our view, this is a matter for the trial judge.

[14] The leading case in Alberta regarding representative actions is ***Korte v. Deloitte Haskins & Sells*** (1993), 8 Alta. L.R. (3d) 337. According to ***Korte***, a party may proceed in a representative capacity so long as: a) The class is capable of clear and definite definition; b) The principal issues of fact and law are the same; c) Success for one of the plaintiffs will mean success for all; and d) no individual assessment of the claims of the individual plaintiffs need be made. Further, ***Korte*** also stands for the proposition that a fiduciary duty may be established without proof of actual reliance by the beneficiary on the fiduciary.

[15] The main thrust of the Appellant's argument was that reliance is a key factor in determining whether a fiduciary duty is owed to each individual investor. They argued that because of the different offering memoranda, and the different level of knowledge at different times among the plaintiffs, the Respondents did not establish reliance and, as a result, they failed to show that there are similar issues of fact and law among all 231 investors. However, this line of reasoning overlooks the fact that, according to ***Korte***, actual reliance may not be needed to succeed in an action based on fiduciary duty. Further, it also discounts the fact that in an application under Rule 42 to strike the action, the court must proceed in a cautious manner. If the pleadings were struck as they now stand, it would mean that the 229 unnamed plaintiffs would be required to launch their own separate actions. If this were done, there is a grave risk that many of the unnamed plaintiffs would lose their claims due to the expiration of limitation periods. Given this possibility, and the fact that ***Korte*** states that it is possible to find a fiduciary duty without actual reliance, the Appellants have not convinced us that the Chambers Judge erred in allowing this action to proceed to trial.

[16] This is not to say that we do not see problems in the manner in which this claim is presented. Given the emphasis the Appellants placed on reliance in their submissions, it is impossible to ignore the fact that the Trial Judge may find this to be a case where, notwithstanding ***Korte***, actual reliance needs to be proven. Such a finding may prove fatal to the class action. As a matter of procedural fairness, the Appellants should not be barred

from developing an argument based on actual reliance merely because there is a possibility that actual reliance will not be required. We feel that these concerns can be adequately met by allowing the Appellants the right to examinations for discovery for each of the 231 plaintiffs.

[17] There was some concern expressed in oral submissions that discovery of the 229 unnamed plaintiffs would not be available through the operation of Rules 187 and 201. Specifically, the Court's attention was directed to the decision of Master Waller in ***Gale (Trustee of)*** **v.** ***Heintz*** (1991), 82 Alta. L.R. (2d) 273 where he decided that Rule 201 was to be read disjunctively to mean that, in order to obtain discovery, the person must be both a member of the firm which is party to the litigation and a person for whose benefit an action is prosecuted or defended. This interpretation was further compounded by Fradsham's annotated Rules where he uses the heading "member of Firm" over Rule 201. This is not a correct interpretation of Rule 201. In our opinion, Rule 201 should be read conjunctively to allow discovery of all persons for whose benefit an action is prosecuted or defended. This interpretation is made in light of, and in order to be consistent with, Rule 187 which allows for discovery of documents by declaring any person for whose benefit an action is brought as a party to the action.

[18] Thus, it is available to the Appellants to obtain discovery of the unnamed plaintiffs through the use of Rules 201 and 187. Through discovery, the defendants can fully examine and investigate the factors which they think lead to the conclusion that there different issues of law and fact among the 231 plaintiffs. Specifically, they can examine their concerns over: 1) the different offering memos that could conceivably give rise to different contract terms; 2) the different levels of knowledge at different times for the investors; 3) possible rights of recission that were not exercised and; 4) the implications of the pooling of assets. Allowing discovery in this manner provides a balance in allowing the defendants to properly prepare their case while simultaneously avoiding the risk of extinguishing the claims of the 229 unnamed plaintiffs.

[19] It was suggested by the Respondents that there was no need to discover anyone other than the two named plaintiffs and that many of the concerns raised by the Appellants could be addressed through undertakings. This is not a satisfactory proposal. If the Appellants were forced to rely on the undertakings of the Respondents, it would create an unnecessary barrier between the Appellants and the information they are entitled to. This would needlessly complicate the litigation process and would result in an even more unwieldy action.

[20] We also find it necessary to comment on the inadequacy of Rule 42. The problems encountered in dealing with this application indicate the inadequacy of Rule 42 for dealing with representative actions. Although some of the problems encountered here could be dealt with through strict case management, this area of the law is clearly in want

of legislative reform to provide a more uniform and efficient way to deal with class action law suits.

[21] As a result of the foregoing considerations, we find that the Chambers Judge did not err in allowing this representative action to proceed. We also find that both oral and documentary discovery of all 231 plaintiffs is available for the Appellants. Although the Respondents were successful in this appeal, much of this litigation could have been avoided by the Respondents agreeing to discovery. As a result, costs will not be awarded.

APPEAL HEARD ON OCTOBER 2, 1998

JUDGMENT DATED at Edmonton, Alberta
this 11 day of December
A.D. 1998

RUSSELL, J.A.

I Concur:

IRVING, J.A.

PICARD, J.A. (Dissenting)

[22] Two plaintiffs brought an action in their personal capacity and as representatives of 229 immigrant investors. The cause of action is breach of fiduciary duties. The issue is whether a representative action is appropriate. Before this court, the plaintiffs in the lawsuit are respondents while the defendants are appellants.

[23] The guideposts available to assist in this decision are Rule 42 and the decision of this court in the ***Korte*** case and the decision of Master Funduk in ***353850 Alberta Ltd.*** All are set out in the judgement of the majority. As for the position taken by my colleagues that the decision of Master Funduk "appears to have been overruled", I find I must respectfully disagree. The ***Pasco*** decision is distinguishable from the decision of Master Funduk in ***353850 Alberta Ltd.*** and from this case. The cause of action in ***Pasco*** was trespass to Indian lands and fisheries by the railway. The plaintiffs were chiefs who had originally sued on behalf of band members but sought amendments to allow them to also sue on behalf of three Indian nations. Their authority for doing so raised issues of historical aboriginal occupation and use of lands and waters, the creation of reservations and the relationship of the bands and the nations and necessitated an interpretation of the ***Indian Act.*** Given the scope of the inquiry required and the extent and type of evidence necessary to deal with it, it is not surprising that the Supreme Court found that the decision had to be made by the trial judge. By contrast the issue in this case is much more narrow and a great deal of relevant evidence was available to the court to allow it to make a decision. The question for the court was whether, bearing in mind the indicia of fiduciary duties, and utilizing the extensive affidavit evidence presented outlining the permutations and combinations of the investment profiles of the investors, it could be found that it was an appropriate case for a representative action. In my view the comments of Master Funduk in ***353850 Alberta Ltd.*** remain applicable to this case.

[24] In ***Korte*** the court set out a list of requirements for a representative action which included: a case where the principal issues of fact and law are the same and where no individual assessment of the claims of the individual plaintiffs need be made.

[25] The Supreme Court of Canada has set out the law on fiduciary duties and appropriate remedies in a number of cases: ***LAC Minerals Ltd. v. International Corona Resources Ltd.***, [1989] 2 S.C.R. 574, ***Hodgkinson v. Simms***,[1994] 3 S.C.R. 377, ***Frame v. Smith***,[1987] 2 S.C.R. 99 and ***Canson Enterprises Ltd. v. Boughton & Co.***, [1991] 3 S.C.R. 534.

Some of the principles from those cases include the following:

1. The existence of a fiduciary relationship is a question of law.

2. Fiduciary duties are imposed only in the most extreme cases where the protection of the beneficiary demands it. They do not generally exist in commercial arm's length transactions where the primary purpose of the relationship is to pursue one's own self-interest.

3. It is a misuse of the term "fiduciary" to use it as a conclusion to justify a particular result, unless the pre-requisites of the fiduciary relationship are present.

4. Fiduciary relationships may arise in two circumstances: in ***per se*** relationships, traditionally considered fiduciary in nature (although this is a presumption that can be rebutted); in other relationships where the circumstances give rise to it (that is where the beneficiary has a reasonable expectation and believes that the fiduciary will act in his exclusive interest to the exclusion of the fiduciary's own self-interests or when the fiduciary undertakes or agrees to assume such responsibility).

5. There are some indicia of a fiduciary relationship including: discretion and power over the beneficiary's affairs, unilateral control of that power and discretion and vulnerability on the part of the beneficiary. (There are two lines of authority on importance of vulnerability: that it is an indicum but not determinative (Justice Laforest in ***LAC Mineral*** **and** ***Hodgkinson***) and that it is essential and an indispensable element to the existence of a fiduciary relationship (Justice Sopinka in the same cases).

6. Not every fiduciary relationship is encumbered by fiduciary duties. The extent of such duties requires a meticulous examination of the facts.

7. The scope of the remedy depends on the nature of the fiduciary duties.

[26] In the hearing before the chambers judge, and before us, the respondents argued their case on the basis that reliance was a key factor in determining whether a fiduciary duty was owed to each individual investor and would be the key factor in the law suit. It is clear from an examination of the Supreme Court decisions that reliance is only one of the factors to be assessed by any court in coming to a decision about fiduciary duties.

[27] These cases illustrate that it is essential that the respondents as plaintiffs bring forward the evidence to put themselves within a relationship requiring fiduciary duties

and prove the scope of those obligations and any breaches. Such evidence is required not only to found liability but also to provide a basis for an appropriate remedy. The extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties: ***Hodgkinson*** pp. 412 - 414.

[28] This responsibility of proof by the respondents cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action. Requiring anything less of the respondents than full participation in the lawsuit robs the appellants as defendants of their right to challenge the respondents' case.

[29] In the decision appealed from, the chambers judge said he could not say, at that stage of the proceedings, that a representative action was inappropriate. He implies that the trial judge could do so after assessing whether there was reliance which he says will be determinative of the remedy. This was an error in law.

[30] The logical consequence of finding that the respondents do not fit within Rule 42 or within the criteria set out in ***Korte*** is to strike those portions of the statement of claim in which the representative action is set up. The result is that the 229 immigrant investors would have to bring separate suits.

[31] The logistical complexities of the resulting lawsuit could, no doubt, be mitigated by effective case management. However, it may be the case that some suits would be barred because of the passage of a limitation period. Unfortunate as this would be, it does not relieve a court of the duty of determining the correct meaning of a Rule and its proper application in the circumstances. The comments of Justice Estey in ***Naken v. General Motors of Canada*** (1983), 144 D.L.R. (3d) 385 at 410 make this point. However, these concerns are removed as a result of counsel for the appellants advising he was prepared to consent to an amendment of the pleadings adding the additional respondents as of the date of the filing of the statement of claim thus removing the need for further protracted and costly litigation for all parties.

[32] In the result, I find that the chambers judge erred in holding that a representative action was appropriate. I would order that, with the consent of the appellants, the 229 persons be added to the statement of claim and recommend that the action be put under case management in the Court of Queen's Bench.

[33] I join the majority in calling for reform of the law in Alberta dealing with representative or class actions.

APPEAL HEARD ON OCTOBER 2, 1998

JUDGMENT DATED at Edmonton, Alberta
this 11th day of December
A.D. 1998

PICARD, J.A

SUPREME COURT OF CANADA

CITATION: Quebec (Director of Criminal and Penal Prosecutions) *v.* Jodoin, 2017 SCC 26

APPEAL HEARD: December 5, 2016
JUDGMENT RENDERED: May 12, 2017
DOCKET: 36539

BETWEEN:

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

OFFICIAL ENGLISH TRANSLATION: Reasons of Gascon J.

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

REASONS FOR JUDGMENT: (paras. 1 to 57)	Gascon J. (McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Brown and Rowe JJ. concurring)
JOINT DISSENTING REASONS: (paras. 58 to 75)	Abella and Côté JJ.

Director of Criminal and Penal Prosecutions *Appellant*

v.

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*

Indexed as: Quebec (Director of Criminal and Penal Prosecutions) *v.* Jodoin

2017 SCC 26

File No.: 36539.

2016: December 5; 2017: May 12.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Costs — Lawyers — Courts — Jurisdiction — Superior Court dismissing motions of defence lawyer for writs of prohibition and awarding costs against lawyer personally — Court of Appeal setting award aside — Criteria and process applicable to exercise by courts of their power to impose such sanction on lawyer — Whether awarding costs against lawyer personally was justified in this case — Whether Court of Appeal erred in substituting its own opinion for that of Superior Court.

J, an experienced criminal lawyer, was representing 10 clients charged with impaired driving. On the morning of a scheduled hearing in the Court of Québec on a motion for disclosure of evidence in his clients' cases, before it even began, J 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. However, before the motions were served, the parties learned that another judge would be presiding instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, J objected to the testimony of an expert witness called by the Crown on the ground that he had not received the required notice. The judge decided to authorize the examination in chief of the expert after the lunch break. During the break, J drew up a new series of motions for writs of prohibition, this time challenging that judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this and the hearing was adjourned, as the service of such motions suspends proceedings until the

Superior Court has ruled on them. The Superior Court dismissed the motions and, at the Crown's request, awarded costs against J personally. The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions, but allowed the appeal solely to set aside the award of costs against J personally.

Held (Abella and Côté JJ. dissenting): The appeal should be allowed and the award of costs restored.

Per McLachlin C.J. and Moldaver, Karakatsanis, Wagner, **Gascon**, Brown and Rowe JJ.: 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. This is a discretion that must be exercised in a deferential manner, but it allows a court to ensure the integrity of the justice system.

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. 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, which means that it may be exercised against defence lawyers. This power 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.

The threshold for exercising the courts' discretion to award costs against a lawyer personally 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.

There are two important guideposts that apply to the exercise of this discretion. 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, whose role is not comparable in every respect to that of a lawyer in a civil case. If costs are awarded against a lawyer personally, 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. Thus, 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. 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. 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.

A court cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards. 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, and should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. The applicable standard of proof is the balance of probabilities. In criminal proceedings, the Crown's role on this issue must be limited to objectively presenting the evidence and the relevant arguments.

The circumstances of this case were exceptional and justified an award of costs against J personally. The Superior Court correctly identified the applicable criteria and properly exercised its discretion. As the court noted, J's conduct in the

cases in question was particularly reprehensible. The purpose of that conduct was unrelated to the motions he brought. J 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. J 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 court to conclude that J had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice. 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 discretion by the Superior Court.

Per **Abella** and **Côté** JJ. (dissenting): Personal costs orders are of an exceptional nature. In the criminal context, such orders could have a chilling effect on criminal defence counsel's ability to properly defend their client. Accordingly, they should only be issued in the most exceptional of circumstances and the Crown should be very hesitant about pursuing them.

In the instant case, J's behaviour did not warrant the exceptional remedy of a personal costs order. It appears that his conduct was not unique and that he was being punished as a warning to other lawyers engaged in similar tactics. The desire to make an example of J's behaviour does not justify straying from the legal requirement that his conduct be rare and exceptional before costs are ordered personally against him.

Moreover, J's motions for writs of prohibition were not unfounded to a sufficient degree to attract a personal costs order. The Crown had not provided J with the notice required for an expert witness testimony under s. 657.3(3) of the *Criminal Code*. J was, as a result, entitled to an adjournment under s. 657.3(4). The judge presiding in the Court of Québec only granted him a brief one over the lunch break and mistakenly said that J had already cross-examined the Crown's expert in other matters. In the circumstances, J'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. For these reasons, the appeal should be dismissed.

Cases Cited

By Gascon J.

Applied: *Quebec (Attorney General) v. Cronier* (1981), 63 C.C.C. (2d) 437; **considered:** *Young v. Young*, [1993] 4 S.C.R. 3; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842; **referred to:** *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; *Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629; *Myers v. Elman*, [1940] A.C. 282; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581; *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1

S.C.R. 901; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395; *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1; *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520; *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35; *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908; *R. v. Carrier*, 2012 QCCA 594; *St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491; *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303; *Galganov v. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13; *Trackom Systems International Inc. v. Trackom Systems Inc.*, 2014 QCCA 1136; *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21; *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631.

By Abella and Côté JJ. (dissenting)

Young v. Young, [1993] 4 S.C.R. 3; *R. v. Gunn*, 2003 ABQB 314; 335 A.R. 137.

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Criminal Code, R.S.C. 1985, c. C-46, s. 657.3(3), (4).

Professional Code, CQLR, c. C-26, s. 23.

Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002, SI/2002-46, s. 25.

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APPEAL from a judgment of the Quebec Court of Appeal (Dutil, Levesque and Émond JJ.A.), 2015 QCCA 847, [2015] AZ-51175627, [2015] J.Q. n° 4142 (QL), 2015 CarswellQue 4364 (WL Can.), setting aside in part a decision of Bellavance J., 2013 QCCS 4661, [2013] AZ-51004528, [2013] J.Q. n° 13287 (QL), 2013 CarswellQue 10170 (WL Can.). Appeal allowed, Abella and Côté JJ. dissenting.

Daniel Royer and *Catherine Dumais*, for the appellant.

Catherine Cantin-Dussault, for the respondent.

Gilles Villeneuve and *Mathieu Stanton*, for the intervener the Director of Public Prosecutions.

Maxime Hébrard and *Marlys A. Edwardh*, for the intervener the Criminal Lawyers' Association (Ontario).

Walid Hijazi, *Lida Sara Nouraie* and *Nicholas St-Jacques*, for the intervener Association des avocats de la défense de Montréal.

Mathew P. Good and *Ariane Bisaillon*, for the intervener the Trial Lawyers Association of British Columbia.

Frank Addario and *Stephen Aylward*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. delivered by

GASCON J. —

I. Overview

[1] This appeal concerns the scope of the courts' power to award costs 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.

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[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.

[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)*

[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 *Quebec (Attorney-General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.). 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 (CanLII)). 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)*

[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 (CanLII)). 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, 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, 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 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. 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. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, 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*, [1940] A.C. 282 (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 Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. CA), 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; *R. v. Smith* (1999), 133 Man. R. (2d) 89 (Q.B.), at para. 43; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409 (Sup. Ct.); 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" (*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, 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]
>
> (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, 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*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 85; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297, at para. 481; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, 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 (C.A.), at para. 31; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, 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 v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at paras. 64-66, citing *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, 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, 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. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, 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, 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. v. Carrier*, 2012 QCCA 594). 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 v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, 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, at p. 574 (emphasis deleted)).

[52] It is well established that costs are awarded on a discretionary basis: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27; *Galganov v. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13, 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 International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, at para. 36 (CanLII); *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21. 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, 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.

The following are the reasons delivered by

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:

> . . . 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, 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, at para. 11 (CanLII)). 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, ABELLA *and* CÔTÉ JJ. *dissenting*

Solicitor for the appellant: Director of Criminal and Penal Prosecutions, Québec.

Solicitors for the respondent: Jodoin & Associés, Granby.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Schurman Longo Grenier, Montréal; Goldblatt Partners, Toronto.

Solicitors for the intervener Association des avocats de la défense de Montréal: Walid Hijazi, Montréal; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Addario Law Group, Toronto; Stockwoods, Toronto.

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 299

Date: 20170428
Docket: 1103 14112
Registry: 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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

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

Original Applicants

- and -

Public Trustee of Alberta

Applicant/Respondent

- and -

Sawridge First Nation

Respondent/Applicant

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

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I Introduction

[1] This decision is the most recent step in a case management process which has the ultimate objective of distributing funds held in the 1985 Sawridge Trust [the "Trust"] to its beneficiaries. The initial step in this process is reported in ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365, 543 AR 90 ["***Sawridge #1***"] affirmed 2013 ABCA 226, 553 AR 324 ["***Sawridge #2***"]. The Trust was set up in 1985 by the Sawridge First Nation [the "SFN" or the "Band"] in an attempt to shelter Band property from persons who had been excluded from membership in the SFN because of their gender or the gender of their parent(s).

[2] The proceeding began as an application to the Court by the Trustees for advice as to how to identify the beneficiaries of the Trust and create an equitable distribution scheme for the considerable assets of the Trust. That initial application has since metastasized into a number of areas of disagreement and has expanded as a succession of third parties have attempted to insert themselves into the process. At the outset, the Court invited the Public Trustee of Alberta [the "Public Trustee"] to participate in this proceeding and represent the interests of potential minor recipients of the proposed distribution of assets: ***Sawridge #1***.

[3] On December 17, 2015 I issued a decision which defined a process to identify who may qualify for a part of the distribution and how the distribution would then proceed: ***1985 Sawridge Trust (Trustee for) v Alberta (Public Trustee),*** 2015 ABQB 799 ["***Sawridge #3***"]. ***Sawridge #3*** triggered at least three appeals (***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51 at para 3). Those appeals were apparently either discontinued or denied for late filing. The participants then returned to me for another case management hearing on August 24, 2016.

[4] At that hearing I concluded the case management process was bogged down and, to some extent, futile, and that the best alternative was to move the beneficiary identification issue to trial. However, that conclusion still left a number of issues to be resolved.

[5] This decision responds to two outstanding issues between the Public Trustee and the Band. As noted, the Public Trustee was brought into this proceeding to represent the interests of potential minor beneficiaries. In ***Sawridge #1*** I instructed the Trust to pay for the Public Trustee's litigation costs.

[6] The SFN is not a party to this litigation but has nevertheless observed and participated throughout since Band membership (or being a child of a Band member) is a criterion for being a beneficiary of the Trust.

[7] ***Sawridge #3*** at paras 43, 46 and 61 authorized the Public Trustee to prepare and serve *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"] s 5.13 applications on the Band in relation to specific membership and Trust asset-related questions. The Public Trustee engaged that procedure but, in the meantime, the Band has provided information that related to two of the three issues addressed in ***Sawridge #3***. The Public Trustee did not proceed with the *Rule* 5.13 application which related to the fairness of a proposed distribution scheme.

[8] These developments have left two remaining issues now addressed by this decision:

1. Does information provided by the Band concerning "current and possible" minor beneficiaries satisfy the *Rule* 5.13 inquiry mandated by ***Sawridge #3***?
2. Should the Band receive costs as a consequence of an abandoned 2015 application and the discontinued *Rule* 5.13 motion?

II. "Current and Possible" Minor Beneficiaries

[9] ***Sawridge #3*** at paras 48-61 authorizes the Public Trustee to investigate and identify minor children of persons who have:

1. completed an application for admission to Band membership, and
2. applied for admission to Band membership, had that application denied, but are engaged in a review or appeal process.

[10] The Public Trustee expresses concern on the form and meaning of language in ***Sawridge #3*** that authorizes the Public Trustee's *Rule* 5.13 inquiries. This resolves to a number of questions on what kind of evidence is adequate to discharge the Public Trustee's obligation to identify and then represent potential minor child distribution recipients. At the hearing I suggested that while I could clarify my instructions in ***Sawridge #3***, the sufficiency of information provided by the Band was a point better discussed by the parties and the Band, with my advice as a subsequent recourse. However, counsel for the Public Trustee clarified it is satisfied to rely on the Band as the best source of evidence on membership questions.

[11] On that basis I make the following findings and instructions.

[12] First, the Public Trustee inquires whether a list of minor children of Band members obtained on April 5, 2016 satisfies the evidentiary requirement for that category of minors. I confirm this information is adequate for that purpose.

[13] Second, the Public Trustee expresses concern that the meaning of a "completed" Band application and/or a "rejected or unsuccessful" Band application is unclear. The Band on January 18, 2016 provided a list of adults with "pending" applications. The Public Trustee inquires whether this category meets the "unresolved" but "completed" Band applications. I confirm that it does. I am satisfied that if the Band deems an application "complete" but has not resolved that application then that individual belongs in "category 3", as defined in ***Sawridge #3***, and their children, if any, fall into "category 4".

[14] The third point on which the Public Trustee sought clarification is whether ***Sawridge #3*** used "rejected" and "unsuccessful" to indicate two different categories. To be clear, this language is operationally synonymous. It captures:

1. persons who have made Band applications prior to this date, had that application rejected, but are challenging that outcome, and

2. persons who have filed completed and unresolved Band applications ("pending" Band applications), who are in the future rejected during the application process, and then challenge that outcome.

The Public Trustee's obligation is to identify these populations, and to also determine whether they have children. I note that both these subgroups will fall into category 5, though some at present may be in category 3.

[15] The Public Trustee also inquires on whether the Band providing information that there are no outstanding appeals or judicial reviews of rejected Band applications is sufficient to define the current category 5 set. In light of the Public Trustee's concession on the Band's expertise and role I conclude that it is.

III. Costs

[16] The Band seeks costs from the Public Trustee, and that these costs not be indemnified by the Trust. This relates to two steps.

[17] First, on June 24, 2015 the Band sought and received an adjournment to applications in this proceeding that named the Band as a respondent. The Band took the position that the Public Trustee's refusal to consent to that adjournment was unreasonable, and should result in a costs award without indemnification.

[18] Second, in the ***Sawridge #3*** decision I directed the Public Trustee to proceed with the *Rule* 5.13 applications, and reserved the question of costs to follow completion of those applications. The Band argues that it was forced to prepare written materials in response. However, the Public Trustee then abandoned a *Rule* 5.13 application. The Band also observes *Rule* 5.13(2) creates a mandatory obligation on the Public Trustee to pay for records produced via that procedure:

> 5.13(2) The person requesting the record must pay the person producing the record an amount determined by the Court.

[19] The Band takes the position that my earlier order which directed that the Public Trustee not be responsible to pay the costs of other parties to the proceedings does not apply to the Band. That is because the Band is not a party to this litigation: ***Sawridge #3*** at para 27. The Band therefore argues that as a non-party it is not captured in my previous instruction.

[20] Beyond that, the Band argues as a general principle of law that this Court retains the jurisdiction to award costs against any party. It cites ***Children's Aid Society of the City of St. Thomas and County of Elgin v LS*** (2004), 46 RFL (5th) 330 at paras 53-54,128 ACWS (3d) 888 (Ont C J) for the proposition that a party should never be "immunized from costs", since litigant accountability is necessary to avoid wasteful, ill-focused court processes. An award of costs is the lever to control that potential abuse.

[21] The Band argues as the successful party the Band presumptively should receive a costs award (*Rule* 10.29(1)) and that the Court should apply the foundational *Rules* 1.1-1.2 to encourage efficient litigation through costs. An award against the Public Trustee is warranted given the 2015 adjournment was inevitable, premature as the Public Trustee had alternative

sources for the information it sought, and the Public Trustee took meritless steps including the abandoned *Rule* 5.13 application. In this case the Band says that enhanced costs are warranted.

[22] The Public Trustee responds that Alberta Court of Appeal in ***Sawridge #2*** at para 30 confirmed my conclusion that the Public Trustee should be immune from any liability for a costs award. The Band has been a *de facto* participant in this matter, no matter that its legal status is as a litigation third party. Ordering costs against the Public Trustee would subvert the basis for the Public Trustee's participation in this proceeding. The Public Trustee has always acted in good faith and adhered to the mandates set by the Court in ***Sawridge #1*** and then in ***Sawridge #3***.

[23] First, I reject the Band's argument that the SFN falls outside the scope of the order I issued which prohibited the Public Trustee from paying costs of "the other parties in the within proceeding", or the Court of Appeal's subsequent confirmation of that direction. The Band, while not a party, is far from a non-participant in this litigation. Further, this strict interpretation of the order that I issued defeats the objective of the framework in which the Public Trustee was invited and agreed to participate in this matter.

[24] That said, I agree with the Band that I retain jurisdiction to make a costs award against the Public Trustee, both on the basis of the principle in ***Children's Aid Society of the City of St. Thomas and County of Elgin v LS***, due to this Court having the ongoing jurisdiction to vary its orders, and also through the Court's inherent jurisdiction to control its own processes and potential abuse of that: I H Jacob, "The Inherent Jurisdiction of the Court", (1970) 23 Current Legal Problems 23, most recently endorsed by the Supreme Court of Canada in ***Endean v British Columbia***, 2016 SCC 42 at para 23, [2016] 2 SCR 162.

[25] Although *Rule* 10.29(1) creates a presumption that the successful party will receive a payment of costs, courts have an exceptionally broad authority to make cost orders as they see fit: *Rules* 10.31, 10.33. Similarly, the very important role that costs awards serve to encourage efficient, timely, and responsive litigation, and create negative consequences for those who misuse the courts and abuse other court participants is well established.

[26] I am going to approach the question of the Public Trustee's activities in a global sense, instead of parsing through individual applications and steps. That is consistent with the general purpose served by cost awards. As noted in ***Sawridge #3*** at paras 32-36, the Public Trustee's activities needed to be "re-focused". I now conclude that objective has been met. While I might otherwise have ordered costs of some kind, this litigation is ultimately intended to benefit the persons who will receive shares of the Trust. This is not so much an adversarial process than one where various organizations are moving to a common goal: to protect the rights of the Trust beneficiaries, and ensure an equitable result is obtained. This is not an instance where a third-party interloper is interfering with a smooth running process, but instead involves a Court-sanctioned participant conducting its statutory function, though that process did require a degree of court management. I therefore decline to order costs against the Public Trustee.

[27] As for whether the *Rule* 5.13(2)'s requirement that "[t]he person requesting the record must pay ... an amount determined by the Court" that is not a basis to order costs. This provision has not been the subject of judicial commentary. The *Rule* uses the words "an amount" to describe the payment that "must" be paid, rather than "costs". I conclude that the intention of *Rule* 5.13 is that where a third party (here the Band) is obliged by court order to produce documents or other materials, then that third party should experience minimal financial

consequences from cooperating with the Court and litigants in the production of relevant evidence.

[28] Normally, I would consider instructing payment of "an amount" under *Rule* 5.13 except for the fact that I have been informed that the Trust is indemnifying the Band for its activities in relation to this proceeding. This means one way or another the Trust will end up 'on the hook' for these litigation activities. Accordingly, I find there is no point in me ordering payment of "an amount" because of the Public Trustee's *Rule* 5.13 activities.

IV. Conclusion

[29] The Public Trustee has now received direction from me in relation to this litigation. The Band's application for costs without indemnification from the Public Trustee is denied.

[30] I pause to add one further observation. I have taken a 'costs neutral' approach to the Trust, the Band, and the Public Trustee in this litigation. That is because all three of these entities in one sense or another have key roles in the distribution process. However, this non-punitive and collaborative approach to costs has no application to third party interlopers in the distribution process as it advances to trial. The same is true for their lawyers. Attempts by persons to intrude into the process without a valid basis, for example, in an abusive attempt to conduct a collateral attack on a concluded court or tribunal process, can expect very strict and substantial costs awards against them (both applicants and lawyers), on a punitive or indemnity basis. True outsiders to the Trust's distribution process will not be permitted to fritter away the Trust assets so that they do not reach the people who own that property in equity, namely, the Trust beneficiaries.

Heard on the 24th day of August, 2016.
Dated at the City of Edmonton, Alberta this 28th day of April, 2017.

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

Appearances:

D.C. Bonora and
A. Loparco, Q.C.
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for 1985 Sawridge Trustees

J.L. Hutchison
Hutchison Law LLP
for Public Trustee of Alberta

E. H. Molstad, Q.C. and
G. Joshee-Arnal
Parlee McLaws LLP
for Sawridge First Nation

Attendances:

C.K.A. Platten, Q.C. and
C. Osualdini
McLennan Ross LLP
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L. A. Maj
Justice Canada
for the Minister of Aboriginal Affairs and Northern Development

N.L. Golding Q.C.
Borden Ladner Gervais LLP
for Patrick Twinn et al.

S. A. Wanke
DLA Piper (Canada) LLP
for Maurice Stoney et al.

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 377

Date: 20170705
Docket: 1103 14112
Registry: Edmonton

In the Matter of the Trustee Act, R.S.A. 2000, C. T-8, as amended

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

Between:

Patrick Twinn, on his behalf, and on behalf of his infant daughter, Aspen Saya Twinn, and his wife Melissa Megley; and Shelby Twinn; and Deborah A. Serafinchon

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

Catherine Twinn

Respondent

Case Management Decision (Sawridge #5)
of the
Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] This is a case management decision on an application filed on August 17, 2016 (the "Application") by Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon ("Applicants") to be added as full parties in Action No. 1103 14112 (the "Action"), for payment of all present and future legal costs and an accounting to existing Beneficiaries. The application by Patrick Twinn, on behalf of his infant daughter, Aspen Saya Twinn and his wife, Melissa Megley, appears to have been abandoned and, in order to keep the record clear, is dismissed. The balance of the Application by the Applicants is also dismissed, although the claims for an accounting from the Trustees by Patrick and Shelby Twinn are dismissed on a without prejudice basis.

II Background

[2] 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".

[3] The history of the Advice and Direction Application is set out in previous decisions (including the Orders taken out in relation thereto) reported as ***1985 Sawridge Trust v Alberta (Public Trustee),*** 2012 ABQB 365, 543 AR 90 ("***Sawridge #1***"), aff'd 2013 ABCA 226, 543 AR 90 ("***Sawridge #2***"), ***1985 Sawridge Trust v Alberta (Public Trustee),*** 2015 ABQB 799 ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 AR 176, ***1985 Sawridge Trust (Trustee for) v Sawridge First Nation***, 2017 ABQB 299 ("***Sawridge #4***") (collectively the "***Sawridge Decisions***"). Some of the terms used in this decision ("***Sawridge #5***") are also defined in the previous ***Sawridge Decisions***.

[4] I had directed that this Application be dealt with through the filing of written briefs, subject to requests for clarification through correspondence between the Court and counsel. These letters have been added to the court file in this Action in a packet described as "**Sawridge #5 Correspondence**" and are listed in Schedule 'A' Part II to this decision.

III The Applicants

[5] Some factual background in relation to the three remaining Applicants is set out below and has been derived from the Affidavits forming part of the materials filed by the participants as described in Schedule 'A' Part I to this decision.

A Patrick Twinn

[6] Patrick Twinn was born on October 22, 1985. His father, Walter Patrick Twinn was the Chief of the Sawridge First Nation ("SFN") from 1966 to his death on October 30, 1997 ("Chief Walter Twinn").

[7] His mother is Sawridge Trustee, Catherine Twinn, who is also a member of the SFN.

[8] Patrick is also a member of the SFN and acknowledges that he is currently and will remain a Beneficiary of the 1985 Sawridge Trust even if the Trustees are successful in their application to vary the definition of 'beneficiary'.

[9] Patrick Twinn also acknowledges that his beneficial interest in the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the Trust.

B Shelby Twinn

[10] Shelby Twinn was born on January 3, 1992 and resided on the SFN Reserve for the first 5 years of her life. She is a granddaughter of Chief Walter Twinn and the daughter of Paul Twinn, a son of Chief Walter Twinn. Paul Twinn is recognized as an Indian by the Government of Canada under the *Indian Act* and is a member of the SFN. The mother of Shelby Twinn was married to Paul Twinn at the time of Shelby's birth.

[11] Shelby Twinn is registered as an Indian under the *Indian Act*. She is not listed as a member of the SFN and claims that she may lose her entitlement as a Beneficiary if the application of the Trustees to vary the definition of 'beneficiary' under the 1985 Sawridge Trust succeeds. Shelby Twinn acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust.

C Deborah Serafinchon

[12] Deborah Serafinchon claims to be the daughter of Chief Walter Twinn and Lillian McDermott, the latter being recognized as an Indian under the *Indian Act*.

[13] Deborah Serafinchon states that she was born an illegitimate child, was placed in foster care at birth and was raised in that system. Deborah Serafinchon asserts that Patrick Twinn is her brother and co-applicant.

[14] Deborah Serafinchon notes that if the current definition of 'beneficiary' under the 1985 Sawridge Trust is varied to exclude discriminatory language, such as "illegitimate", "male" and "female", she will then be included as a 'beneficiary' under the 1985 Sawridge Trust. She expresses concern about any proposed definition which would have the effect of excluding her as a 'beneficiary' being accepted by the Court.

IV Positions of the Parties

[15] The materials filed on this Application and reviewed by me are extensive. They are described in Schedule 'A'. The written briefs forming part of this array of materials contain the arguments of the various participants.

[16] The initial position of the Public Trustee of Alberta ("OPTG") on the Application is set out in a short letter, dated October 31, 2016, as supplemented by clarification letters of June 23 and 30, 2017 and are all included in the "Sawridge #5 Correspondence" packet.

[17] The Application is also supported by Sawridge Trustee Catherine Twinn, who is the mother of the Applicant, Patrick Twinn. She disassociates herself from the opposition to the Application by the other Trustees.

[18] The Sawridge Trustees (except Catherine Twinn) oppose the Application in its entirety.

V Issues

[19] The issues to be decided on this Application are:

a Whether some or all of the Applicants should be made a Party to this Action?

b Whether the Applicants should be awarded advance costs and indemnification for future legal fees from the 1985 Sawridge Trust?

[20] While claims for an accounting by the Trustees have been made by some of the Applicants, no submissions were made on this remedy.

VI Disposition of the Application

[21] I confirm that the claims by Patrick Twinn on behalf of his infant daughter, Aspen Saya Twinn, and his wife, Melisa Megley, have been abandoned and, for clarity of record purposes, are dismissed.

[22] I also dismiss the claims of the remaining Applicants for the reasons which follow.

A Applicability of Rules 3.74 and 3.75 of the *Alberta Rules of Court*, Alta Reg 124/2010

[23] *Alberta Rules of Court*, Alta Reg 124/2010 (the "*Rules*" or individually a "*Rule*") *Rules* 3.74 and 3.75 provide for the procedure for the addition of parties to an action commenced by a statement of claim or originating notice, respectively.

[24] The Trustees characterize the Applicants as "third parties" and argue that they cannot be added as parties, because they are not persons named in the original litigation. They rely on the decision of Poelman, J in ***Manson Insulation Products Ltd v Crossroads C & I Distributors***, 2011 ABQB 51 at para 48, 2011 CarswellAlta 108 ("***Manson Insulation***").

[25] ***Manson Insulation*** involves an action commenced by statement of claim. This Action was commenced by an originating notice, a procedure under which all participants are not known at the outset and it is also less clear as to when the 'pleadings' close. I do not accept that the Applicants are barred by application of *Rule* 3.74(2)(b) because they may be "third parties".

[26] However, *Rules* 1.2 and 3.75(3) do have application to the circumstances here. I must be satisfied that an order should be made to add the Applicants as parties and I must also be satisfied that the addition of these Applicants as parties will not cause prejudice to the primary Respondents, the Trustees.

[27] The Advice and Direction Application has been underway for almost six years. There have been a number of complex applications resulting in a variety of decisions (See the ***Sawridge Decisions***). The Trustees assert that some of the Applicants have chosen not to abide by deadlines imposed by this Court. In turn the Applicants take issue with the effectiveness of the early notifications in respect to the Advice and Direction Application. All of that said it is clear that this proceeding has gone on for a long time. I agree with the Trustees that the addition of more participants will make an already complex piece of litigation more complicated, not only in terms of potential new issues, but also in terms of more difficult logistics in coordinating additional counsel and individual parties and prolonging the procedural steps in this litigation, for example, even more questioning. All of that will in turn result in increased costs likely to be borne one way or another by the 1985 Sawridge Trust and the assets held by the Trust for its beneficiaries whom, I have already noted, include at a minimum two of the Applicants, namely Patrick and Shelby Twinn.

[28] In my decisions to date I have attempted to narrow and define the issues in this litigation. To allow additional parties at this stage will expand the lawsuit rather than create a more focussed set of issues for determination by a trial judge who will ultimately be tasked with determining this litigation.

[29] Further, I am not satisfied that the Applicants can pay the costs if they are unsuccessful and are not awarded an indemnity against paying the Trustees and, therefore, the costs of the

Trust. In other words, if this attempted entry into this Action is unsuccessful, then the Trust and its beneficiaries are left again to pay the bill.

[30] In conclusion, the Applicants have not satisfied me that their addition to this proceeding as full parties will not cause prejudice to the Trustees and the 1985 Sawridge Trust. Delay in bringing this litigation to a conclusion and expanding its scope are not, in my view, capable of being remedied by costs awards.

B Is it necessary to add Patrick and Shelby Twinn as Parties?

[31] The Trustees take the position that the interests of Patrick and Shelby Twinn are already represented in the Advice and Direction Application and that their addition would be redundant.

[32] In respect to Patrick Twinn, I agree that it is unnecessary to add him as a party. Patrick Twinn takes the position that he is currently, and will remain a Beneficiary of the 1985 Sawridge Trust. The Trustees confirm this and I accept that is correct and declare him to be a current Beneficiary of the Trust.

[33] Patrick Twinn understands and accepts that his beneficial interest under the 1985 Sawridge Trust may either be diluted or enhanced if the Trustees vary the definition of 'beneficiary' under the 1985 Sawridge Trust. There is no circumstance that I can foresee where his status as a Beneficiary will be eliminated and there is no need to add him as a party to this Action. In fact, adding him to the litigation will only result in the Trust's resources being further reduced, to the detriment of all current and future beneficiaries.

[34] Further, counsel for the OPTG in her letters of June 23 and June 30, 2017 has confirmed that the Public Trustee continues to represent minors who have become adults during the course of this litigation. As a result, both Patrick and Shelby Twinn will have their interests looked after by the OPTG in any event.

[35] Shelby Twinn is in a similar situation. She acknowledges that she is currently a Beneficiary under the 1985 Sawridge Trust. The Trustee states at para 24 of its Brief, filed October 31, 2016, that:

> Shelby and her sister, Kaitlyn Twinn, are both **current beneficiaries** of the 1985 Trust. (Emphasis added.)

[36] I accept the Trustees' confirmation and declare Shelby Twinn to be a current Beneficiary of the Trust.

[37] As with Patrick Twinn, I cannot foresee a circumstance where the status of Shelby Twinn as a Beneficiary under the 1985 Sawridge Trust will be eliminated. Her participation through her own lawyer offers no benefit other than to dissipate the Trust's property through the payout of another set of legal fees.

[38] For these reasons, there is no need to add Shelby Twinn as a party to this Action.

[39] A further reason of more general application for not adding Patrick and Shelby Twinn as parties to this Action is that to do so would have the effect of making this lawsuit a more adversarial process. Since both of these Applicants are already recognized as Beneficiaries by the Trustees and now by the Court, I observe that their ongoing involvement in the litigation would be better served by transparent and civil communications with the Trustees and their legal

counsel and through a positive dialogue with the Trustees to ensure that their status as Beneficiaries is respected.

C Should Deborah Sarafinchon be added as a Party?

[40] On the evidence presented to me, Debora Sarafinchon is not currently a Beneficiary under the 1985 Sawridge Trust. She accepts that she is not an Indian under the *Indian Act* and is not a member of the SFN. She has not applied for membership in the SFN and apparently has no intention of making such an application.

[41] As I have said in my earlier decisions in ***Sawridge #3***, it is not appropriate for this Court to get involved in disputes over membership in the SFN. Apart from the jurisdictional issues which might arise if I was tempted to address membership issues, it would be contrary to my position that this litigation should be narrowed rather than unnecessarily expanded.

[42] I will give Ms. Sarafinchon the benefit of the doubt and will not characterize her application to be added as a party as being a collateral attack on SFN membership issues. However, I am concerned about the Court being drawn into that sort of contest in this long-running litigation.

[43] There is nothing stopping Ms. Sarafinchon from monitoring the progress of this litigation and reviewing the proposals which the Trustees may make in respect to the definition of 'beneficiary' under the 1985 Sawridge Trust and providing comments to the Trustees and the Court. I also repeat my concern about increasing the adversarial nature of this Advice and Direction Application.

[44] For all these reasons, I decline the request by Ms. Sarafinchon to be added as a party to this Action.

VII Is the consent of beneficiaries required to vary the 1985 Sawridge Trust such that they ought to be entitled to party status?

[45] It is not necessary for me to address this issue in deciding this Application and I decline to do so.

VIII Should the Applicants be entitled to advance costs?

[46] In light of my decision to refuse to add all of these Applicants as parties to this Action, it is not necessary for me to decide the issue of awarding them advance costs.

IX Costs

[47] As is apparent from my analysis, I have concluded that Patrick and Shelby Twinn, who are attempting to participate in this process, offer nothing and instead propose to fritter away the Trust's resources to no benefit. In coming to this conclusion I observe that Patrick and Shelby Twinn were not interested in paying for their own litigation costs. They instead sought to offload that on the Trust, which would then have to pay for their representation in this litigation. I would not have permitted that, even if I had concluded these were appropriate litigation participants, which they are not.

[48] There is a parallel here with estate disputes where an unsuccessful litigation participant seeks to have an estate pay his or her legal costs. In that type of litigation a cost award of that kind means someone inside the group of intended beneficiaries loses, usually the residual beneficiary. Moen J in ***Babchuk v Kutz***, 2007 ABQB 88, 411 AR 181, affirmed *en toto* 2009

ABCA 144, 457 AR 44, conducted a detailed review of the principles that guide when an estate should indemnify an unsuccessful litigant. That investigation investigates the role and need for the unsuccessful litigant's participation, for example by asking who caused the litigation, whether the unsuccessful litigant's participation was reasonable, and how the parties as a whole conducted themselves.

[49] Here I have concluded that Patrick and Shelby Twinn had no basis to participate, and, worse, that their proposed participation would only end up harming the pool of beneficiaries as a whole. Their appearance is late in the proceeding, and they have not promised to take steps to ameliorate the cost impact of their proposed participation, other than to shift it to the Trust.

[50] *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.

[51] 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. By default successful litigation parties are due costs for that reason: *Rule* 10.29(1). The Court nevertheless retains a broad jurisdiction to vary costs depending on the circumstances (*Rule* 10.33), and naturally should make cost awards to encourage the *Rules* overall objectives and purposes (*Rule* 1.2).

[52] Elevated cost awards are appropriate in a wide variety of circumstances so as to achieve those objectives, as is reviewed in ***Brown v Silvera***, 2010 ABQB 224 at paras 29-35, 488 AR 22, affirmed 2011 ABCA 109, 505 AR 196.

[53] I conclude 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. I therefore order that Patrick and Shelby Twinn shall pay solicitor and own client indemnity costs of the Trustees in responding to this Application.

[54] In respect to Deborah Serafinchon, she was outside the Trust relationship and though I have rejected her application she has not litigated as an 'insider' who has done nothing but attempt to diminish resources of the Trust. I therefore award costs against Deborah Serafinchon in favour of the Trustees on a party/party basis. If there is any dispute over the resolution of the amount of costs in both cases, I retain jurisdiction to resolve that problem should it arise.

[55] In closing, I confirm the OPTG representation of minors who have become adults will be subject to the existing indemnity and costs exemption orders. This direction shall be included in the formal order documenting this judgment.

Heard and decided on the basis of the written materials described in Schedule 'A'.
Dated at the City of Edmonton, Alberta this 5th day of July, 2017.

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

Submissions in writing from:

N.L. Golding Q.C.
Borden Ladner Gervais LLP
for the Applicants Patrick Twinn et al.

D.C. Bonora and
A. Loparco, Q.C.
Dentons LLP
for The 1985 Sawridge Trustees

J.L. Hutchison
Hutchison Law LLP
for the OPTG

C.K.A. Platten, Q.C. and
C. Osualdini
McLennan Ross LLP
for Catherine Twinn

Schedule 'A'

Part I - Materials filed by the participants in the Application by Patrick Twinn et al.

FILING DATE	DESCRIPTION
August 17, 2016	Application by Patrick Twinn et al. to be added as parties to Action 1103 14112 – Borden Ladner Gervais ("BLG").
August 17, 2016	Affidavit of Patrick Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Shelby Twinn, sworn July 26, 2016.
August 17, 2016	Affidavit of Deborah Sarafinchon, sworn July 26, 2016.
September 30, 2016	Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Extracts of Evidence of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
September 30, 2016	Book of Authorities of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
October 21, 2016	Transcript of Questioning on Affidavit of Patrick Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Shelby Twinn.
October 21, 2016	Transcript of Questioning on Affidavit of Deborah Serafinchon.
October 31, 2016	Response Brief of the Trustees for the 1985 Sawridge Trust in Response to the Brief of the Applicants Patrick Twinn, Shelby Twinn, and Deborah Serafinchon – Dentons.
October 31, 2016	Letter from Hutchison Law to Denise Sutton re Application by Patrick Twinn et al. – Hutchison Law.
November 1, 2016	Brief of Catherine.
November 1, 2016	Affidavit of Paul Bujold sworn October 31, 2016 – Dentons.
November 10, 2016	Letter from Dentons to counsel (cc'd to Thomas J) re Undertaking Responses of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – Dentons.
November 10, 2016	Undertakings of Patrick Twinn.
November 10, 2016	Undertakings of Shelby Twinn.

November 10, 2016	Undertakings of Deborah Serafinchon.
November 14, 2016	Letter from Dentons to Thomas J re typo in response to the Brief of Patrick Twinn.
December 2, 2016	Affidavit of Deborah Serafinchon sworn November 24, 2016.
December 2, 2016	Letter from Dentons to Thomas J re response to unfiled Affidavit of Deborah Serafinchon.
December 5, 2016	Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
December 5, 2016	Extract of Evidence related to Reply Brief of Patrick Twinn, Shelby Twinn and Deborah Serafinchon – BLG.
December 9, 2016	Letter from Dentons to Thomas J re filed Undertakings of Paul Bujold from the Questioning on Affidavit on November 29, 2016.
December 9, 2016	Undertakings of Paul Bujold – Dentons.
December 12, 2016	Transcript on Questioning of Paul Bujold of November 29, 2016 – Dentons.

Part II - List of Correspondence

DATE	FROM	TO
June 09, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding
June 16, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 19, 2017	Ms. Nancy L. Golding, QC	Justice D.R.G. Thomas
June 20, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 22, 2017	Justice D.R.G. Thomas	Ms. Nancy L. Golding, QC and Ms. Janet Hutchison
June 22, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 23, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas
June 27, 2017	Ms. Doris C.E. Bonora	Justice D.R.G. Thomas
June 28, 2017	Ms. Karen A. Platten, QC	Justice D.R.G. Thomas
June 29, 2017	Justice D.R.G. Thomas	Ms. Janet Hutchison
June 30, 2017	Ms. Janet L. Hutchison	Justice D.R.G. Thomas

Included in a filed packet described as "Sawridge #5 Correspondence".

Court of Queen's Bench of Alberta

Citation: Morin v TransAlta Utilities Corporation, 2017 ABQB 409

Date: 20170627
Docket: 1403 06722
Registry: Edmonton

Between:

David Keeneth Morin, Lorna Karen Morin, Donna Elaine Morin, Percy Joseph Morin, Julian Edward Morin, Romeo Morin, Rita Gordon, Charles Cowan and Alex Peter Morin

Plaintiffs / Appellants

- and -

TransAlta Utilities Corporation, AltaLink Partnership, Alberta Utilities Commission, the Attorney General in Right of Alberta, Aboriginal Affairs and Northern Development Canada and Minister John Duncan

Defendants / Respondents

Corrected judgment: A corrigendum was issued on July 28, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

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

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Introduction

[1] The underlying matter before me was an appeal from Master Smart's decision dated July 18, 2016 in which he dismissed the claims of seven of the nine plaintiffs. With respect to a further plaintiff, he gave plaintiffs' counsel the opportunity to file evidence that this plaintiff had

authorized the commencement of the lawsuit on her behalf, and had resiled from a settlement arrangement that had resulted in her providing the defendants with a discontinuance of action.

[2] The action is a claim advanced against the defendants alleging, amongst other things, that the defendants were trespassing on lands owned by the Enoch Cree Nation (the "Nation") in relation to electrical transmission lines. The action was initially commenced by Mr. Willier at a time when he was in-house counsel for the Nation.

[3] The named plaintiffs were the Nation, and the Chief and Council of the Nation suing for damages to Nation Lands and interests, and nine individually named plaintiffs on whose lands transmission towers or other facilities had been built. These plaintiffs were the holders of certificates of occupancy for the parcel of land they lived on recognizing possessory rights but not land ownership rights.

[4] After the action was commenced, an election removed the Chief and Council. Mr. Willier was no longer retained as in-house counsel, and the Nation and the new Chief and Council retained new lawyers to represent them. A notice of change of solicitors was filed on behalf of the Chief and Council and the Nation, leaving Mr. Willier as solicitor of record for the named certificate of occupancy holders. Shortly after these changes, the litigation by the Nation and Chief and Counsel was settled.

[5] The defendants each brought applications to strike the remaining plaintiffs' claims as against them. Before the applications to strike were heard by Master Smart in July 2016, the Nation procured discontinuances of action from plaintiffs Peter Alex Morin and Donna Elaine Morin (Nielson), as well as releases. Peter Alex Morin was paid $20,000 by the Nation for signing the discontinuance and the release. It is not in evidence what, if anything, Donna Elaine Morin (Nielson) was paid.

[6] Before the application before Master Smart, Peter Alex Morin resiled from the settlement, and Mr. Willier advised Master Smart that he acted for Peter Alex Morin. There was some uncertainty as to the status of his representation of Donna Elaine Morin (Nielson).

[7] The basis for Master Smart's decision was that when the action was commenced, five of the plaintiffs were deceased. The uncontradicted evidence before him from Michelle Wilsdon, one of the Nation's current counsellors, was that the representatives of the estates of these former certificate of possession holders had not authorized the commencement of the action.

[8] Two of the named plaintiffs were not, at the time the action was commenced, holders of certificates of possession, and the uncontradicted evidence before Master Smart through Ms. Wilsdon was that these former certificate of possession holders had not authorized the action to be brought in their names.

[9] The Government of Canada had previously served a notice to admit on Mr. Willier to the effect that five of the nine plaintiffs were dead at the time the action was commenced and that two other plaintiffs were not certificate of possession holders at the time the action was commenced. There had been no response to the notice to admit, such that at the time of the application, its contents were deemed to be true, pursuant to Rule 6.37(3).

[10] Since no information was filed by or on behalf of Donna Elaine Morin (Nielson) by August 15, 2016 (the time limit imposed by Master Smart), her claim too was struck by the operation of Master Smart's decision.

[11] On August 19, 2017, Mr. Willier filed a notice of appeal on the whole of Master Smart's decision. The notice of appeal seeks a stay pending appeal, but nothing was done to apply for a stay. The appeal was set for October 14, 2017. At that time, Mr. Willier had agents appear to speak to an adjournment. An adjournment was granted, with costs to the defendants.

[12] The appeal proceeded before me on June 22, 2017. At the outset of the appeal, Mr. Willier abandoned the appeal and cited difficulties obtaining instructions from Peter Alex Morin. The defendants, other than the Alberta Utilities Commission and the Government of Alberta, seek costs in relation to the appeal.

[13] AltaLink and TransAlta seek enhanced costs from Mr. Willier personally, on the basis of Rule 10.49 as well as relying on common law principles relating to costs against lawyers personally. The Government of Canada seeks costs of the appeal, but not against Mr. Willier personally.

[14] The Alberta Utilities Commission and the Government of Alberta seek no costs of the appeal.

Positions

[15] AltaLink cites the following authorities:

Ward Estate v Olds Aviation Ltd., [1996] A.J. No. 1048 (ABCA);

Quebec v Jodoin, 2017 SCC 26;

Yonge v Toynbee, [1909] 1 KB 215 (UK CA);

Fricker v Van Grutten, [1895] 2 Ch. 649 (UK CA);

Trang v Alberta (Edmonton Remand Centre), 2007 ABCA 267; and

Pollock v Liberty Technical Services Ltd., [1997] A.J. No. 488 (ABQB).

[16] AltaLink argues that the appeal from the Master's decision was inappropriate and falls within Rule 10.49. Additionally, it argues that Rule 10.50 is engaged, as it characterizes Mr. Willier's actions in pursuing the appeal as "serious misconduct."

[17] AltaLink also argues that costs should be awarded on a full indemnity basis against a solicitor who has commenced proceedings without authority.

[18] It seeks "penalty" costs of $10,000 in relation to the appeal.

[19] TransAlta adopts the AltaLink submissions, and seeks costs in the amount of $15,000 in relation to the appeal.

[20] Mr. Willier recognized that there would be a cost order relating to the abandonment of the appeal, but offered no suggestion as to who should be responsible for the costs. He indicated that he had been instructed by former Chief and Council to include the nine named certificate of possession holders in the action he commenced while he was in-house counsel for Enoch.

[21] Counsel for AltaLink noted that Mr. Willier had essentially consented to the application relating to the deceased plaintiffs. Having reviewed the transcript, I do not see any express admission to that effect. Mr. Willier did not provide any information confirming that he had been retained by any of the certificate of possession holders other than Peter Alex Morin. He

suggested that he might have been retained by the four plaintiffs who were alive, but wanted to have the striking application dealt with at the same time as his application to amend the statement of claim.

[22] In any event, a notice of appeal was filed with respect to the entire decision.

Analysis

[23] It is trite law that a lawsuit may not be commenced on behalf of a party without that party's consent. If the party is unable to provide an informed consent, a litigation representative may be appointed.

[24] It is also clear from cases such as those cited by AltaLink that a solicitor who commences proceedings without proper authority may be liable for the defendant's costs.

[25] The information on the application and before me indicates that Peter Alex Morin had instructed Mr. Willier to commence the action. The uncontradicted evidence of Michelle Wilsdon was that she had spoken to three of the four plaintiffs who were still alive, and that each of David Kenneth Morin, Lorna Karen Morin and Donna Elaine Morin (Nielson) told her that they had not instructed Mr. Willier to name them as plaintiffs in the action.

[26] This information was presumptively inadmissible on the application as it is hearsay, and this is an application for a final order (dismissal of the claims). That was not raised before the Master, nor before me.

[27] In any event, I am satisfied that once a solicitor's authority to represent someone is called into question, there is an onus on the solicitor to demonstrate that he or she has such authority: ***Ward Estate v Olds Aviation Ltd.***

[28] Despite being provided with ample opportunity to do so relating to Donna Elaine Morin (Nielson) and on the appeal with respect to any or all of the other plaintiffs, Mr. Willier did not do so.

[29] In the absence of any evidence of authority (other than with respect to Peter Alex Morin), the application before Master Smart was bound to succeed and the appeal was bound to fail.

[30] Because of well-established authority that a solicitor who commences proceedings without authority becomes liable for costs in the matter, the issue before me is really not whether Mr. Willier should pay costs to the defendants who seek them but rather, the amount of such costs.

[31] Commencing proceedings without proper authority is a serious matter. Doing so exposes the commencing party to liability for costs, amongst other harms including reputational and relationship harms.

[32] Lawyers who commence proceedings warrant that they have the authority to do so. When authority is absent, there is no obvious reason why the lawyer should not have to indemnify the defendants for their reasonable costs in defending themselves. The lawyer may also expose himself to other claims.

[33] There may be situations where a lawyer genuinely but mistakenly believes he has authority from someone to represent them. There must, however, be a reasonable basis for that. Lawyers must be deemed to know that dead people cannot sue, and lawyers cannot commence an

action on behalf of someone without capacity or an unrepresented estate without following the Rules of Court regarding litigation representatives.

[34] Similarly, lawyers must be deemed to know that authority must come from the person him or herself, and not someone else (such as Chief and Council) telling the lawyer to sue on someone's behalf. There is no information before me that Chief and Council can authorize proceedings to be brought in individual Band member's names.

[35] In the face of this, Mr. Willier resisted the application to strike the claim against people who cannot have given him the necessary authority to sue (the deceased ones) and three others for whom there is no evidence of any such authority. Master Smart reserved his decision on the costs of the application before him, understanding that there would be a further striking application relating to Peter Alex Morin's claim (and potentially Donna Elaine Morin (Nielson)'s claim if proof of authority had been provided by August 15, 2016). That application is proceeding on June 28, 2017 so it is not necessary for me to deal with costs of anything other than the appeal.

[36] The Rules of Court are clear that costs follow the event unless otherwise ordered. Successful parties should be able to get costs from the party or parties opposing them. The losing parties are, in the absence of any direction by the Court to the contrary, jointly and severally responsible for costs ordered against them. The successful party can collect from whomever he or she chooses, leaving it to the unsuccessful parties to sort out ultimate responsibility amongst themselves and their lawyer(s).

[37] Here, Peter Alex Morin is the only plaintiff left standing. But it would be unfair for him to bear the costs relating to the striking of the claims of his co-plaintiffs. Presumably Peter Alex Morin is unaware of the absence of authority to commence the lawsuit for his co-plaintiffs. There is no suggestion that he has done anything in relation to this appeal, and the result of the appeal (indeed the result of the application before Master Smart) does not affect his position in the lawsuit.

[38] It would be possible to award costs against the plaintiffs who were struck and leave them to claim indemnity from Mr. Willier, but that would encourage the commencement or maintenance of other proceedings that are unnecessary. Such an order would be contrary to the spirit of the new Rules of Court.

[39] The only fair thing to do here is to award costs against Mr. Willier personally. The recent Supreme Court decision of ***Quebec v Jodoin*** is interesting but does not create a remedy that was not already there in the Rules of Court or at common law in civil proceedings. Although ***Jodoin*** is a criminal law case, the principles expressed in paragraph 29 are helpful:

> [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.

[40] I do not see those principles as limiting the power of the Court in civil matters to follow its own rules of procedure in awarding costs in appropriate circumstances. The imperative of advising the lawyer in advance that a personal cost remedy will be sought, and affording the lawyer the opportunity to respond to the claim, is simple procedural fairness. The nature and timing of the notice may well depend on the circumstances of the individual case, and the request for such costs and argument on it may well proceed during an application itself.

[41] Here, both TransAlta and AltaLink gave notice on this appeal that they would be seeking costs against Mr. Willier personally, so any notice requirements were amply met here in any event.

[42] TransAlta and AltaLink complain that they should have been advised sooner that Mr. Willier was not going to proceed with the appeal. That would have been courteous, and may have avoided some of the costs involved, but is not a factor that I would consider to be aggravating here.

[43] Nor is the absence of filing any materials on the appeal. Appeals from the Master do not require new materials to be filed by any party; the only mandatory filing is the transcript of the proceedings before the Master. That was done; albeit late.

[44] The appeal was adjourned at Mr. Willier's request in October; Verville J awarded costs of the adjournment to the defendants, without making any finding as to which defendant should be responsible. There is frankly no plaintiff that should be made responsible for the costs of the appeal, so the costs ordered by Verville J should be paid personally by Mr. Willier.

[45] The Alberta Utilities Commission seeks no costs in relation to the appeal, so this order does not affect them. Canada does not seek costs against Mr. Willier personally, so I vacate the costs awarded to them on the adjournment application, as it would be unfair for them to collect those costs from anyone other than Mr. Willier.

[46] Alberta takes the same position. Since they do not seek costs on the appeal, the cost award in Alberta's favour arising from the adjournment is vacated.

[47] That leaves TransAlta and AltaLink. Rule 10.49 states:

> 10.49(1) The Court may order a party, lawyer or other person to pay to the court clerk a penalty in an amount determined by the Court if
>
> (a) the party, lawyer or other person contravenes or fails to comply with these rules or a practice note or direction of the Court without adequate excuse, and
>
> (b) the contravention or failure to comply, in the Court's opinion, has interfered with or may interfere with the proper or efficient administration of justice.
>
> (2) The order applies despite
>
> (a) a settlement of the action, or
>
> (b) an agreement to the contrary by the parties.

[48] Rule 10.50 states:

> 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.

[49] Penalty costs imposed under Rule 10.49 go to the Court, not the litigants. The measure of costs to be awarded to the parties is always in the discretion of the courts. The English cases cited by AltaLink support solicitor client or indemnity costs in these situations. Such an award is not an absolute. Both AltaLink and TransAlta seek fixed amounts of costs.

[50] Here, Mr. Willier should not have commenced this action on behalf of the eight plaintiffs whose claims have been struck. He should not have resisted the application to strike against those plaintiffs. He should not have appealed Master Smart's decision; indeed he had no authority from anyone with the ability to authorize him to file the appeal. The appeal should not have been pursued. Once Mr. Willier determined that he was going to abandon the appeal, he should have notified other counsel immediately so they would have at least been spared the expense of preparation. I do not think an appearance would have been avoided, but it would have related only to costs and not the merits of the appeal.

[51] Mr. Willier's conduct here was both unauthorized and discourteous. I am satisfied that this is one of those situations described in ***Jodoin*** where he has interfered with the administration of justice. He has also interfered with the administration of justice by ignoring the rules relating to litigation representatives. In doing so, there was a considerable waste of court resources. It is appropriate that he pay a penalty to the Court of Queen's Bench in the amount of $1,000.

[52] Costs under Rule 10.50 are subsumed within the costs otherwise ordered under Schedule C; if there is a tariff item a multiplier might be used; if there is no tariff item then the Court should come up with an appropriate amount. I do not see that costs under Rule 10.50 are an add-on in themselves, to be imposed in addition to Schedule C.

[53] Solicitor and client costs have not been sought. Under Schedule C, Column 1 is the appropriate column as there is no specified amount in the statement of claim. An old rule of thumb was that Schedule C costs represented approximately a third of what might be the reasonable solicitor and client costs of the proceedings. The Rules of Court costs are out of date. Treble Column C costs have been used in cases where fraud has been alleged and not proven, and in other cases where the Court determined it was appropriate to send a message to the losing party.

[54] The appropriate measure of costs here, in my view, is to use four times Column 1 to recognize an inflationary factor to the tariff that was set some 20 years ago.

[55] I do not want to put the parties to the cost or time of preparing bills of costs or arguing over disbursements. No travel costs would be appropriate in any event.

[56] Therefore, each of TransAlta and AltaLink are awarded costs based on Schedule 1: $150 for the contested adjournment plus $1,000 for the application. Even though Mr. Willier abandoned the appeal at the hearing, that was too late for him to benefit from the reduction for abandoning the application specified in Schedule C item 7(3). The amount of $1,150 is thus quadrupled. I set disbursements for the appeal at $250 per party.

[57] Accordingly, each of TransAlta and AltaLink is awarded $4,850 in costs against Mr. Willier personally.

Heard on the 22nd day of June, 2017.
Dated at the City of Edmonton, Alberta, this 27th day of June, 2017.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Will Willier
Willier & Company
for the Plaintiffs /Appellants

Gavin S. Fitch, Q.C.
McLennan Ross LLP
for the Defendant / Respondent TransAlta Utilities Corporation

Karen Wyke
Fasken Martineau DuMoulin LLP
for the Defendant / Respondent AltaLink Partnership

J.P. Mousseau
Alberta Utilities Commission
for the Defendant / Respondent Alberta Utilities Commission

Angela Croteau
Alberta Department of Justice
for the Defendant / Respondent Attorney General in Right of Alberta

Alethea LeBlanc and Linda Maj
Department of Justice Canada
for the Defendants / Respondents Aboriginal Affairs
and Northern Development Canada and Minister John Duncan

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

The following paragraphs have been changed as follows:

[12] The appeal proceeded before me on June 22, 2017. At the outset of the appeal, Mr. Willier abandoned the appeal and cited difficulties obtaining instructions from Peter Alex Morin. The defendants, other than the Alberta Utilities Commission and the Government of Alberta, seek costs in relation to the appeal.

[13] AltaLink and TransAlta seek enhanced costs from Mr. Willier personally, on the basis of Rule 10.49 as well as relying on common law principles relating to costs against lawyers personally. The Government of Canada seeks costs of the appeal, but not against Mr. Willier personally.

[14] The Alberta Utilities Commission and the Government of Alberta seek no costs of the appeal.

[46] Alberta takes the same position. Since they do not seek costs on the appeal, the cost award in Alberta's favour arising from the adjournment is vacated.

In the Court of Appeal of Alberta

Citation: Stoney v 1985 Sawridge Trust, 2016 ABCA 51

Date: 20160226
Docket: 1603-0033-AC
Registry: Edmonton

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

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

Between:

Maurice Stoney

Applicant (Putative)

- and -

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

Respondents

- and -

Public Trustee of Alberta

Respondent

Oral Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application to Extend Time to File Appeal

Oral Reasons for Decision of
The Honourable Mr. Justice Jack Watson

[1] This is Court of Appeal file number 1603-0033-AC, In the Matter of the *Trustee Act*, RSA 2000, c T-8 as amended; and In the Matter of The Sawridge Band *Inter Vivos* Settlement Created by Chief Walter Patrick Twinn, of the Sawridge Indian Band, No. 19, now known as the Sawridge First Nation, on April 15, 1985 (the "1985 Sawridge Trust").

[2] The application before me now is by a gentleman named Maurice Stoney. Mr. Stoney claims, with some vigour, that he is a member of the First Nation in question and that he has been for a long time, and that as a member of the First Nation, certain legal rights of his follow from this.

[3] The matter that is under appeal by two parties now – and for which the subject matter before me is a motion for an extension of time for a further appeal – is a decision by Mr. Justice Thomas that was given at 2015 ABQB 799. His decision was in the course of a proceeding which dealt with The Sawridge Band *Inter Vivos* Settlement created back on April 15, 1985, which is referred to in the various proceedings as the Sawridge Band Trust. As mentioned, Mr. Stoney's position is that he is a member of the Sawridge First Nation and that as a consequence of that he presumably has a right to some share in the distribution of the trust when that is eventually carried out.

[4] The application that is specifically is before me at this time is by Mr. Stoney for an extension of time to appeal the judgment of Mr. Justice Thomas. The part of the reasons of Mr. Justice Thomas which are objected to in the proposed appeal by Mr. Stoney arise from his role as a case manager in connection with the ongoing proceeding dealing with the trust. His position is that both inappropriately and unfairly, Mr. Justice Thomas in his role as case manager has made final determinations which seriously and adversely affect his situation *vis-à-vis* his rights to participate in the trust. It is interesting to note that in the course of so arguing, his supporting affidavit which was sworn on October 27, 2015 in para 13 contains the broader assertion that:

> For thirty years, I have been seeking to have my membership in Sawridge be recognized.

In that respect, therefore, Mr. Stoney has the concern that his membership is also an issue in the judgment of Mr. Justice Thomas, either directly or indirectly, by virtue of these case management determinations which Mr. Justice Thomas made.

[5] During the course of argument with counsel, I referred counsel to para 56 of the judgment of Mr. Justice Thomas in which he purported to designate what he described as: "the potential recipients of a distribution of the 1985 Sawridge Trust...". I say purported because the existing two appeals from his decision dispute what he has said and done. He identified six categories.

[6] The other appeals by the other parties in relation to that turn very much on that paragraph. I will, therefore, not offer any extensive discussion about what the implications are of that paragraph nor whether it is the product of fair process, nor whether it is accurate or anything of that sort. I merely observe that that paragraph would appear to be a key triggering paragraph in particular for Mr. Stoney's request that he also be part of the process before the Court of Appeal, in relation to the challenges to the judgment of Mr. Justice Thomas.

[7] Indeed, Mr. Stoney's arguments to a large extent replicate points put forward by the appellants that have existing appeals against the judgment of Mr. Justice Thomas on the question of fair process. Certainly, Ms. Kennedy in her eloquent submissions on behalf of Mr. Stoney made considerable remarks in connection with the manner in which the issue of para 56 and, indeed, paras 32 and following in Mr. Justice Thomas' judgment arose. She takes the position that, in effect, Mr. Justice Thomas has seriously side-swiped the interest of Mr. Stoney and, although they are not appellants, the interest of the other two ladies whose names have been mentioned in the course of these proceedings.

[8] The position that has been taken in answer to the application for an extension of time is to invoke firstly, the Reasons for Judgment of Mr. Justice Slatter in ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Ltd,*** 2015 ABCA 206, 602 AR 135. The position taken on behalf of the First Nation, although the First Nation has not been, strictly speaking, a party to the proceedings before Mr. Justice Thomas, is that the objections and complaints made by Mr. Stoney (and, although they are not here, made by the two ladies presumably) are long since settled by the Federal Court and by other proceedings and other courts. The First Nation contends that the claims of Mr. Stoney, therefore, are not live questions here, whether or not they were implicitly raised in Mr. Justice Thomas' decision. They are certainly not the subject matter of the current appeals from Mr. Justice Thomas' decision, at least in the opinion of the First Nation.

[9] The response in answer to the extension of time application given by the Trustees of the trust – albeit not for this purpose including a dissenting Trustee – are that Mr. Stoney's position does not meet any of the criteria contained in para 4 of the judgment of ***Attila Dogan*** to which I have just made reference. The position taken on that aspect should be addressed, therefore, first.

[10] The position taken by the Trustees is that having regard to the way in which the record unfolded in this matter, there is not really adequate evidence before this Court to make a determination as to whether the principles in ***Cairns v Cairns***, [1931] 4 DLR 819 (Alta SC (AD)), which are quoted by Mr. Justice Slatter in ***Attila Dogan,*** are met. The situation is that they are suggesting that the affidavit evidence does not provide a reasonable explanation for the failure to file on time and it further does not provide an indication of a *bona fide* intention to appeal while the right of appeal existed.

[11] I am prepared to infer that, in fact, there would have been intention to appeal while the right of appeal existed had Ms. Kennedy been aware of the judgment of Mr. Justice Thomas. Further, while there are certainly some strengths to the argument against Ms. Kennedy's position relative to

the explanation for failure to file the appeal on time, I am satisfied that that would not be of itself a basis upon which to apply the ***Attila Dogan*** and ***Cairns*** test against the application being made on behalf of Mr. Stoney.

[12] It seems to me that the real issue that comes to the forefront of this matter is whether under para 4(e) of ***Attila Dogan*** there is a reasonable chance of success on the appeal, which Justice Slatter goes on to describe as a reasonably arguable appeal. This brings back into focus the objection made by the First Nation relative to whether or not the position of Mr. Stoney, at this stage, is merely that of an intermeddler seeking to intrude the issue of membership into an appeal to the Court of Appeal from Mr. Justice Thomas when Mr. Justice Thomas did not deal with membership.

[13] Indeed, it is quite clear from the reasoning of Mr. Justice Thomas that he attempted to avoid the question of membership. That was because he was taking on, in his view, the strict issue of the administration of the trust. From the reasons that he provided, the Federal Court was the proper location in which to determine whether a person is or is not a member of that particular First Nation. Whether or not that is correct and whether or not that issue would be resolved later by this Court on the existing two appeals is an interesting point which I do not need to come to grips with here. But the point of the matter is that Mr. Justice Thomas, at least, did not consider himself to be dealing with the question of membership.

[14] Mr. Justice Thomas' decision, in this respect, was attempting to regulate the processes for dealing with the trust. Insofar as doing so is concerned, it is clear that the administration of the trust would have a considerable effect on people who are entitled to be beneficiaries. The argument placed before me for Mr. Stoney is that a person who has a legitimate status as a member, and who has been foreclosed in the opportunity to put that position forward so far, may still very well be a person who should at some point by a competent authority be determined to be a beneficiary under the trust.

[15] The difficulty with the argument in that respect, however, from the point of view of the viability of an appeal under the ***Attila Dogan*** case, is that once the appeal gets to the Court of Appeal from Mr. Justice Thomas' decision, the impact of the decision upon Mr. Stoney's situation is yet to be understood.

[16] It seems to me that if the arguments that are put forward by the existing appellants from Mr. Justice Thomas' reasons hold sway in some way or another – and I would have to speculate what might happen there – that could very well address entirely the position of Ms. Kennedy's client. At least it would arguably do so insofar as her concern that Mr. Justice Thomas' judgment somehow stands in the path of Mr. Stoney in terms of getting some rights as a beneficiary.

[17] It has already been pointed out in the argument before me that there has not been, up to now, an application made by Ms. Kennedy's client, Mr. Stoney, to be a participant in the proceedings before Mr. Justice Thomas, in any formal way at least. He is certainly not named as a

party there, but with admirable fairness, Ms. Bonora, counsel for the Trustees, appreciates that there is no specific time running on this point before Mr. Justice Thomas. That is because the issue of who is a beneficiary for the purposes of division of this trust has not actually been made yet.

[18] In fact, one of the reasons why Mr. Justice Thomas got to making his decision under appeal in the first place was because he was attempting to make determinations for the process to determine who gets to decide who is beneficiary and so forth.

[19] That being the case, Ms. Bonora quite fairly points out that Mr. Stoney's position as to whether or not he should be considered to be entitled to be a beneficiary in the trust has not arisen yet before Justice Thomas. That is going to have to be decided at some future date whether or not the appeal goes ahead from Mr. Justice Thomas and whether or not Mr. Justice Thomas' judgment, in this particular regard, is upheld or changed or in some way dealt with by the Court of Appeal.

[20] It therefore follows that in terms of determining reasonable chance of success in the appeal, the embargo against the participation of Mr. Stoney that is or has been created by the various proceedings that have occurred in various courts including the Federal Court as raised by the First Nation, has an enhanced status for the purposes of determining the extension of time here. That is because, on the face of things, Mr. Stoney does not have a participatory right in relation to the proceedings on the trust, does not have standing to appeal within the meaning of the case of ***Dreco Energy Services Ltd et al v Wenzel Downhole Tools Ltd***, 2008 ABCA 36, 429 AR 51 at paras 5 to 8, and is, in fact, a stranger to the proceedings insofar as an appeal from the decision of Mr. Justice Thomas to the Court of Appeal is concerned.

[21] Since Mr. Stoney is interested in matters which were not entirely addressed by Mr. Justice Thomas, and which may or may not be addressed by the Court in the medium of other arguments by other parties before the Court of Appeal, I am left with the situation where it seems to be quite clear that there is no reasonable chance of success on an appeal by Mr. Stoney. That is because no one is going to say anything about him, particularly when the appeal is heard. If incidentally the result of the appeal is that somehow his status or ability to apply as a beneficiary is improved, so be it. The mere existence of that judgment and of a potential decision of the Court of Appeal in relation to the judgment of Mr. Justice Thomas does not, it seems to me, create a condition that would give rise to a right of appeal on behalf of Mr. Stoney in this respect.

[22] Having said all that, then, I am not satisfied that an extension of time should be granted to Mr. Stoney to appeal the decision of Mr. Justice Thomas, even if I could discern precisely what it is about the decision of Mr. Justice Thomas that is directly under attack, or would be under attack, on an appeal by Mr. Stoney. I can make inferences about what Mr. Stoney might hope might unfold on appeal, but there is not, at this point in time, an arguable point by Mr. Stoney as against Justice Thomas' judgment, bearing in mind what the judgment is and what it says.

[23] The application is dismissed.

[Discussion with counsel re costs]

Watson J.A.:

[24] Costs will follow for the parties that participated on the motion itself. And any parties who did not, do not get anything.

Application heard on February 17, 2016

Reasons filed at Edmonton, Alberta
this 26th day of February, 2016

Watson J.A.

Appearances:

P.E. Kennedy
for the Applicant (Putative)

M.S. Poretti/D.C.E. Bonara
for the Respondents Roland Twinn, Walter Felix Twinn, Bertha L'Hirondelle, and Clara Midbo (Sawridge Trustees)

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

C. Osualdini
for the Respondent Catherine Twinn

E. Meehan, Q.C./J.L. Hutchinson
for the Respondent Public Trustee of Alberta