Fast Track

COURT OF APPEAL OF ALBERTA

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

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

BOOK OF AUTHORITIES OF THE APPELLANTS

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BOOKS OF AUTHORITIES

1. *Trustee Act*, RSA 2000, c T-8
2. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365
3. *Pintea v Johns*, 2016 ABCA 99
4. *Lofstrom v Radke*, 2017 ABCA 287
5. *Alberta Rules of Court*, Alta Reg 124/2010, r 4.14
6. *Castledowns Law Office Management Ltd. v FastTrack Technologies Inc.*, 2012 ABCA 219
7. *Horst Tyson Dahlem v Canmore Legal Services*, 2017 ABCA 97
8. *Hill v Hill*, 2013 ABCA 313
9. *Chisholm v Lindsay*, 2017 ABCA 21
10. *Alberta Rules of Court*, r 3.75
11. *McFaul v Ranch-Lewchuk*, 2015 ABQB 706
12. *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226
13. *Amoco Canada Petroleum Co. v Alberta & Southern Gas Co.*, 1993 CanLII 7084 (AB QB)
14. *Babchuk v Kutz*, 2007 ABQB 88
15. *Powermax Energy Inc. v Argonauts Group Ltd.*, 2003 ABQB 543
16. *College of Physicians & Surgeons*, 2009 ABQB 48
17. *Stagg v Condominium Plan No. 882-2999*, 2013 ABQB 684
18. *Meads v Meads*, 2012 ABQB 571
19. *Foote Estate (Re)*, 2010 ABQB 197
20. *Brown v Silvera*, 2010 ABQB 224
21. *1985 Sawridge Trust v Alberta* (Public Trustee), 2017 ABQB 436
22. *Deans v Thachuk, 2005 ABCA 368*

Province of Alberta

TRUSTEE ACT

Revised Statutes of Alberta 2000
Chapter T-8

Current as of December 17, 2014

Office Consolidation

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(4) Every transfer, payment and delivery made pursuant to an order under subsection (3) is valid and takes effect as if it had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered.

RSA 1980 cT-10 s40

Personal liability

41 If in any proceeding affecting trustees or trust property it appears to the court

(a) that a trustee, whether appointed by the court or by an instrument in writing or otherwise, or that any person who in law may be held to be fiduciarily responsible as a trustee, is or might be personally liable for any breach, whether the transaction alleged or found to be a breach of trust occurred before or after the passing of this Act, but

(b) that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed that breach,

then the court may relieve the trustee either wholly or partly from personal liability for the breach of trust.

RSA 1980 cT-10 s41

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52

Application to court for advice

43(1) Any trustee may apply in court or in chambers in the manner prescribed by the rules of court for the opinion, advice or direction of the Court of Queen's Bench on any question respecting the management or administration of the trust property.

(2) The trustee acting on the opinion, advice or direction given by the Court is deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in respect of the subject-matter of the opinion, advice or direction.

(3) Subsection (2) does not extend to indemnify a trustee in respect of any act done in accordance with the opinion, advice or direction of the Court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining that opinion, advice or direction.

RSA 1980 cT-10 s43

Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v. Alberta (Public Trustee), 2012 ABQB 365

Date: 20120612
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 the Sawridge Indian Band, on April 15, 1985 (the "1985 Sawridge Trust")

Between:

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

Respondent

- and -

Public Trustee of Alberta

Applicant

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

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I. Introduction

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

[2] The 1985 Sawridge Trust is administered by the Trustees named as Respondents in this application [the "Sawridge Trustees" or the "Trustees"] who now seek the advice and direction of this Court in respect to proposed amendments to the definition of the term "Beneficiaries" in the 1985 Sawridge Trust and confirmation of the transfer of assets into that Trust. One consequence of these proposed amendments to the 1985 Sawridge Trust would be that the entitlement of certain dependent children to share in Trust assets would be affected. There is some question as to the exact nature of the effects, although it seems to be accepted by all of those involved on this application that certain children who are presently entitled to a share in the benefits of the 1985 Sawridge Trust would be excluded if the proposed changes are approved and implemented. Another concern is that the proposed revisions would mean that certain dependent children of proposed members of the Trust would become beneficiaries and entitled to shares in the Trust, while other dependent children would be excluded.

[3] At the time of confirming the scope of notices to be given in respect to the application for advice and directions, it was observed that children who might be affected by variations to the 1985 Sawridge Trust were not represented by counsel. In my Order of August 31, 2011 [the "August 31 Order"] I directed that the Office of the Public Trustee of Alberta [the "Public Trustee"] be notified of the proceedings and invited to comment on whether it should act in respect of any existing or potential minor beneficiaries of the Sawridge Trust.

[4] On February 14, 2012 the Public Trustee applied to be appointed as the litigation representative of minors interested in the proceedings, for the payment of advance costs on a solicitor and own client basis and exemption from liability for the costs of others. The Public Trustee also applied, for the purposes of questioning on affidavits which might be filed in this proceeding, for an advance ruling that information and evidence relating to the membership criteria and processes of the Sawridge Band is relevant material.

[5] On April 5, 2012 I heard submissions on the application by the Public Trustee which was opposed by the Sawridge Trustees and the Chief and Council of the Sawridge Band. The Trustees and the Band, through their Chief and Council, argue that the guardians of the potentially affected children will serve as adequate representatives of the interests of any minors.

[6] Ultimately in this application I conclude that it is appropriate that the Public Trustee represent potentially affected minors, that all costs of such representation be borne by the Sawridge Trust and that the Public Trustee may make inquiries into the membership and application processes and practices of the Sawridge Band.

II. The History of the 1985 Sawridge Trust

[7] An overview of the history of the 1985 Sawridge Trust provides a context for examining the potential role of the Public Trustee in these proceedings. The relevant facts are not in dispute and are found primarily in the evidence contained in the affidavits of Paul Bujold (August 30, 2011, September 12, 2011, September 30, 2011), and of Elizabeth Poitras (December 7, 2011).

[8] In 1982 various assets purchased with funds of the Sawridge Band were placed in a formal trust for the members of the Sawridge Band. In 1985 those assets were transferred into the 1985 Sawridge Trust. At the present time the value of assets held by the 1985 Sawridge Trust is approximately $70 million. As previously noted, the beneficiaries of the Sawridge Trust are restricted to persons who were members of the Band prior to the adoption by Parliament of the *Charter* compliant definition of Indian status.

[9] In 1985 the Sawridge Band also took on the administration of its membership list. It then attempted (unsuccessfully) to deny membership to Indian women who married non-aboriginal persons: ***Sawridge Band v. Canada***, 2009 FCA 123, 391 N.R. 375, leave denied [2009] S.C.C.A. No. 248. At least 11 women were ordered to be added as members of the Band as a consequence of this litigation: ***Sawridge Band v. Canada***, 2003 FCT 347, [2003] 4 F.C. 748, affirmed 2004 FCA 16, [2004] 3 F.C.R. 274. Other litigation continues to the present in relation to disputed Band memberships: ***Poitras v. Sawridge Band***, 2012 FCA 47, 428 N.R. 282, leave sought [2012] S.C.C.A. No. 152.

[10] At the time of argument in April 2012, the Band had 41 adult members, and 31 minors. The Sawridge Trustees report that 23 of those minors currently qualify as beneficiaries of the 1985 Sawridge Trust; the other eight minors do not.

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

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

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

III. Application by the Public Trustee

[14] In its application the Public Trustee asks to be named as the litigation representative for minors whose interests are potentially affected by the application for advice and directions being made by the Sawridge Trustees. In summary, the Public Trustee asks the Court:

1. to determine which minors should be represented by it;

2. to order that the costs of legal representation by the Public Trustee be paid from the 1985 Sawridge Trust and that the Public Trustee be shielded from any liability for costs arising; and

3. to order that the Public Trustee be authorized to make inquiries through questioning into the Sawridge Band membership criteria and application processes.

The Public Trustee is firm in stating that it will only represent some or all of the potentially affected minors if the costs of its representation are paid from the 1985 Sawridge Trust and that it must be shielded from liability for any costs arising in this proceeding.

[15] The Sawridge Trustees and the Band both argue that the Public Trustee is not a necessary or appropriate litigation representative for the minors, that the costs of the Public Trustee should not be paid by the Sawridge Trust and that the criteria and mechanisms by which the Sawridge Band identifies its members is not relevant and, in any event, the Court has no jurisdiction to make such determinations.

IV. Should the Public Trustee be Appointed as a Litigation Representative?

[16] Persons under the age of 18 who reside in Alberta may only participate in a legal action via a litigation representative: *Alberta Rules of Court*, Alta Reg 124/2010, s. 2.11(a) [the "*Rules*", or individually a "*Rule*"]. The general authority for the Court to appoint a litigation representative is provided by *Rule*, 2.15. A litigation representative is also required where the membership of a trust class is unclear: *Rule*, 2.16. The common-law *parens patriae* role of the courts (***E. v. Eve (Guardian Ad Litem)***, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1) allows for the appointment of a litigation representative when such action is in the best interests of a child. The *parens patriae* authority serves to supplement authority provided by statute: ***R.W. v. Alberta (Child, Youth and Family Enhancement Act Director)***, 2010 ABCA 412 at para. 15, 44 Alta. L.R. (5th) 313. In summary, I have the authority in these circumstances to appoint a litigation representative for minors potentially affected by the proposed changes to the 1985 Sawridge Trust definition of "Beneficiaries".

[17] The Public Trustee takes the position that it would be an appropriate litigation representative for the minors who may be potentially affected in an adverse way by the proposed redefinition of the term "Beneficiaries" in the 1985 Sawridge Trust documentation and also in respect to the transfer of the assets of that Trust. The alternative of the Minister of Aboriginal Affairs and Northern Development applying to act in that role, as potentially authorized by the *Indian Act*, R.S.C. 1985, c. I-5, s. 52, has not occurred, although counsel for the Minister takes a watching role.

[18] In any event, the Public Trustee argues that it is an appropriate litigation representative given the scope of its authorizing legislation. The Public Trustee is capable of being appointed to supervise trust entitlements of minors by a trust instrument (*Public Trustee Act*, S.A. 2004, c. P-44.1, s. 21) or by a court (*Public Trustee Act*, s. 22). These provisions apply to all minors in Alberta.

A. Is a litigation representative necessary?

[19] Both The Sawridge Trustees and Sawridge Band argue that there is no need for a litigation representative to be appointed in these proceedings. They acknowledge that under the proposed change to the definition of the term "Beneficiaries" no minors could be part of the 1985 Sawridge Trust. However, that would not mean that this class of minors would lose access to any resources of the Sawridge Trust; rather it is said that these benefits can and will be funnelled to

those minors through those of their parents who are beneficiaries of the Sawridge Trust, or minors will become full members of the Sawridge Trust when they turn 18 years of age.

[20] In the meantime the interests of the affected children would be defended by their parents. The Sawridge Trustees argue that the Courts have long presumptively recognized that parents will act in the best interest of their children, and that no one else is better positioned to care for and make decisions that affect a child: ***R.B. v. Children's Aid Society of Metropolitan Toronto***, [1995] 1 S.C.R. 315 at 317-318, 122 D.L.R. (4th) 1. Ideally, a parent should act as a 'next friend' [now a 'litigation representative' under the new *Rules*]: ***V.B. v. Alberta (Minister of Children's Services)***, 2004 ABQB 788 at para. 19, 365 A.R. 179; ***C.H.S. v. Alberta (Director of Child Welfare)***, 2008 ABQB 620, 452 A.R. 98.

[21] The Sawridge Trustees take the position at para. 48 of its written brief that:

> [i]t is anachronistic to assume that the Public Trustee knows better than a First Nation parent what is best for the children of that parent.

The Sawridge Trustees observe that the parents have been notified of the plans of the Sawridge Trust, but none of them have commented, or asked for the Public Trustee to intervene on behalf of their children. They argue that the silence of the parents should be determinative.

[22] The Sawridge Band argues further that no conflict of interest arises from the fact that certain Sawridge Trustees have served and continue to serve as members of the Sawridge Band Chief and Council. At para. 27 of its written brief, the Sawridge Band advances the following argument:

> ... there is no conflict of interest between the fiduciary duty of a Sawridge Trustee administering the 1985 Trust and the duty of impartiality for determining membership application for the Sawridge First Nation. The two roles are separate and have no interests that are incompatible. The Public Trustee has provided no explanation for why or how the two roles are in conflict. Indeed, the interests of the two roles are more likely complementary.

[23] In response the Public Trustee notes the well established fiduciary obligation of a trustee in respect to trust property and beneficiaries: ***Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.***, 2011 SCC 23 at para. 148, [2011] 2 S.C.R. 175. It observes that a trustee should avoid potential conflict scenarios or any circumstance that is "... ambiguous ... a situation where a conflict of interest and duty might occur ..." (citing D. W. M. Waters, M. Gillen and L. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd. ed. (Toronto: Thomson Carswell, 2005), at p. 914 ["*Waters' Law of Trusts*"]. Here, the Sawridge Trustees are personally affected by the assignment of persons inside and outside of the Trust. However, they have not taken preemptive steps, for example, to appoint an independent person or entity to protect or oversee the interests of the 23

minors, each of whom the Sawridge Trustees acknowledge could lose their beneficial interest in approximately $1.1 million in assets of the Sawridge Trust.

[24] In these circumstances I conclude that a litigation representative is appropriate and required because of the substantial monetary interests involved in this case. The Sawridge Trustees have indicated that their plan has two parts:

> firstly, to revise and clarify the definition of "Beneficiaries" under the 1985 Sawridge Trust; and
>
> secondly, then seek direction to distribute the assets of the 1985 Sawridge Trust with the new amended definition of beneficiary.

While I do not dispute that the Sawridge Trustees plan to use the Trust to provide for various social and health benefits to the beneficiaries of the Trust and their children, I observe that to date the proposed variation to the 1985 Sawridge Trust does not include a *requirement* that the Trust distribution occur in that manner. The Trustees could, instead, exercise their powers to liquidate the Sawridge Trust and distribute approximate $1.75 million shares to the 41 adult beneficiaries who are the present members of the Sawridge Band. That would, at a minimum, deny 23 of the minors their current share of approximately $1.1 million each.

[25] It is obvious that very large sums of money are in play here. A decision on who falls inside or outside of the class of beneficiaries under the 1985 Sawridge Trust will significantly affect the potential share of those inside the Sawridge Trust. The key players in both the administration of the Sawridge Trust and of the Sawridge Band overlap and these persons are currently entitled to shares of the Trust property. The members of the Sawridge Band Chief and Council are elected by and answer to an interested group of persons, namely those who will have a right to share in the 1985 Sawridge Trust. These facts provide a logical basis for a concern by the Public Trustee and this Court of a potential for an unfair distribution of the assets of the 1985 Sawridge Trust.

[26] I reject the position of the Sawridge Band that there is no potential for a conflict of interest to arise in these circumstances. I also reject as being unhelpful the argument of the Sawridge Trustees that it is "anachronistic" to give oversight through a public body over the wisdom of a "First Nations parent". In Alberta, persons under the age of 18 are minors and their racial and cultural backgrounds are irrelevant when it comes to the question of protection of their interests by this Court.

[27] The essence of the argument of the Sawridge Trustees is that there is no need to be concerned that the current and potential beneficiaries who are minors would be denied their share of the 1985 Sawridge Trust; that their parents, the Trustees, and the Chief and Council will only act in the best interests of those children. One, of course, hopes that that would be the case, however, only a somewhat naive person would deny that, at times, parents do not always act in

the best interests of their children and that elected persons sometimes misuse their authority for personal benefit. That is why the rules requiring fiduciaries to avoid conflicts of interest is so strict. It is a rule of very longstanding and applies to all persons in a position of trust.

[28] I conclude that the appointment of the Public Trustee as a litigation representative of the minors involved in this case is appropriate. No alternative representatives have come forward as a result of the giving of notice, nor have any been nominated by the Respondents. The Sawridge Trustees and the adult members of the Sawridge Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

[29] This is a 'structural' conflict which, along with the fact that the proposed beneficiary definition would remove the entitlement to some share in the assets of the Sawridge Trust for at least some of the children, is a sufficient basis to order that a litigation representative be appointed. As a consequence I have not considered the history of litigation that relates to Sawridge Band membership and the allegations that the membership application and admission process may be suspect. Those issues (if indeed they are issues) will be better reviewed and addressed in the substantive argument on the adoption of a new definition of "Beneficiaries" under the revised 1985 Sawridge Trust.

B. Which minors should the Public Trustee represent?

[30] The second issue arising is who the Public Trustee ought to represent. Counsel for the Public Trustee notes that the Sawridge Trustees identify 31 children of current members of the Band. Some of these persons, according to the Sawridge Trustees, will lose their current entitlement to a share in the 1985 Sawridge Trust under the new definition of "Beneficiaries". Others may remain outside the beneficiary class.

[31] There is no question that the 31 children who are potentially affected by this variation to the Sawridge Trust ought to be represented by the Public Trustee. There are also an unknown number of potentially affected minors, namely, the children of applicants seeking to be admitted into membership of the Sawridge Band. These candidate children, as I will call them, could, in theory, be represented by their parents. However, that potential representation by parents may encounter the same issue of conflict of interest which arises in respect to the 31 children of current Band members.

[32] The Public Trustee can only identify these candidate children via inquiry into the outstanding membership applications of the Sawridge Band. The Sawridge Trustees and Band argue that this Court has no authority to investigate those applications and the application process. I will deal in more detail with that argument in Part VI of this decision.

[33] The candidate children of applicants for membership in the Sawridge Band are clearly a group of persons who may be readily ascertained. I am concerned that their interest is also at risk. Therefore, I conclude that the Public Trustee should be appointed as the litigation representative

not only of minors who are children of current Band members, but also the children of applicants for Band membership who are also minors.

V. The Costs of the Public Trustee

[34] The Public Trustee is clear that it will only represent the minors involved here if:

1. advance costs determined on a solicitor and own client basis are paid to the Public Trustee by the Sawridge Trust; and

2. that the Public Trustee is exempted from liability for the costs of other litigation participants in this proceeding by an order of this Court.

[35] The Public Trustee says that it has no budget for the costs of this type of proceedings, and that its enabling legislation specifically includes cost recovery provisions: *Public Trustee Act*, ss. 10, 12(4), 41. The Public Trustee is not often involved in litigation raising aboriginal issues. As a general principle, a trust should pay for legal costs to clarify the construction or administration of that trust: ***Deans v. Thachuk***, 2005 ABCA 368 at paras. 42-43, 261 D.L.R. (4th) 300, leave denied [2005] S.C.C.A. No. 555.

[36] Further, the Public Trustee observes that the Sawridge Trustees are, by virtue of their status as current beneficiaries of the Trust, in a conflict of interest. Their fiduciary obligations require independent representation of the potentially affected minors. Any litigation representative appointed for those children would most probably require payment of legal costs. It is not fair, nor is it equitable, at this point for the Sawridge Trustees to shift the obligation of their failure to nominate an independent representative for the minors to the taxpayers of Alberta.

[37] Aline Huzar, June Kolosky, and Maurice Stoney agree with the Public Trustee and observe that trusts have provided the funds for litigation representation in aboriginal disputes: ***Horse Lake First Nation v. Horseman***, 2003 ABQB 114, 337 A.R. 22; ***Blueberry Interim Trust (Re)***, 2012 BCSC 254.

[38] The Sawridge Trustees argue that the Public Trustee should only receive advance costs on a full indemnity basis if it meets the strict criteria set out in ***Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2, [2007] 1 S.C.R. 38 [“***Little Sisters***”] and ***R. v. Caron***, 2011 SCC 5, [2011] 1 S.C.R. 78. They say that in this instance the Public Trustee can afford to pay, the issues are not of public or general importance and the litigation will proceed without the participation of the Public Trustee.

[39] Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The ***Little Sisters*** criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the

Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in ***Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd.*** (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):

> In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment.

In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: ***Residential Warranty Co. of Canada Inc. (Re)***, 2006 ABQB 236, 393 A.R. 340, affirmed 2006 ABCA 293, 275 D.L.R. (4th).

[40] I have concluded that a litigation representative is appropriate in this instance. The Sawridge Trustees argue this litigation will proceed, irrespective of whether or not the potentially affected children are represented. That is not a basis to avoid the need and cost to represent these minors; the Sawridge Trustees cannot reasonably deny the requirement for independent representation of the affected minors. On that point, I note that the Sawridge Trustees did not propose an alternative entity or person to serve as an independent representative in the event this Court concluded the potentially affected minors required representation.

[41] The Sawridge Band cites recent caselaw where costs were denied parties in estate matters. These authorities are not relevant to the present scenario. Those disputes involved alleged entitlement of a person to a disputed estate; the litigant had an interest in the result. That is different from a court-appointed independent representative. A homologous example to the Public Trustee's representation of the Sawridge Trust potential minor beneficiaries would be a dispute on costs where the Public Trustee had represented a minor in a dispute over a last will and testament. In such a case this Court has authority to direct that the costs of the Public Trustee become a charge to the estate: *Public Trustee Act*, s. 41(b).

[42] The Public Trustee is a neutral and independent party which has agreed to represent the interests of minors who would otherwise remain unrepresented in proceedings that may affect their substantial monetary trust entitlements. The Public Trustee's role is necessary due to the potential conflict of interest of other litigants and the failure of the Sawridge Trustees to propose alternative independent representation. In these circumstances, I conclude that the Public Trustee should receive full and advance indemnification for its participation in the proceedings to make revisions to the 1985 Sawridge Trust.

VI. Inquiries into the Sawridge Band Membership Scheme and Application Processes

[43] The Public Trustee seeks authorization to make inquiries, through questioning under the *Rules*, into how the Sawridge Band determines membership and the status and number of applications before the Band Council for membership. The Public Trustee observes that the application process and membership criteria as reported in the affidavit of Elizabeth Poitras appears to be highly discretionary, with the decision-making falling to the Sawridge Band Chief and Council. At paras. 25 - 29 of its written brief, The Public Trustee notes that several reported cases suggest that the membership application and review processes may be less than timely and may possibly involve irregularities.

[44] The Band and Trustees argue that the Band membership rules and procedure should not be the subject of inquiry, because:

A. those subjects are irrelevant to the application to revise certain aspects of the 1985 Sawridge Trust documentation; and

B. this Court has no authority to review or challenge the membership definition and processes of the Band; as a federal tribunal decisions of a band council are subject to the exclusive jurisdiction of the Federal Court of Canada: *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18.

A. In this proceeding are the Band membership rules and application processes relevant?

[45] The Band Chief and Council argue that the rules of the Sawridge Band for membership and application for membership and the existence and status of any outstanding applications for such membership are irrelevant to this proceeding. They stress at para. 16 of their written brief that the "Advice and Direction Application" will not ask the Court to identify beneficiaries of the 1985 Sawridge Trust, and state further at para. 17 that "... the Sawridge First Nation is fully capable of determining its membership and identifying members of the Sawridge First Nation." They argue that any question of trust entitlement will be addressed by the Sawridge Trustees, in due course.

[46] The Sawridge Trustees also argue that the question of yet to be resolved Band membership issues is irrelevant, simply because the Public Trustee has not shown that Band membership is a relevant consideration. At para. 108 of its written brief the Sawridge Trustees observe that the fact the Band membership was in flux several years ago, or that litigation had occurred on that topic, does not mean that Band membership remains unclear. However, I think that argument is premature. The Public Trustee seeks to investigate these issues not because it has *proven* Band membership is a point of uncertainty and dispute, but rather to reassure itself (and the Court) that the beneficiary class can and has been adequately defined.

[47] The Public Trustee explains its interest in these questions on several bases. The first is simply a matter of logic. The terms of the 1985 Sawridge Trust link membership in the Band to an interest in the Trust property. The Public Trustee notes that one of the three 'certainties' of a valid trust is that the beneficiaries can be "ascertained", and that if identification of Band membership is difficult or impossible, then that uncertainty feeds through and could disrupt the "certainty of object": *Waters' Law of Trusts* at p. 156-157.

[48] The Public Trustee notes that the historical litigation and the controversy around membership in the Sawridge Band suggests that the 'upstream' criteria for membership in the Sawridge Trust may be a subject of some dispute and disagreement. In any case, it occurs to me that it would be peculiar if, in varying the definition of "Beneficiaries" in the trust documents, that the Court did not make some sort inquiry as to the membership application process that the Trustees and the Chief and Council acknowledge is underway.

[49] I agree with the Public Trustee. I note that the Sawridge Band Chief and Council argue that the Band membership issue is irrelevant and immaterial because Band membership will be clarified at the appropriate time, and the proper persons will then become beneficiaries of the 1985 Sawridge Trust. It contrasts the actions of the Sawridge Band and Trustees with the scenario reported in ***Barry v. Garden River Band of Ojibways*** (1997), 33 O.R. (3d) 782, 147 D.L.R. (4th) 615 (Ont. C.A.), where premature distribution of a trust had the effect of denying shares to potential beneficiaries whose claims, via band membership, had not yet crystalized. While the Band and Trustees stress their good intentions, this Court has an obligation to make inquiries as to the procedures and status of Band memberships where a party (or its representative) who is potentially a claimant to the Trust queries whether the beneficiary class can be "ascertained". In coming to that conclusion, I also note that the Sawridge Trustees acknowledge that the proposed revised definition of "Beneficiaries" may exclude a significant number of the persons who are currently within that group.

B. Exclusive jurisdiction of the Federal Court of Canada

[50] The Public Trustee emphasizes that its application is not to challenge the procedure, guidelines, or otherwise "interfere in the affairs of the First Nations membership application process". Rather, the Public Trustee says that the information which it seeks is relevant to evaluate and identify the beneficiaries of the 1985 Sawridge Trust. As such, it seeks information in respect to Band membership processes, but not to affect those processes. They say that this Court will not intrude into the jurisdiction of the Federal Court because that is not 'relief' against the Sawridge Band Chief and Council. Disclosure of information by a federal board, commission, or tribunal is not a kind of relief that falls into the exclusive jurisdiction of the Federal Courts, per *Federal Court Act*, s. 18.

[51] As well, I note that the "exclusive jurisdiction" of statutory courts is not as strict as alleged by the Trustees and the Band Chief and Council. In ***783783 Alberta Ltd. v. Canada***

(Attorney General), 2010 ABCA 226, 322 D.L.R. (4th) 56, the Alberta Court of Appeal commented on the jurisdiction of the Tax Court of Canada, which per *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s. 12 has "exclusive original jurisdiction" to hear appeals of or references to interpret the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp). The Supreme Court of Canada in ***Canada v. Addison & Leyen Ltd.***, 2007 SCC 33, 365 N.R. 62 indicated that interpretation of the *Income Tax Act* was the sole jurisdiction of the Tax Court of Canada (para. 7), and that (para. 11):

> ... The integrity and efficacy of the system of tax assessments and appeals should be preserved. Parliament has set up a complex structure to deal with a multitude of tax-related claims and this structure relies on an independent and specialized court, the Tax Court of Canada. Judicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court. ...

[52] The legal issue in ***783783 Alberta Ltd. v. Canada (Attorney General)*** was an unusual tort claim against the Government of Canada for what might be described as "negligent taxation" of a group of advertisers, with the alleged effect that one of two competing newspapers was disadvantaged. Whether the advertisers had or had not paid the correct income tax was a necessary fact to be proven at trial to establish that injury: paras. 24-25. The Alberta Court of Appeal concluded that the jurisdiction of a provincial superior court includes whatever statutory interpretation or application of fact to law that is necessary for a given issue, in that case a tort: para. 28. In that sense, the trial court was free to interpret and apply the *Income Tax Act*, provided in doing so it did not determine the income tax liability of a taxpayer: paras. 26-27.

[53] I conclude that it is entirely within the jurisdiction of this Court to examine the Band's membership definition and application processes, provided that:

1. investigation and commentary is appropriate to evaluate the proposed amendments to the 1985 Sawridge Trust, and

2. the result of that investigation does not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the Sawridge Band Chief and Council.

[54] Put another way, this Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach *Charter* principles and the requirements of natural justice. However, I do not have authority to order a judicial review remedy on that basis because that jurisdiction is assigned to the Federal Court of Canada.

[55] In the result, I direct that the Public Trustee may pursue, through questioning, information relating to the Sawridge Band membership criteria and processes because such information may be relevant and material to determining issues arising on the advice and directions application.

VII. Conclusion

[56] The application of the Public Trustee is granted with all costs of this application to be calculated on a solicitor and its own client basis.

Heard on the 5th day of April, 2012.
Dated at the City of Edmonton, Alberta this 12th day of June, 2012.

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

Appearances:

Ms. Janet L. Hutchison
(Chamberlain Hutchison)
for the Public Trustee / Applicants

Ms. Doris Bonora,
Mr. Marco S. Poretti
(Reynolds, Mirth, Richards & Farmer LLP)
for the Sawridge Trustees / Respondents

Mr. Edward H. Molstad, Q.C.
(Parlee McLaws LLP)
for the Sawridge Band / Respondents

In the Court of Appeal of Alberta

Citation: Pintea v Johns, 2016 ABCA 99

Date: 20160502
Docket: 1501-0047-AC
Registry: Calgary

Between:

Valentin Pintea

Appellant
(Plaintiff)

- and -

Dale Johns and Dylan Johns

Respondents
(Defendants)

The Court:

The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment of the Honourable Mr. Justice McDonald and the Honourable Madam Justice Veldhuis

Dissenting Memorandum of Judgment of the Honourable Mr. Justice Martin

Appeal from the Orders by
The Honourable Madam Justice C.L. Kenny
Dated the 21st day and the 30th day of January, 2015
Filed on the 30th day of January, 2015
(Docket: 0701 12350)

Standard of Review

[7] Appellate intervention is warranted if a chambers judge did not give sufficient weight to relevant considerations, or proceeded arbitrarily, on wrong principles, or on an erroneous view of the facts, or if there is likely to be a failure of justice: *Hover v Metropolitan Life Insurance Co*, 1999 ABCA 123, 237 AR 30 at para 10, citing *Russell Food Equipment (Calgary) Limited v Valleyfield Investment Ltd* (1962), 40 WWR 292 at 295 (Alta TD).

[8] Reasonableness is the applicable standard in reviewing a chambers judge's exercise of discretion: *Decock v Alberta*, 2000 ABCA 122, 255 AR 234 at para 13. However, where the matter in issue is a question of law, the standard of review is correctness: *Northland Bank v Willson*, 1997 ABCA 162, 200 AR 150 at para 9 (CA); *Decock*. A reasonableness standard also applies to discretionary decisions of a case management judge: *Indian Residential Schools, Re* (*sub nom Doe v Canada*), 2001 ABCA 216, 286 AR 307 at para 23.

Analysis

[9] Our colleague refers to the respondents' application to adduce fresh evidence, noting their assertion that, after the appellant was notified that his appeal had been struck, he engaged in "mischief" by presenting some documents to suggest that he had in fact filed a timely change of address. The respondents argue that this is a serious allegation that cannot be condoned or ignored. Given the sole ground of appeal concerns whether the appellant was given proper notice of the January 30, 2015 hearing date, it is important to apply the requisite test as set forth in *R v Palmer* [1980] 1 SCR 759.

[10] In brief, the *Palmer* test requires the Court to have regard to four considerations. First, the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial. Second, the evidence must bear upon a decisive or potentially decisive issue in the trial. Third, the evidence must be credible in the sense that it is reasonably capable of belief. Fourth, the evidence, if believed, and when taken together with other evidence adduced at trial, could reasonably be expected to have affected the result.

[11] The respondents have brought an application to adduce fresh evidence. They specifically attack the veracity of the following three documents that the appellant has sought to adduce as fresh evidence in his appeal materials:

- A letter that the appellant claims he provided on July 14, 2014 to Ms. Sia Stanwell, a judicial assistant at the Court of Queen's Bench, purporting to advise that he had moved from his Coachwood address to the Strathridge address two weeks prior;

- A copy of a Form 39 Confirmation of Trial date filed July 14, 2014 with the Coachwood address crossed out and the impugned Strathridge address inserted in handwriting; and

In the Court of Appeal of Alberta

Citation: Lofstrom v Radke, 2017 ABCA 287

Date: 20170908
Docket: 1703-0093-AC
Registry: Edmonton

Between:

Timothy James Lofstrom

Appellant
(Plaintiff)

- and -

Anastasia Radke

Respondent
(Defendant)

The Court:

The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice E.J. Simpson
Dated the 14th day of March, 2017
(Docket: FL14 01598)

Memorandum of Judgment

The Court:

Background

[1] The appellant, a self-represented plaintiff, appeals an interlocutory order made by the case management judge dismissing the appellant's application for interim contact, guardianship and parenting of the respondent's children.

[2] The appellant's claim, ultimately, is for permanent contact, guardianship and parenting of three of the respondent's four children with whom the appellant lived for two and one-half years. The respondent is the biological mother of the children. The appellant is not the biological father. He simply lived with the respondent and her children for two and a half years. The appellant has also claimed a beneficial interest in the respondent's home, recreational property, business and investments.

[3] For the reasons which follow, we would dismiss the appellant's appeal of the dismissal of his application for interim contact, guardianship and parenting of the respondent's children on the basis that the appellant failed to identify any errors of law or misapprehension of the facts by the case management judge.

Standard of Review

[4] Absent an error in law, a high degree of deference is given to interim orders made by a case management judge: see *Letourneau v. Letourneau*, 2014 ABCA 156 at para 6, [2014] CarswellAlta 702. A high degree of deference means that unless the order is clearly wrong, this court is not likely to overturn it.

Analysis

[5] The impugned order, which dismissed the appellant's interim contact, guardianship and parenting application, was clearly the result of the appellant's failure to satisfy the case management judge that such an order was in the best interests of the children. The case management judge was not satisfied, in part, because of an assessment report which concluded that the appellant's mental health was less than satisfactory and that the children could be at risk if the appellant had contact with them. In our view, that was a reasonable basis for the case management judge to dismiss the appellant's application.

[6] We note that the appellant was convicted in June of 2016 of six counts of breaching a recognizance entered into after he was charged with harassing the respondent and breaking into

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Ways the Court may manage action

4.11 The Court may manage an action in one or more of the following ways, in which case the responsibility of the parties to manage their dispute is modified accordingly:

(a) the Court may make a procedural order;

(b) the Court may direct a conference under rule 4.10 *[Assistance by the Court]*;

(c) on request under rule 4.12 *[Request for case management]*, or on the initiative of the Chief Justice under rule 4.13 *[Appointment of case management judge]*, the Chief Justice may appoint a case management judge for the action;

(d) the Court may make an order under a rule providing for specific direction or a remedy.

Request for case management

4.12(1) A request for a case management order must be made in writing to the Chief Justice and a copy of the request must be served on each of the other parties.

(2) The request must state

(a) the reason for the request, and

(b) whether any of the other parties agrees with the request.

(3) An action commenced or continued under the *Class Proceedings Act* must have a case management judge appointed for the action unless the Chief Justice decides otherwise, and the request for a case management judge must be made no later than the date on which the first application in respect of the class proceeding is made under section 2(2) of the *Class Proceedings Act*.

Appointment of case management judge

4.13 The Chief Justice may order that an action be subject to case management and appoint a judge as the case management judge for the action for one or more of the following reasons:

(a) to encourage the parties to participate in a dispute resolution process;

(b) to promote and ensure the fair and efficient conduct and resolution of the action;

(c) to keep the parties on schedule;

(d) to facilitate preparation for trial and the scheduling of a trial date.

Authority of case management judge

4.14(1) A case management judge, or if the circumstances require, any other judge, may

(a) order that steps be taken by the parties to identify, simplify or clarify the real issues in dispute,

(b) establish, substitute or amend a complex case litigation plan and order the parties to comply with it,

(c) make an order to facilitate an application, proceeding, questioning or pre-trial proceeding,

(d) make an order to promote the fair and efficient resolution of the action by trial,

(e) facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial,

(f) make any procedural order that the judge considers necessary, or

(g) as a case management judge, exercise the powers that a trial judge has by adjudicating any issues that can be decided before commencement of the trial, including those related to

(i) the admissibility of evidence,

(ii) expert witnesses,

(iii) admissions, and

(iv) adverse inferences.

(2) Unless the Chief Justice or the case management judge otherwise directs, or these rules otherwise provide, the case management judge must hear every application filed with respect to the action for which the case management judge is appointed.

(3) A decision that results from the exercise of the power referred to in subrule (1)(g) is binding on the parties for the remainder of the trial, even if the judge who hears the evidence on the merits is not the same as the case management judge, unless the court is satisfied that it would not be in the interests of justice because, among other considerations, fresh evidence has been adduced.

AR 124/2010 s4.14;85/2016

Case management judge presiding at summary trial and trial

4.15 Unless every party and the judge agree, a case management judge must not hear an application for judgment by way of a summary trial or preside at the trial of the action for which the case management judge is appointed.

In the Court of Appeal of Alberta

Citation: Castledowns Law Office Management Ltd. v. FastTrack Technologies Inc., 2012 ABCA 219

Date: 20120711
Docket: 1103-0301-AC
Registry: Edmonton

Between:

Castledowns Law Office Management Ltd., 104 Street Law Office Management Ltd., Roy Nickerson, Trudy Nickerson, Westering Heights Estates Ltd., KSA Holdings Inc., David Mercer, Paul Foisy and Marianna Foisy and 1131102 Alberta Ltd.

Respondents (Plaintiffs)

- and -

FastTrack Technologies Inc.

Appellant (Defendant)

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J. Goss
Dated the 1st day of November, 2011
Filed on the 14th day of November, 2011
(Docket: 0603-14617)

and unjust enrichment against the proposed new parties. It also commenced a separate action in April 2011 in which it sought specific performance. No aspect of that separate action is before this court.

[12] FastTrack's application to amend its counterclaim was dismissed by the case management judge on November 1, 2011. This is an appeal from that decision.

ISSUES

[13] 1. What are the legal tests for amending pleadings and adding parties?

2. Have the respondents established that they would suffer non-compensable prejudice if the amendments were allowed?

3. Are the proposed amendments barred through laches or the expiry of limitation periods?

STANDARD OF REVIEW

[14] The issue whether the case management judge erred in her formulation and application of the legal test for the amendment of pleadings is an extricable question of law and is reviewable on the standard of correctness; see *Hill v Hill (Family Trust)*, 2007 ABCA 293 at para 8, [2007] AJ No 1067.

[15] The issue whether the case management judge erred in deciding that to allow the proposed amendments would result in non-compensable prejudice to the respondents is a question of fact to be reviewed on a standard of palpable and overriding error; see *Housen v Nikolaisen*, 2002 SCC 33 at para 10, [2002] 2 SCR 235.

ANALYSIS OF ISSUES

1. *What is the legal test for amending pleadings and for adding parties?*

[16] Rule 3.65 of the Alberta Rules of Court grants the court considerable discretion to allow amendments after pleadings have closed. Generally, it provides that a court ought to allow an amendment, but there are various exceptions to this presumption. They include circumstances in which the proposed amendment would cause serious prejudice to the opposing party, not compensable in costs, or where it seeks to add a new party or new cause of action after the expiry of a limitation period; see *Dusty's Saloon, a division of AP Woznow & Sons Enterprises Ltd v WMI Waste Management of Canada Inc*, [2001] AJ No 108 at paras 26-28, 279 AR 187; *Dow Chemicals Canada Inc v Nova Chemicals Corp* 2010 ABQB 524 at para 21, 495 AR 338.

In the Court of Appeal of Alberta

Citation: Horst Tyson Dahlem Professional Corporation v John F Schneider Professional Corporation (Canmore Legal Services), 2017 ABCA 97

Date: 20170327
Docket: 1601-0054-AC
Registry: Calgary

Between:

Horst Tyson Dahlem Professional Corporation

Respondent
(Plaintiff)

- and -

John F. Schneider Professional Corporation, operating as Canmore Legal Services and John F. Schneider

Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheila Greckol

Memorandum of Judgment

Appeal from the Decisions by
The Honourable Mr. Justice G.C. Hawco
Dated the 12th day of February, 2016 and
the 23rd day of March, 2016
(2016 ABQB 92; 2016 ABQB 173, Docket: 0601 07392)

1. Incorrectly applying s 133 of the *Legal Profession Act,* RSA 2000, c L-8, disregarding deemed admissions from a notice to admit, and finding that the appellant Mr. Schneider was personally liable;

2. Failing to find there was a collateral agreement that the respondent deduct staff time before billing;

3. Excluding relevant evidence;

4. Failing to find that the respondent agreed to pay for Yellow Pages advertising and owed money for the typewriter;

5. Awarding an unreasonably high quantum of interest; and

6. Granting solicitor-client costs.

STANDARD OF REVIEW

[8] The application of s 133 of the *Legal Profession Act* to the facts of this case to determine whether Mr. Schneider is personally liable for the debt is a question of mixed fact and law. If the trial judge made an extricable error of law or principle, such as misstating the legal test, the standard of correctness applies; otherwise, this issue is reviewable for palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at para 36, [2002] 2 SCR 235.

[9] The treatment of deemed admissions from a Notice to Admit involves an element of discretion, with which this court will not interfere unless the trial judge misdirected himself or came to a decision that is so clearly wrong that it amounts to an injustice: *Stringer v Empire Life Insurance Company*, 2015 ABCA 349 at paras 10-12, 57 CCLI (5th) 108; *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125.

[10] The trial judge's finding that there was no collateral agreement is a question of fact, reviewable for palpable and overriding error: *Housen* at para 10. His exclusion of the appellants' late disclosure is a discretionary decision entitled to deference: *Halkyard (Estate) v Mathew*, 2001 ABCA 67 at para 15, 277 AR 373.

[11] Failing to accept an admission of fact or making fact findings that are contrary to clear admissions in the pleadings is essentially a failure to consider relevant evidence, which is an error of law reviewable for correctness: *Alberta Permit Pro v Booth*, 2009 ABCA 146 at para 38, [2009] 6 WWR 599; *Evans v Teamsters Local Union No 31*, 2008 SCC 20 at para 47, [2008] 1 SCR 661; *Housen* at para 8.

[12] The trial judge's decision regarding the quantum of pre-judgment interest involves an assessment of the contract between the parties and whether there was any reason to deviate from

In the Court of Appeal of Alberta

Citation: Hill v Hill, 2013 ABCA 313

Date: 20130927
Docket: 1201-0333-AC
Registry: Calgary

Between:

Daniel Walter Hill

Appellant/Cross-Respondent
(Plaintiff)

- and -

Paul James Hill, Richard P. Rendek, Rand Flynn, Famhill Investments Limited and Harvard Developments Inc.

Respondents/Cross-Appellants
(Defendants)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Peter Costigan
The Honourable Madam Justice Elizabeth Hughes

Memorandum of Judgment Regarding Costs

Appeal from the Judgment by
The Honourable Mr. Justice E.C. Wilson
Dated the 7th day of November, 2012
Filed the 4th day of December, 2012
(2012 ABQB 694, Docket: 0501-00476)

[47] Four aspects of holding fees to single column 5 for the respondent defendants' part of the trial are disturbing.

[48] First, the appellant (respondent by cross-appeal) does not point to any evidence which the respondent defendants led at trial which they should not have, or was unnecessary. (Only one bit was objected to at trial as irrelevant.)

[49] Even more striking, the trial judge's Reasons on the merits show that the respondent defendants won the trial largely because of witnesses whom they called. A striking example is that of the surviving tax lawyer involved in the supposed 1976 appointment of beneficiaries. And some of the respondent defendants testified on those topics. Indeed another of the respondents' witnesses not only gave important eyewitness evidence, but prepared spreadsheets which the trial judge found "particularly useful".

[50] The second aspect is amount in issue. We have noted above the reasons why single column 5 would be clearly inadequate for any suit over assets and income of this size, even if it ran smoothly and without misconduct, and were not of unusual complexity.

[51] That factor got no weight whatever, as the trial judge put costs down to single column 5 (at the end of the trial) without any misconduct by the respondent defendants, nor any divided success.

[52] Third, we have noted above the undoubted incessant misconduct by the appellant plaintiff: a host of grave but unfounded allegations of misconduct. Similarly that got no weight at all during the second part of the trial when the defendants defended themselves against those allegations. That is baffling.

[53] Fourth, the trial judge noted the great complexity of the suit. Similarly it got no weight at all for the second part of the trial.

[54] For over 70 years, Courts of Appeal have had and used the power to interfere with discretionary decisions (such as costs) where improper weights are given (or not given) to irrelevant (or relevant) factors.

[55] The seminal case is ***Evans v Bartlam*** [1937] AC 473, [1937] 2 All ER 646 (HL(E)). The power of an appeal court to interfere was held to cover a case where not nearly enough weight had been given to an important factor, in ***Charles Osenton & Co v Johnston*** [1942] AC 130, [1941] 2 All ER 245, 250, 253, 256, 261 (HL(E)). That was approved in ***Friends of the Oldman River Society v R*** [1992] 1 SCR 3, 132 NR 321, [1992] 2 WWR 193, 246-47 (paras 104-05). It overturned a discretionary decision on grounds that it had given insufficient weight to an important question: p 249 (WWR (para 108)). See also ***Dufault v Stevens*** (1978) 86 DLR (3d) 671, 678 (BC CA), and ***Campbell v Campbell*** (1955) 14 WWR 690 (BC CA).

[56] A discretionary costs order was upset on appeal for giving no weight to two important factors, in ***Minister of National Health v Apotex*** (2000) 194 DLR (4th) 483, 265 NR 90, 94-95 (FCA).

In the Court of Appeal of Alberta

Citation: Chisholm v Lindsay, 2017 ABCA 21

Date: 20170118
Docket: 1601-0096-AC
Registry: Calgary

Between:

Catherine Chisholm

Appellant
(Plaintiff)

- and -

Noreen Lindsay

Respondent
(Defendant)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice R.J. Hall
Dated the 24th day of March, 2016
Filed on the 2nd day of May, 2016
(Docket: 0701 04015)

iv. Rule 5.41 nominates fees of Dr. Hashman, Dr. Hoyer, Dr. Selland and Marni Tory; and

v. The photocopy disbursement expense.

[4] The parties appeared before the assessment officer who made the assessment directed by the Panel. He awarded additional costs of $68,441.94 (including $1,050 for the costs of the assessment) but noted that his assessment was provisional and referred a question to the Court of Queen's Bench with respect to his jurisdiction. The Chief Justice directed a chambers judge to determine the following issue:

> Does the Assessment Officer have the jurisdiction to assess the 5 costs items referred to in paragraph 3 of the judgment of the Court of Appeal filed August 13th, 2015, notwithstanding the same 5 items were previously decided by the trial judge?

[5] The chambers judge concluded that the assessment officer lacked jurisdiction to assess the five costs items previously decided by the trial judge. He concluded that the trial judge's costs order must be final and binding because the Panel declined to intervene on those items. He concluded, "that the taxation assessment completed by the Assessment Officer is of no force or effect".

[6] The appellant appeals on the basis that the Panel's Judgment meant that the issue of jurisdiction was *res judicata*.

II. Analysis

[7] The issue on appeal is whether the chamber judge correctly interpreted paragraph 3 of the Judgment. Questions of jurisdiction are questions of law for which the standard of review is correctness. The same standard applies to whether a matter is *res judicata*: *David M. Gottlieb Professional Corporation v Nahal*, 2012 ABCA 88, 522 AR 25 at para 9

[8] A judgment or order of the court, not the reasons given, is the governing document. However, when the judgment contains an ambiguity it can be resolved by reviewing the reasons: *3264920 Canada Inc v Strother*, 2010 BCCA 328 at para 27, citing *Canadian Pacific Railway Co. v Blain* (1905), 36 SCR 159 at 166-67:

> I cannot conceive that this formal judgment, transmitted to the court below, is at variance with the written memorandum read in open court as the judgment of the court. I cannot even say that it contradicts the very terms of the reasons. But suppose it is inconsistent with their tenor and meaning, which document is to govern and constitute the judgment of this court? Is it the judgment pronounced in court, which alone should be transmitted and certified to the court appealed from, or the reasons for judgment which were not read in court nor transmitted to the

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RULES OF COURT

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(c) a party was incorrectly named as a party or was incorrectly omitted from being named as a party.

(2) If subrule (1) applies, a judgment entered in respect of the action is without prejudice to the rights of persons who were not parties to the action.

Subdivision 2
Changes to Parties

Adding, removing or substituting parties after close of pleadings

3.74(1) After close of pleadings, no person may be added, removed or substituted as a party to an action started by statement of claim except in accordance with this rule.

(2) On application, the Court may order that a person be added, removed or substituted as a party to an action if

(a) in the case of a person to be added or substituted as plaintiff, plaintiff-by-counterclaim or third party plaintiff, the application is made by a person or party and the consent of the person proposed to be added or substituted as a party is filed with the application;

(b) in the case of an application to add or substitute any other party, or to remove or to correct the name of a party, the application is made by a party and the Court is satisfied the order should be made.

(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Information note

An order under this rule is likely to include terms, conditions and time limits. See rule 1.4(2)(e) *[Procedural orders]*.

Adding, removing or substituting parties to originating application

3.75(1) In an action started by originating application no party or person may be added or substituted as a party to the action except in accordance with this rule.

(2) On application of a party or person, the Court may order that a person be added or substituted as a party to the action

(a) in the case of a person to be added or substituted as an originating applicant, if consent of the person proposed to be added or substituted is filed with the application;

(b) in the case of an application to add or substitute a person as a respondent, or to remove or correct the name of a party, if the Court is satisfied the order should be made.

(3) The Court may not make an order under this rule if prejudice would result for a party that could not be remedied by a costs award, an adjournment or the imposition of terms.

Action to be taken when defendant or respondent added

3.76(1) If a defendant or respondent is added to or substituted in an action, the plaintiff, originating applicant, plaintiff-by-counterclaim or third party plaintiff must, unless the Court otherwise orders,

(a) amend the commencement document, as required, to name the new party, and

(b) serve the amended commencement document on each of the other parties.

(2) Unless the Court otherwise orders,

(a) in the case of a new defendant, the new defendant has the same time period to serve a statement of defence as the defendant had under rule 3.31 *[Statement of defence]*, and

(b) the action against the new defendant or new respondent, as the case may be, starts on the date on which the new party is added to or substituted in the action.

Subsequent encumbrancers not parties in foreclosure action

3.77 A plaintiff in a foreclosure action must not make any subsequent encumbrancer a party to the claim unless possession is claimed from the subsequent encumbrancer.

Information note

In foreclosure actions, a notice of address for service may be filed and served under rule 11.24 *[Notice of address for service in foreclosure actions]*.

Court of Queen's Bench of Alberta

Citation: McFaul v Ranch-Lewchuk, 2015 ABQB 706

Date: 20151109
Docket: 0703 09300
Registry: Edmonton

Between:

Brian McFaul

Applicant

- and -

Jesse Ranch-Lewchuk, Edward Szymt, Alan Gratton, John Doe, XYZ Corporation and the Administrator of the Motor Vehicle Accident Claims Act

Respondents

Reasons for Judgment
of the
Honourable Madam Justice Dawn Pentelechuk

Introduction

[1] The Plaintiff claims damages for injuries he sustained in a single motor vehicle accident on August 26, 2006. He alleges the Defendant Jesse Ranch-Lewchuk was driving when he lost control of the vehicle and veered into the ditch.

[2] The Plaintiff seeks to amend his Statement of Claim to add Elizabeth MacIntyre as personal representative of the Estate of Allan Joseph MacIntyre as a Defendant and to plead particulars of negligence with respect to the late Mr. MacIntyre. Specifically, the proposed

[56] The second requirement to allow the amendment is that the proposed Defendant must have received sufficient knowledge of the claim such that he will not be prejudiced in maintaining a defence to the claim: s 6(4)(b).

[57] The proposed Defendant has the burden of establishing that it did not receive sufficient knowledge of the added claim: s 6(5)(b). The applicable limitation period, as stated above, is three years from August 26, 2006 (two years under s 3(1)(a) of the *Limitations Act* plus one year for service of the Statement of Claim). Therefore, I must be satisfied that Mr. MacIntyre or his Estate, received sufficient knowledge of the added claim before August 26, 2009, *and* that his ability to defend the added claim on its merits is not prejudiced.

[58] There is no evidence that the proposed Defendant or his Estate ever received any knowledge of the claim prior to August 26, 2009. Rather, the evidence establishes that the proposed Defendant's insurer received notice on September 23, 2009, through a letter sent by the Plaintiff's counsel: (Aff of Lorna Lawrence sworn Aug 12, 2015).

[59] The death of a proposed Defendant has been recognized as highly prejudicial: ***McCormick v Boychuk***, 2008 ABQB 728 at para 8; ***Kydd v Abolarin***, 2011 ABQB 690 at para 52. Other cases have found that an inability to answer a claim due to the loss of a key witness is serious prejudice: ***Laasch v Turenne***, 2012 ABQB 566 at para 68, aff'd 2013 ABCA 182; ***422252 Alberta Ltd v Messenger***, 2013 ABQB 399 at para 59. Unlike cases that deal with the death of a proposed Defendant or key witness *after* the expiration of the limitation period, here, Mr. MacIntrye died on December 24, 2007, within two years of the accident date. Any prejudice arising from his death would not have precluded an action against his Estate.

[60] However, the 'notice' in this case is insufficient. First, it was after August 26, 2009, and therefore outside of the three year period that started to run on August 26, 2006: s 6(4)(b) *Limitations Act*. That alone disposes of the matter. Second, I also note authority that knowledge of an insurer will not suffice if there is no evidence that the proposed Defendant received sufficient knowledge: ***McLaughlin v Broddy***, 2006 ABQB 914 at paras 32-36; (for a contrary view, see ***McDonnell v Csaki***, 2014 ABQB 452).

[61] Therefore, the evidence satisfies me that the proposed Defendant did not receive notice of the added claim within the applicable time period, and the Plaintiff's added claim against the proposed Defendant is statute barred, under both ss 3 and 6 of the *Limitations Act*.

Rule 3.74

[62] In ***Kent v Martin***, 2011 ABQB 416, Tilleman J referred to Rule 3.74(2)(b) and, specifically, the requirement that the Court must be "satisfied the Order should be made". He suggested these words mean that justice must require the addition of the parties (at para 9).

[63] Even if I am wrong about the applicable limitation period, or alternatively, that s 6(4) of the *Limitations Act* allows the addition of the Plaintiff's proposed amendment notwithstanding the expiry of the limitation period, I am not satisfied that allowing the amendment in these circumstances is appropriate.

[64] Under Rule 3.74 of the *Rules of Court*, the Court may order that a person be added as a party to an action if the application is made by a party and the Court is satisfied the order should be made. Like s 6(4) of the *Limitations Act*, this Rule also precludes an amendment if it would

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2013 ABCA 226

Date: 20130619
Docket: 1203-0230-AC
Registry: Edmonton

IN THE MATTER OF THE *TRUSTEE ACT*, R.S.A. 2000, C. T-8, AS AMENDED

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

Between:

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

Appellants (Respondents)

- and -

Public Trustee of Alberta

Respondent (Applicant)

- and -

**Sawridge First Nation,
Minister of Indian Affairs and Northern Development,
Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney**

Interested Parties

The Court:

**The Honourable Mr. Justice Peter Costigan
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 12th day of June, 2012
Filed on the 20th day of September, 2012
(Docket: 1103 14112)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellants are Trustees of the Sawridge Trust (Trust). They wish to change the designation of "beneficiaries" under the Trust and have sought advice and direction from the court. A chambers judge, dealing with preliminary matters, noted that children who might be affected by the change were not represented by counsel, and he ordered that the Public Trustee be notified. Subsequently, the Public Trustee applied to be named as litigation representative for the potentially interested children, and that appointment was opposed by the Trustees.

[2] The judge granted the application. He also awarded advance costs to the Public Trustee on a solicitor and his own client basis, to be paid for by the Trust, and he exempted the Public Trustee from liability for any other costs of the litigation. The Trustees appeal the order, but only insofar as it relates to costs and the exemption therefrom. Leave to appeal was granted on consent.

II. Background

[3] The detailed facts are set out in the Reasons for Judgment of the chambers judge: *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365. A short summary is provided for purposes of this decision.

[4] On April 15, 1985 the Sawridge First Nation, then known as the Sawridge Indian Band No. 19 (Sawridge) set up the 1985 Sawridge Trust (Trust) to hold certain properties in trust for Sawridge members. The current value of those assets is approximately $70,000,000.

[5] The Trust was created in anticipation of changes to the *Indian Act*, RSC 1985, c I-5, which would have opened up membership in Sawridge to native women who had previously lost their membership through marriage. The beneficiaries of the Trust were defined as "all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982."

[6] The Trustees are now looking to distribute the assets of the Trust and recognize that the existing definition of "beneficiaries" is potentially discriminatory. They would like to redefine "beneficiaries" to mean the present members of Sawridge, and acknowledge that no children would be part of the Trust. The Trustees suggest that the benefit is that the children would be funnelled through parents who are beneficiaries, or children when then become members when they attain the age of 18 years.

[7] Sawridge is currently composed of 41 adult members and 31 minors. Of the 31 minors, 23 currently qualify as beneficiaries under the Trust, and 8 do not. It is conceded that if the definition of beneficiaries is changed, as currently proposed, some children, formerly entitled to a share in the benefits of the trust, will be excluded, while other children who were formerly excluded will be included.

[8] When Sawridge's application for advice and direction first came before the court, it was observed that there was no one representing the minors who might possibly be affected by the change in the definition of "beneficiaries." The judge ordered that the Public Trustee be notified of the proceedings and be invited to comment on whether it should act on behalf of the potentially affected minors.

[9] The Public Trustee was duly notified and it brought an application asking that it be named as the litigation representative of the affected minors. It also asked the court to identify the minors it would represent, to award it advance costs to be paid for by the Trust, and to allow it to make inquiries through questioning about Sawridge's membership criteria and application processes. The Public Trustee made it clear to the court that it would only act for the affected minors if it received advanced costs from the Trust on a solicitor and his own client basis, and if it was exempted from liability for costs to the other participants in the litigation.

III. The Chambers Judgment

[10] The chambers judge first considered whether it was necessary to appoint the Public Trustee to act for the potentially affected minors. The Trustees submitted that this was unnecessary because their intention was to use the trust to provide for certain social and health benefits for the beneficiaries of the trust and their children, with the result that the interests of the affected children would ultimately be defended by their parents. The Trustees also submitted that they were not in a conflict of interest, despite the fact that a number of them are also beneficiaries under the Trust.

[11] The chambers judge concluded that it was appropriate to appoint the Public Trustee to act as litigation representative for the affected minors. He was concerned about the large amount of money at play, and the fact that the Trustees were not required to distribute the Trust assets in the manner currently proposed. He noted, that while desirable, parents do not always act in the best interests of their children. Furthermore, he found the Trustees and the adult members of the Band (including the Chief and Council) are in a potential conflict between their personal interests and their duties as fiduciaries.

[12] The chambers judge determined that the group of minors potentially affected included the 31 current minors who were currently band members, as well as an unknown number of children of applicants for band membership. He also observed that there had been substantial litigation over many years relative to disputed Band membership, which litigation appears to be ongoing (para 9).

[13] The judge rejected the submission of the Trustees that advance costs were only available if the strict criteria set out in *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 SCR 38, were met. He stated that the criteria set out in *Little Sisters* applied where a litigant has an independent interest in the proceeding. He viewed the role of the Public Trustee as being "neutral" and capable of providing independent advice regarding the interests of the affected minors which may not otherwise be forthcoming because of the Trustees' potential conflicts.

[14] In result, the chambers judge appointed the Public Trustee as litigation representative of the minors, on the conditions that it would receive advance costs and be exempted from any liability for costs of other parties. He finished by ordering costs of the application to the Public Trustee on a solicitor and its own client basis.

IV. Grounds of Appeal

[15] The appellants advance four grounds of appeal:

> (a) The Chambers Judge erred in awarding the Respondent advance costs on a solicitor and his own client basis by concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings.
>
> (b) In the alternative, the Chambers Judge erred in awarding advance costs without any restrictions or guidelines with respect to the amount of costs or the reasonableness of the same.
>
> (c) The Chambers Judge erred in exempting the Respondent of any responsibility to pay costs of the other parties in the proceeding.
>
> (d) The Chambers Judge erred in granting the Respondent costs of the application on a solicitor and his own client basis.

V. Standard of Review

[16] A chambers judge ordering advance costs will be entitled to considerable deference unless he "has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts": *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 at paras 42-43.

VI. Analysis

A. Did the chambers judge err by failing to apply the *Little Sisters* criteria?

[17] The Trustees argue that advanced interim costs can only be awarded if "the three criteria of impecuniosity, a meritorious case and special circumstances" are strictly established on the evidence before the court: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371, at para 36; as subsequently applied in the "public interest cases" of *Little Sisters* at para 37 and in *R v Caron*, 2011 SCC 5, [2011] 1 SCR 78 at paras 36-39. They go on to submit that none of these requirements were met in the present case. We are not persuaded that the criteria set out in *Okanagan* and *Little Sisters* were intended to govern rigidly all awards of advance funding and, in particular, do not regard them as applicable to exclude such funding in the circumstances of this case. As will be discussed, a strict application is neither possible, nor serves the purpose of protecting the interests of the children potentially affected by the proposed changes to the Trust.

[18] We start by noting that the rules described in *Okanagan* and *Little Sisters* apply in adversarial situations where an impecunious private party wants to sue another private party, or a public institution, and wants that party to pay its costs in advance. For one thing, the test obliges the applicant to show its suit has merit. In this case, however, the Public Trustee has not been appointed to sue anyone on behalf of the minors who may be affected by the proposed changes to the Trust. Its mandate is to ensure that the interests of the minor children are taken into account when the court hears the Trustees' application for advice and direction with respect to their proposal to vary the Trust. The minor children are not, as the chambers judge noted, "independent" litigants. They are simply potentially affected parties.

[19] The Trustees submit the chambers judge erred by characterizing the role of the Public Trustee as neutral rather than adversarial. While we hesitate to characterize the role of the Public Trustee as "neutral", as it will be obliged, as litigation representative, to advocate for the best interests of the children, the litigation in issue cannot be characterized as adversarial in the usual sense of that term. This is an application for advice and direction regarding a proposed amendment to a Trust, and the merits of the application are not susceptible to determination, at least at this stage. Indeed, the issues remain to be defined, and their extent and complexity are not wholly ascertainable at this time; nor is the identity of all the persons affected presently known. However, what can be said with certainty at this time is that the interests of the children potentially affected by the changes require independent representation, and the Public Trustee is the appropriate person to provide that representation. No other litigation representative has been put forward, and the Public Trustee's acceptance of the appointment was conditional upon receiving advance costs and exemption.

[20] There is a second feature of this litigation that distinguishes it from the situation in *Okanagan* and *Little Sisters*. Here the children being represented by the Public Trustee are potentially affected parties in the administration of a Trust. Unlike the applicants in *Okanagan* and *Little Sisters*, therefore, the Public Trustee already has a valid claim for costs given the nature of the application

before the court. As this court observed in *Deans v Thachuk*, 2005 ABCA 368 at para 43, 261 DLR (4th) 300:

> In *Buckton, Re, supra*, Kekewich J. identified three categories of cases involving costs in trust litigation. **The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund.** The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply. [emphasis added]

[21] Moreover, the chambers judge observed that the Trustees had not taken any "pre-emptive steps" to provide independent representation of the minors to avoid potential conflict and conflicting duties (para 23). Their failure to have done so ought not now to be a reason to shift the obligation to others to bear the costs of this representation. The Public Trustee is prepared to provide the requisite independent representation, but is not obliged to do so. Having regard to the fact that the Trust has ample funds to meet the costs, as well as the litigation surrounding the issue of membership, it cannot be said that the conditions attached by the Public Trustee to its acceptance of the appointment are unreasonable or otherwise should be disregarded.

[22] It should be noted, parenthetically, that the Trustees rely on *Deans* as authority for the proposition that the *Okanagan* criteria will apply in pension trust fund litigation, which they submit is analogous to the situation here. But it is clear that the decision to apply the *Okanagan* criteria in *Deans* was based on the nature of the litigation in that case. It was an action against a trust by certain beneficiaries, was adversarial and fit into the third category described in the passage from *Buckton* quote above.

[23] In our view, there are several sources of jurisdiction for an order of advance costs in the case before us. One is section 41 of the *Public Trustee Act*, SA 2004, c P-44.1 which provides:

> 41 Unless otherwise provided by an enactment, where the Public Trustee is a party to or participates in any matter before a court,

(a) the costs payable to the Public Trustee, and the client, party or other person by whom the costs are to be paid, are in the discretion of the court, and

(b) the court may order that costs payable to the Public Trustee are to be paid out of and are a charge on an estate.

[24] It is evident that the court is vested with a large discretion with respect to an award of costs under section 41. While not dealing specifically with an award of advance costs, this discretionary power encompasses such an award. Further, the court has broad powers to "impose terms and conditions" upon the appointment of a litigation representative pursuant to Rule 2.21, which states:

2.21 The Court may do one or more of the following:

(a) terminate the authority or appointment of a litigation representative;

(b) appoint a person as or replace a litigation representative;

(c) impose terms and conditions on, or on the appointment of, a litigation representative or cancel or vary the terms or conditions.

[25] The chambers judge also invoked *parens patriae* jurisdiction as enabling him to award advance costs, in the best interests of the children, to obtain the independent representation of the Public Trustee on their behalf. To the extent that there is any gap in statutory authority for the exercise of this power, the *parens patriae* jurisdiction is available. As this Court commented in *Alberta (Child, Youth and Family Enhancement Act, Director) v DL*, 2012 ABCA 275, 536 AR 207, in situations where there is a gap in the legislative scheme, the exercise of the inherent *parens patriae* jurisdiction "is warranted whenever the best interests of the child are engaged" (para 4).

[26] In short, a wide discretion is conferred with respect to the granting of costs under the *Trustee Act*, the terms of the appointment of a litigation representative pursuant to the *Rules of Court*, and in the exercise of *parens patriae* jurisdiction for the necessary protection of children. In our view, the discretion is sufficiently broad to encompass an award of advanced costs in the situation at hand.

[27] In this case, it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed to the Trust, require protection which can only be ensured by means of independent representation. It cannot be supposed that the parents of the children are necessarily motivated to obtain such representation. Indeed, it appears that all the

children potentially affected by the proposed changes have not yet been identified, and it may be that children as yet unborn may be so affected.

[28] The chambers judge noted that there were 31 children potentially affected by the proposed variation, as well as an "unknown number of potentially affected minors" – the children of applicants seeking to be admitted into membership of the Band (para 31). He concluded that a litigation representative was necessary and that the Public Trustee was the appropriate person to be appointed. No appeal is taken from this direction. In our view, the trial judge did not err in awarding advance costs in these circumstances where he found that the children's interest required protection, and that it was necessary to secure the costs in such fashion to secure the requisite independent representation of the Public Trustee.

B. Did the chambers judge err in failing to impose costs guidelines?

[29] The Trustees submit the chambers judge erred by awarding advance costs without any restrictions or guidelines. In our view, this complaint is premature and an issue not yet canvassed by the court. We would add that an award of advanced costs should not be construed as a blank cheque. The respondent fairly concedes that the solicitor and client costs incurred by it will be subject to oversight and further direction by the court from time to time regarding hourly rates, amounts to be paid in advance and other mechanisms for ensuring that the quantum of costs payable by the Trust is fair and reasonable. The subject order merely establishes that advance costs are payable; the mechanism for obtaining payment and guidelines for oversight has yet to be addressed by the judge dealing with the application for advice and directions.

C. Did the chambers judge err in granting an exemption from the costs of other participants?

[30] Much of the reasoning found above applies with respect to the appeal from the exemption from costs. An independent litigation representative may be dissuaded from accepting an appointment if subject to liability for a costs award. While the possibility of an award of costs against a party can be a deterrent to misconduct in the course of litigation, we are satisfied that the court has ample other means to control the conduct of the parties and the counsel before it. We also note that an exemption for costs, while unusual, is not unknown, as it has been granted in other appropriate circumstances involving litigation representatives: *Thomlinson v Alberta (Child Services)*, 2003 ABQB 308 at paras 117-119, 335 AR 85; and *LC v Alberta (Metis Settlements Child and Family Services)*, 2011 ABQB 42 at paras 53-55, 509 AR 72.

D. Did the chambers judge err in awarding costs of the application to the Public Trustee?

[31] Finally, with respect to the appeal from the grant of solicitor and client costs on the application heard by the chambers judge, it appears to us that one of the subjects of the application was whether the Public Trustee would be entitled to such an award if it were appointed as litigation representative. The judge's award flowed from such finding. The appellant complains, however, that the judge proceeded to make the award without providing an opportunity to deal separately with the costs of the application itself. It does not appear, however, that any request was made to the judge to make any further representations on this point prior to the entry of his order. We infer that the parties understood that their submissions during the application encompassed the costs for the application itself, and that no further submission was thought to be necessary in that regard before the order was entered.

VII. Conclusion

[32] The appeal is dismissed.

Appeal heard on June 5, 2013

Memorandum filed at Edmonton, Alberta
this 19th day of June, 2013

Authorized to sign for: Costigan J.A.

O'Brien J.A.

McDonald J.A.

Appearances:

F.S. Kozak, Q.C.
M.S. Poretti
for the Appellants

J.L. Hutchison
for the Respondent

Alberta Court of Queen's Bench
Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.
Date: 1993-05-06

Kent R. Anderson, for applicants TCPL Resources Ltd. and Encor Energy Corporation Inc.
Murray A. Putnam, Q.C., for respondent Alberta and Southern Gas Co. Ltd.
Alan D. Hunter, Q.C., for respondent Pacific Gas and Electric Company.

(Doc. Calgary 9101-15026)

May 6, 1993.

[1] VIRTUE J.:– TCPL Resources Ltd. ("TCPL") and Encor Energy Corporation Inc. ("Encor") seek to be added as party plaintiffs in an action which Amoco Canada Petroleum Company Limited and Amoco Canada Resources Ltd. ("Amoco") have brought against Alberta and Southern Gas Co. Ltd. ("A&S") and Pacific Gas and Electric Company ("PG&E"). The Plaintiff, Amoco, takes no position on the application.

[2] The application was heard by Master Floyd on January 7th, 1993, and dismissed without written reasons. The Applicants, TCPL and Encor, appeal the decision of the Master to this Court.

[3] The Applicants claim to be interested parties ""under the Plaintiff Amoco", and submit that their presence as party Plaintiffs is necessary in order for the Court to effectually and completely adjudicate upon the matters raised in the Statement of Claim. They submit further that the interests of the Applicants may be materially prejudiced if they are not added as parties.

[4] They also seek leave to amend the Statement of Claim so as to disclose the nature of their interest.

[5] The applicants TCPL and Encor allege that each acquired a 12.5% interest in Amoco's contracts to sell natural gas to the Defendant A&S and that Encor has the right to receive 25% of the proceeds of the sale of natural gas to the Defendant A&S and that Encor has sustained 25% of the loss claimed to have been sustained by the Plaintiff Amoco due to the alleged breaches of contract by A&S. The Applicants also claim that at all material times TCPL and Encor have owned a 25% interest in the reserves and reservoirs dedicated to the performance of Amoco's contracts to supply A&S and that if the injunction sought by Amoco is not granted their interests in the reservoirs and reserves will be adversely affected.

[6] In their Statement of Claim the Amoco Corporations claim that Amoco contracted with A&S, by way of a number of contracts under which the Plaintiff Amoco

The rejection of a "commercial interest" as a foundation for a person becoming a party was re-affirmed by the Court of Appeal in *In re I.G. Farbenindustrie*, [1944] 1 Ch. 41.

[23] Having reviewed the cases referred to me by the parties I conclude that the tests to be applied in this case are these:

(a) Can the question to be settled between the Plaintiff Amoco and the Defendants A&S and PG&E be effectually and completely settled without TCPL and Encor being added as Plaintiffs?

(b) Will the order which the Plaintiff Amoco seeks, directly affect TCPL and Encor, not in their commercial interests but in the enjoyment of their legal rights?

[24] I am satisfied that the answer to the first question is that the question can be settled without the addition of those parties. The issue is whether there has been a breach of the contract between Amoco and the Defendants. Neither TCPL nor Encor have anything to bring to the resolution of that issue that cannot be adduced by way of their evidence, if required. There is no contractual relationship between those parties and the Defendants. The existence of proposed novation agreements, which are still in draft form, do not, in my view, alter this non-relationship.

[25] The answer on cross-examination of Randall Findlay, vice-president of both the Applicant corporations, upon his affidavit in support of the application, is revealing. He was asked:

> Q. In terms of the litigation between Amoco and A&S and PG&E, I take it Encor has no unique or different evidence to offer the Court in respect of whether or not A&S has been in breach of its obligations under these three contracts? In other words, Amoco has whatever evidence there is in respect of A&S purchases and takes under these contracts?
>
> A. No, I don't believe we have anything unique to offer.

[26] This question and answer add weight to my conclusion that the issue between Amoco and the Defendants can be effectually and completely settled without the intervention of the Applicants as parties. The issue is one between Amoco and the Defendants.

[27] Insofar as the second part of the test is concerned, I am satisfied that while the Applicants' commercial interests may be affected by the outcome of the litigation, their legal rights will not be altered. Those rights exist against Amoco, not the Defendants.

[28] A factor considered in some of the cases in which the rule is applied is the prevention of multiplicity of actions. That is not a factor in this case. The Applicants have

Court of Queen's Bench of Alberta

Citation: Babchuk v. Kutz, 2007 ABQB 88

Date: 20070209
Docket: 0110 01054
Registry: Red Deer

Between:

Clayton Dean Babchuk

Plaintiff

- and -

Cheryl Kutz, Karen Lopes and Carole Canino

Defendants

Reasons for Judgment
of the
Honourable Madam Justice A.B. Moen

Introduction

[1] There are two applications before the Court: first, an application by the successful Executor of the Babchuk Estate (the "Estate") for double costs from July 2001 up to and including the trial, to be paid by the challengers of the Will - the daughters of the testator, Fred Babchuk (the "Testator"); and second, an application by the daughters for their solicitor/client costs to be paid from the Estate.

[2] The daughters of the Testator unsuccessfully contested the Testator's Will on the basis that he lacked capacity at the time he made his Will which will gave all of his property to his

son, Clayton, the Executor. Judgment in the matter of Babchuk Estate was given June 8, 2006, after a three-week trial in September, 2005. The Judgment sets out my reasons in full.

[3] I shall not canvass the facts in any detail as they are set out in the Judgment. The Estate is worth at least $1.6 million and the Defendants say their costs are about $300,000.00.

[4] The issues in this matter are:

1. Should the Estate pay the unsuccessful daughters their costs?
2. If the Estate is ordered to pay costs to the unsuccessful party, on what basis should those costs be awarded?
3. If the unsuccessful party is required to pay costs, on what basis should those costs be awarded?

Discussion

[5] The Court has authority to award costs in its own discretion, but that discretion must be exercised judicially: ***Dansereau Estate v. Vallee***, 2000 ABQB 288 at para 16; ***Popke v. Bolt***, 2005 ABQB 861 at para 19; ***Seward v. Seward Estate*** (1997) 201 A.R. 77 (Q.B.) at para 9. The usual rule is that the unsuccessful party bears the costs. However, in an estate matter the unsuccessful party sometimes has its costs paid by the estate.

[6] The policy reason why the unsuccessful party bears the burden of the costs is to encourage litigants to settle their disputes, that is, to discourage litigation. Litigation is very expensive and often depletes assets. The competing policy reason why the estate sometimes pays the costs of both litigants is that society has an interest in ensuring only valid wills are probated. Sometimes litigation is necessary to ensure that the court supervises the probity of a particular will: ***Popke v. Bolt***, at para 22 and 23.

1. Should the Estate pay the unsuccessful daughters' costs?

[7] It is not automatic in probate litigation that the estate must pay costs: ***McCullogh Estate v. Ayer***, [1998] A.J. No. 111 (C.A.). Rather, the modern approach to fixing costs in estate litigation is to scrutinize the litigation carefully to restrict unwarranted litigation and protect estates from being depleted by such litigation: ***McDougald Estate v. Gooderham*** (2005), 255 D.L.R. (4th) 435 (Ont. C.A.).

[8] There are a number of factors that must be considered when determining whether the court should award costs to an unsuccessful party in estate litigation:

a. Did the testator cause the litigation?
b. Was the challenge reasonable?
c. Was the conduct of the parties reasonable?
d. Was there an allegation of undue influence?

Powermax Energy Inc. v. Argonauts Group Ltd., 2003 ABQB 543

Date: 20030627
Action No. 0101 08885

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

POWERMAX ENERGY INC.

Plaintiff
(Defendant by Counterclaim)

- and -

ARGONAUTS GROUP LTD.

Defendant
(Plaintiff by Counterclaim)

MEMORANDUM FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE P. CHRUMKA

APPEARANCES:
Grant R. Vipond
for the Plaintiff

Julie C. Whitaker
For the Defendant

INTRODUCTION

[1] The two issues are:

1. Whether the plaintiff is entitled to double the amount of solicitor and own client costs pursuant to Rule 174(2) of the **Alberta Rules of Court**?

punishing those who refuse reasonable offers to settle is fulfilled.

[24] In ***Max Sonnenberg Inc. v. Stewart, Smith (Canada) Limited,*** Veit J. considered the issue of whether as between the litigants there is authority to award costs to the successful party on an indemnity basis. Veit J. held at p. 371:

> I am of the view that R. 601(1) provides that authority and that nothing in RR. 613-626 derogates from it. Because of the broad authority in the empowering rule, clear, specific language would be required to cut down the discretion. Not only is that type of language absent in the latter group of rules, those rules appear to apply only to a dispute between a solicitor and his client concerning the solicitor's fees.

[25] In the case at bar, I agreed with Veit J's analysis and ordered that Powermax be indemnified for all loss it suffered by the actions of Argonauts. I considered Powermax's submission that punitive damages in the sum of $100,000.00 be awarded. I was aware that while positive misconduct may be better considered in the context of punitive damages, solicitor-client costs may also be awarded against a party which has been guilty of positive misconduct. Positive conduct by a party, even if taken into consideration in awarding punitive damages my also be taken into account again of the issue of costs. ***Max Sonnenberg Inc.***, at 372-373; ***Dusik v. Newton*** (1984), 51 B.C.L.R. 217.

[26] In the case at bar, I am not confusing costs and damages. As was held in ***Olson v. New Home Certification Program of Alberta*** (1986), 44 Alta. L.R. (2d) 207, 69 A.R. 356 (Lutz J.), and by Veit J. in ***Max Sonnenberg Inc.*** at 372, costs deal with and are concerned

> ...with the conduct of the litigation while damages deal with the conduct of the parties giving rise to the cause of action.

[27] With respect to double costs, the purpose of Rule 174(2) is to encourage reasonable settlements between the parties and to avoid uneconomical litigation. ***Forster v. MacDonald*** (1995), 35 Alta. L.R. (3d) 319 (C.A.) 319 at 320-321

[28] In the case at bar I intended to fully indemnify Powermax for any loss it suffered by reason of the conduct of Argonauts. Accordingly, Powermax was awarded compensatory damages for all funds, $475,649.20, which were withheld by Argonauts to pay for the cost overruns, together with interest on those funds at 2% over prime, additional compensatory damages of $7,654.48 plus interest under the Judgment Interest Act, and costs on a solicitor and its own client (full indemnity) basis inclusive of all disbursements. I awarded costs to Powermax on an indemnity basis. I, however, did not anticipate that there was a possibility of a substantial windfall in the form of a second set of solicitor and own client costs. If double solicitor and its own client costs were awarded, this would not only be an over-indemnification but a double full indemnification.

[29] In the case at bar there is a special reason why double solicitor and its own client

costs should not be awarded. A factor to be considered is that Powermax, although not liable for the cost overruns, for the reasons set out in the judgment, by reason of the installation of a treator, instead of a free water knockout, is receiving and will continue to receive a benefit. By reason of the treator, the costs of producing pipeline oil are reduced. More importantly, I dismissed Powermax's claim for punitive damages and ordered that it be compensated for all losses suffered and costs incurred. Powermax was awarded costs at the highest level possible in the first instance. This award of solicitor and its own client costs (full indemnity) is a rare and exceptional and in itself is of a punitive nature.

[30] I have not been cited or found any authority for an over indemnification which amounts to double full indemnification in the first instance. The exceptional nature of full indemnity costs, the punitive nature of double full indemnification, the dismissal of Powermax's claim for punitive damages and the compensatory damages and interest awarded, amount to a special reason why a double costs awarded should not be made.

[31] I therefore find that Powermax is not entitled to double the amount of solicitor and its own clients costs previously ordered.

IS POWERMAX ENTITLED TO CLAIM, AS DISBURSEMENTS, FEES PAID TO THREE EXPERT WITNESSES NOT CALLED AT THE TRIAL?

[32] The second issue raised is whether Powermax is entitled to claim as disbursements, fees paid to three witnesses retained as experts. The three witnesses, Edward Mills, Neil K. Cusworth and Biagio Mele, were retained to address issues and matters raised in Argonauts Counterclaim.

[33] The reasons for retaining each of the three witness are set out in Powermax's Brief of Costs, paragraphs 13 to 16 inclusive (the oral submissions were essentially the same):

> 13. To help address issues raised in the Counterclaim, the Plaintiff retained three experts, Diamond Willow Projects Ltd. (Ed Mills), Pambria Enterprises Ltd. (Biagio Mele), and Neil Cusworth, incurring costs of $9,750.11, $8,281.80 and $5,000.00, respectively. Diamond Willow Projects Ltd. and Pambria Enterprises Ltd. were already familiar with the Plaintiff's Red Willow operations as Ed Mills and Biagio Mele had conducted other unrelated work in the area. A copy of the experts' resumes and invoices appears at tab P.
>
> 14. Diamond Willow Projects Ltd. was retained to audit the Battery construction costs and attended at the Battery for this purpose. Pambria Enterprises Ltd. was then retained to work with Diamond Willow Projects Ltd. to help assess the Battery construction costs, to calculate the cost difference between installing a free water knockout and installing a treator, to conduct an economic analysis of the various justifications (or lack of justification) for constructing a battery of the size in issue in this Action, and to analyze the economics of various alternatives.

Court of Queen's Bench of Alberta

Citation: College of Physicians and Surgeons of the Province of Alberta v. J.H., 2009 ABQB 48

Date:20090127
Docket: 0701 05154
Registry: Calgary

In the Matter of an Investigation by the College of Physicians and Surgeons of the Province of Alberta Regarding a Complaint by a Patient, C.P., Regarding Medical Practitioners Dr. J.H. and Dr. P.H.

In the Matter of an Application to the Court of Queen's Bench Pursuant to Section 47(2) of the *Medical Profession Act*, R.S.A. 2000, c. M-11

Between:

The College of Physicians and Surgeons of the Province of Alberta

Plaintiff

- and -

Dr. J.H. and Dr. P.H.

Defendants

Restriction on Publication: Restriction on Publication: Section 17 of the *Medical Profession Act* restricts the publication of information that might be detrimental to the personal interests, reputation or privacy of the complainants in this matter. By order of the Honourable Mr. Justice Robert A. Graesser, the affidavits filed in connection with the application heard February 13, 2008 are sealed. The sealing order will continue until further order of the Court.

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

> C.P.C. 115, 30 A.R. 208 (Q.B.). An award of solicitor-client costs is to be made to express a court's disapproval of the conduct of the litigation by a party to it. The general rule is party-party costs, and departure from that general rule requires cogent justification."

McBain, J. places emphasis on the conduct of the litigation at p. 358 where he mentions the fact that "Mr. Low in argument argues that a distinction must be made between punitive damages and an award of solicitor-client costs, the latter apparently going to the conduct of the action". McBain, J. then said that "I am not satisfied that the particulars here justify an award of solicitor-client costs, and I shall make no such award." He did, however, award punitive damages.

[20] But Hutchinson J. also referred to a number of circumstances which have attracted awards of solicitor and client costs on pages 8 and 9:

> In order for costs to be awarded on an indemnity basis or even on a solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. Examples from the above cited cases resulting in the identification of a rare and exceptional case include:
>
> 1. Circumstances constituting blameworthiness in the conduct of the litigation by that party (***Reese***);
>
> 2. Cases in which justice can only be done by a complete indemnification for costs (***Foulis v. Robinson***);
>
> 3. Where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positivity misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (***Sonnenberg***);
>
> 4. An attempt to decelve the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (***Olson***);

5. Where the defendants were guilty of positive misconduct, where others should be deterred from like conduct of the defendants should be penalized beyond the ordinary order of costs (***Dusik v. Newton***);

6. Defendants found to be acting fraudulently and in breach of trust (***David v. David***);

7. The defendants' fraudulent conduct in inducing a breach of contract an in presenting a deceptive statement of accounts to the court at trial (***Kepic v. Tecumseh Road Builder et. al.***);

8. Fraudulent conduct (***Sturrock***);

9. An attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (***Pharand***).

[21] Ultimately, Hutchinson J. awarded solicitor client costs to the successful Plaintiff as a result of his finding that the senior officer of Trimac had been guilty of positive misconduct in inducing the company to breach its contract with the Plaintiff, in the face of previous personal promises. That award was confirmed on appeal.

[22] In ***Hamilton v. Open Window Bakery Ltd.***, [2004] 1 S.C.R. 303, Arbour J. (for the Court) restored the trial judge's award of solicitor and client costs, citing ***Young v. Young*** at para. 26:

> In ***Young v. Young***, [1993] 4 S.C.R. 3, at p. 134, McLachlin J. (as she then was) for a majority of this Court held that solicitor-and-client costs "are generally awarded only where there has been [page313] reprehensible, scandalous or outrageous conduct on the part of one of the parties". An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct". However, allegations of fraud and dishonesty are serious and potentially very damaging to those accused of deception. When, as here, a party makes such allegations unsuccessfully at trial and with access to information sufficient to conclude that the other party was merely negligent and neither dishonest nor fraudulent (as Wilkins J. found), costs on a solicitor-and-client scale are appropriate: see, generally, M. M. Orkin, The Law of Costs (2nd ed. (loose-leaf)), at para. 219.

Court of Queen's Bench of Alberta

Citation: Stagg v Condominium Plan No. 882-2999, 2013 ABQB 684

Date: 20131119
Docket: 1201 06002
Registry: Calgary

Between:

Rod Stagg and Greg Stokowski

Plaintiffs/Applicants

- and -

The Owners: Condominium Plan 882-2999, Sunreal Property Management Ltd. and Wayne Herve

Defendants/Respondents

Reasons for Judgment of the Honourable Mr. Justice W. A. Tilleman

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I. INTRODUCTION

[1] Rodd Stagg and Greg Stokowski [the "Applicants"] seek against The Owners: Condominium Plan No. 882 299, a condominium corporation known as Points West Resort [the "Corporation"] an award of costs pursuant to rule 10.31 of *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*"] and section 67 of the *Condominium Property Act*, RSA 2000, c C-22 [the "*Act*"].

[2] This Application for costs is made against the Corporation for the Originating Application by the Applicants, filed on May 17, 2012, for relief pursuant to section 67 of the *Act* against The Owners: Condominium Plan No. 882 299, Sunreal Property Management Ltd. and Wayne Herve [collectively, the "Respondents"]. The Originating Application was made by the Applicants for, among other things, reimbursement to Greg Stokowski in the amount of $14,527.31 for a deposit paid by Mr. Stokowski [the "Deposit"] on behalf of the Corporation and rectification of minutes for a meeting of the Board that took place on July 23, 2011.

> Where neither unnecessary legal services are provided nor unnecessary disbursements incurred, the practical outcome would seem to be that costs "as between a solicitor and his client" would equal the same amount as costs calculated "as between solicitor and client".

[30] I accept in principle that such a distinction was intended to exist in this Court as between "solicitor-client" and "solicitor and own client" scales of costs. However, given the interchangeable use of these two terms in the jurisprudence, as well as the inconsistent application of the actual costs awarded, I am not convinced that the distinction exists on a practical level.

[31] Nonetheless, in my view, the significant issue to be determined by this Court is whether the costs are to be awarded on a full indemnity or partial indemnity basis. To that end, when I use the term "solicitor-client" costs, I am referring to costs awarded on a full indemnity basis for costs essential to and arising from the four corners of the litigation, and have relied on the jurisprudence awarding "solicitor and own client costs" and "solicitor and client costs" where such costs were awarded on a full indemnity basis.

[32] Further, judicial authority to order solicitor-client costs is not totally unfettered, and must be awarded in accordance with established legal principles regarding when such an "exceptional" award is justified. In ***Jackson v Trimac Industries Ltd*** (1993), 138 AR 161 at para 28, 8 Alta LR (3d) 403 (QB), aff'd on costs (1994), 155 AR 42, 20 Alta LR (3d) 117 (CA) [*Jackson*], Justice Hutchinson listed the following authorities as examples of the "rare and exceptional or unusual" cases in which solicitor-client or solicitor and own client costs may be awarded:

> 1. circumstances constituting blameworthiness in the conduct of the litigation by that party (Reese);
>
> 2. cases in which justice can only be done by a complete indemnification for costs (Foulis v. Robinson);
>
> 3. where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his (Sonnenberg);
>
> 4. an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion (Olson);

5. where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs (Dusik v. Newton);

6. defendants found to be acting fraudulently and in breach of trust (Davis v. Davis);

7. the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial (Kepic v. Tecumseh Road Builder et al.);

8. fraudulent conduct (Sturrock);

9. an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges (Pharand).

C. Solicitor-Client Costs Awarded Under Section 67 of the *Act*

[33] Jurisprudence considering section 67 of the *Act* is limited, particularly on the award of solicitor-client costs in the context of improper conduct of a condo board.

[34] In ***Condominium Corporation No 0111505 v Anders***, 2005 ABQB 401 [*Anders*], Justice Clark awarded "full indemnity costs" to the Defendant against the Plaintiff condo board, holding that she "should not have been put to the cost of retaining counsel ... [and] is entitled to her costs against the Board on a full indemnity basis": para 9. As I will discuss further in my analysis, the facts of *Anders* resemble the facts in the case at bar insofar as the board in *Anders* chose to proceed with unnecessary litigation before this Court and ought not to have put the Defendant to the cost of such litigation in the first place. Justice Clark did not, however, make a finding of improper conduct against the Board in *Anders*, focusing instead on the fact that the litigation was ultimately unnecessary.

[35] In ***Condominium Plan No 772 0093 v Rathbone***, 2010 ABQB 69 [*Rathbone*], Master Smart canvassed the jurisprudence awarding costs under the *Act* in deciding whether it was appropriate to award solicitor-client costs in relation to a finding of improper conduct on the part of an owner under section 67. Although section 67 provides for the award of costs in a finding of improper conduct, the condominium corporation relied on sections 39 and 42 of the *Act* (which reliance was, in my respectful opinion, an error) in order to recover solicitor-client costs from the Defendant. In his analysis at paras 15-18, Master Smart focused on the award of solicitor-client costs under the *Act* and whether the condominium by-laws in question provided for the award of solicitor-client costs:

> In *Maverick Equities Inc. v. Condominium Plan No. 942 2336*, 2008 ABCA 221, which involved an appeal from a decision of the chambers judge relating to whether certain behaviour of the unit owner was improper conduct for purposes of s. 67 of the Act, the Court of Appeal granted solicitor-client costs of the appeal, but such costs were provided for in the bylaws.

Court of Queen's Bench of Alberta

Citation: Meads v. Meads, 2012 ABQB 571

Date: 20120918
Docket: 4803 155609
Registry: Edmonton

Between:

Crystal Lynne Meads

Appellant

- and -

Dennis Larry Meads

Respondent

Editorial Notice: On behalf of the Government of Alberta **personal data identifiers** have been removed from this unofficial electronic version of the judgment.

Reasons for Decision
of the
Associate Chief Justice
J.D. Rooke

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1. double costs: ***Banilevic v. Canada (Customs and Revenue Agency)***, 2002 SKQB 371 at paras. 12-13, 117 A.C.W.S. (3d) 549; ***Ellis v. Canada (Office of the Prime Minister)***, 2001 SKQB 378 at para. 29, 210 Sask.R. 138;
2. special costs: ***Dempsey v. Envision Credit Union***, 2006 BCSC 1324 at paras. 46, 48, 60 B.C.L.R. (4th) 309; ***CIBC v. Marples***, 2008 BCSC 590 at paras. 3, 4, 7; and
3. substantial or full indemnification: ***Williams v. Johnston***, [2008] O.J. No. 4853 (QL) at para. 15, 2008 CanLII 63194 (Ont. S.C.), affirmed 2009 ONCA 335, 176 A.C.W.S. (3d) 609, leave denied [2009] S.C.C.A. No. 266; ***MBNA Canada Bank v. Luciani***, 2011 ONSC 6347 at paras. 3, 17.

[596] A cost award that indemnifies an innocent party has merit where that person faces OPCA litigation, at least for the portions of an action that relates to an OPCA concept, argument, or strategy. Frequently that may be either on a full indemnity, solicitor and own client basis, or an elevated solicitor and client costs award. Moen J. has recently reviewed the criteria for elevated cost awards of this kind in ***Brown v. Silvera***, 2010 ABQB 224 at paras. 29-35, 488 A.R. 22.

[597] Some of the identified criteria for an award of those kinds include:

- solicitor and client costs are awarded where the conduct of a party has been 'reprehensible, scandalous or outrageous': ***Walsh v. Mobil Oil Canada***, 2008 ABCA 268 at para. 112, 440 A.R. 199; ***Hamilton v. Open Window Bakery Ltd.***, 2004 SCC 9 at para. 26, [2004] 1 S.C.R. 303; ***Young v. Young***, [1993] 4 S.C.R. 3 at 134, 108 D.L.R. (4th) 193;
- solicitor and client costs might suffice to satisfy the objectives of deterrence and punishment that would otherwise be served by a punitive damage award: ***Colborne Capital Corp. v. 542775 Alberta Ltd.***, 1999 ABCA 14 at para. 294, 228 A.R. 201; ***College of Physicians & Surgeons***, 2009 ABQB 48 at paras. 4-23, 468 A.R. 101;
- misconduct during the litigation can surely be found if there is no reasonable basis on which to commence, or continue, litigation: ***College of Physicians & Surgeons***, at para. 33;
- a proceeding that was based on groundless allegations and was a type of conduct that should be discouraged: ***College of Physicians & Surgeons***, at para. 33;
- justice can only be done by a complete indemnification for costs: ***Foulis v. Robinson*** (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134 (Ont. C.A.);
- there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust

legal proceedings to obtain that which was obviously his: ***Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd.***, 48 Alta. L.R. (2d) 367, [1987] 2 W.W.R. 75 (Alta. Q.B.);

- an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice: ***Olson v. New Home Certification Program of Alberta*** (1986), 69 A.R. 356, 44 Alta. L.R. (2d) 207 (Alta. Q.B.);

- where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs: ***Dusik v. Newton*** (1984), 51 B.C.L.R. 217, 24 A.C.W.S. (2d) 465 (B.C.S.C.), varied on other grounds 62 B.C.L.R. 1, 31 A.C.W.S. (2d) 199 (B.C.C.A.);

- an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges: ***Pharand Ski Corp. v. Alberta*** (1991), 122 A.R. 81, 122 A.R. 395 (Alta. Q.B.); and

- the positive misconduct of the party which gives rise to the action is so blatant and is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial: ***Jackson v. Trimac Industries Ltd.*** (1993), 138 A.R. 161 at para. 32, 8 Alta. L.R. (3d) 403 (Alta. Q.B.), affirmed on costs, 155 A.R. 42, 20 Alta. L.R. (3d) 117 (Alta. C.A.) (but see ***Polar Ice Express Inc. v. Arctic Glacier Inc.***, 2009 ABCA 20 at para. 21, 446 A.R. 295).

[598] Many, if not most, of these characteristics emerge in a typical proceeding that involves OPCA concepts and litigants. The character of that misconduct is further aggravated by the fact that OPCA litigants enter into the courts wielding tools that they anticipate will disrupt, if not break, the system, and thereby defeat genuine legal rights.

[599] I note that increased costs, such as special costs or double costs, were awarded by courts which had a more limited appreciation of the OPCA movement, its members, and strategies. With our present understanding of this vexatious litigation phenomenon, a strong deterrent response is appropriate. Similarly, the courts have an obligation to help shield those who are targeted in this manner.

[600] Courts have made gurus liable for costs where a guru participates and instigates litigation of this kind: ***Dempsey v. Envision Credit Union***, 2006 BCSC 1324 at paras. 46, 48, 60 B.C.L.R. (4th) 309, see also ***Jackson v. Canada (Customs and Revenue Agency)***, 2001 SKQB 377 at para. 40, 210 Sask.R. 285. I think that is a reasonable response to the participation of these highly disruptive and manipulative persons.

Court of Queen's Bench of Alberta

Citation: Foote Estate (Re), 2010 ABQB 197

Date: 20090323
Docket: ES03 119897
Registry: Edmonton

In the Matter of the Estate of Eldon Foote

Court File Number	ES03 119897
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial District	Edmonton
Estate Name	Eldon Douglas Foote
Applicant (Plaintiff)	Trudy David, Douglas Foote, Debbie Entwistle, Dean Foote & Laurie Evans and Anne Foote
Respondent (Defendant)	The Estate of Eldon Douglas Foote and the Lord Mayor's Charitable Fund and the Edmonton Community Foundation

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

Introduction

[1] This decision on costs follows my earlier decision on the late Eldon Foote's domicile, ***Re Foote Estate***, 2009 ABQB 654.

[2] In that decision, I ruled that Eldon Foote was domiciled on Norfolk Island, an Australian territory, at the date of his death on May 17, 2004.

[3] Each of the successful Respondents, the Executor and the two residual beneficiaries, the Edmonton Community Foundation and the Lord Mayor of Melbourne Charitable Fund now applies for costs of the proceedings on a solicitor and client basis against the Applicants, Mr. Foote's widow Anne and 5 of his 6 children, Douglas, Trudy, Dean, Laurie and Debbie.

[4] Anne and the children seek payment of their solicitor and client costs from the Estate.

Background

[5] These proceedings were commenced by Anne and the children for advice and directions as to Mr. Foote's domicile as well as the validity or enforceability of a so-called poison pill clause in Mr. Foote's will, essentially disinheriting a beneficiary who challenged the will. Anne and the children intended to bring family relief claims against the Estate, but were concerned about the poison pill provision, and realized that an issue with respect to family relief claims, wherever they were brought, would be Mr. Foote's domicile at his death. It is common ground that domicile at death will determine the applicable law with respect to family relief claims.

[6] I was appointed case manager of the application for advice and directions. The first major application related to determining the proper forum for the domicile hearing. Anne and the children argued for Alberta; the Executor and residual beneficiaries argued for Norfolk Island or Australia. I ruled in ***Foote Estate***, 2007 ABQB 654 that the Alberta courts had jurisdiction to determine domicile, and directed that the issue be tried here. Costs of the forum application were reserved, to be dealt with in the domicile proceedings.

[7] The issue worked its way through document production and discoveries, and was tried over three weeks in the spring of 2009.

Position of the Parties

[8] The Executor and the Edmonton Community Foundation seek costs of all proceedings on a solicitor and client basis from Anne and the children; alternatively they seek party and party costs on a multiple of Column 5 of Schedule C of the *Rules of Court*. The Lord Mayor seeks costs of the domicile proceedings on a solicitor and client basis, or alternatively on a multiple of Column 5, but submits that Anne and the children should have their costs from the Respondents on the same scale with respect to the forum application.

[9] The basis for the position of the Respondents can be summarized as follows:

1. Modern law holds that the rule "costs follow the event" generally applies to estate litigation;

2. They were successful;

3. Once document discovery took place and discoveries were completed, it should have been obvious to the unsuccessful Applicants that they would not be successful; and

4. Costs are in the discretion of the Court, and the Court should exercise its discretion in favour of a solicitor and client costs award.

[10] With respect to their position on elevated Schedule C costs, they point to the size of the Estate - something in excess of $120,000,000.00.

[11] In support of their positions, they cite:

Re Anderson Estate, 2009 ABQB 663; ***Babchuk v. Kutz***, 2007 ABQB 88; ***College of Physicians and Surgeons of the Province of Alberta v. J.H.***, 2009 ABQB 48; ***McCulough Estate v. Ayer***, 1998 ABCA 38; ***McDougald Estate v. Gooderham***, [2005] O.J. No. 2432; ***Mitchell v. Gard*** (1863), 164 E.R. 1280; ***Petroski v. Petroski Estate***, 2009 ABQB 753; ***Riva v. Robinson***, 2000 ABQB 391; ***Salter v. Salter Estate***, [2009] O.J. No. 2328; ***Re Serdahely Estate***, 2005 ABQB 861; and ***St. Onge Estate v. Breau***, 2009 NBCA 36.

[12] Anne and the children argue for their solicitor and client costs out of the Estate, on the basis that the circumstances of this case fall within the established exceptions to the "costs follow the event" rule. They also point to the Court's general discretion, and argue that the circumstances and size of the Estate warrant a solicitor and client cost award in their favour.

[13] In support of their position, they cite:

Alberta Rules of Court, Alta Reg. 390/1968, Rule 607; ***Corlet, Re***, [1938] 3 W.W.R. 20; ***Hegedus Estate v. Paul (Public Trustee of)***, 71 Alta. L.R. (3d) 179; ***Ross v. Redl***, 2009 SKQB 266; ***Schuttler v. Anderson***, 246 A.R. 17; ***Scramstad v. Stannard***, [1997] A.J. No. 302; ***Seward v. Seward Estate***, 201 A.R. 77; and Stevenson & Côté, *Annotated Rules of Court 2009*, 601.

Law

[14] The basic principles for costs in estate litigation have been summarized by Moen J. in ***Babchuk v. Kutz***, 2007 ABQB 81 and ***Petrowski v. Petrowski Estate***, 2009 ABQB 753. In ***Babchuk***, the daughters of the testator unsuccessfully challenged his will on the basis of lack of testamentary capacity. The successful executor sought costs on the basis of double party/party costs (but not as a result of bettering an offer); the unsuccessful daughters sought their costs on a solicitor client basis payable out of the estate. Moen J. denied any costs to the unsuccessful daughters, and awarded the executor single party/party costs against them.

[15] In ***Petrowski***, the defendant executrix successfully defended a claim of undue influence against herself and the estate, as well as for family relief. The unsuccessful applicant sought costs on a solicitor and client basis from the estate, and the executrix sought costs from the unsuccessful defendant. Moen J. denied the unsuccessful applicant his costs, and ordered that he pay the executrix's costs on Column 5, doubled for steps after she had made a formal offer of accepting a discontinuance of action without costs.

[16] As a result of Moen J.'s thorough review of the law on costs payable by an estate, and recovery of costs by a successful executor, it is not necessary for me to deal with most of the cases cited to me. It is clear from her decisions that there are a number of well-established principles in Alberta:

1. The Court has a discretion with respect to costs, but that discretion must be exercised judicially (***Babchuk*** at para. 5);

2. The "modern" approach to costs in estate litigation requires careful scrutiny of the litigation to restrict unwarranted litigation and protect estates from being depleted by such litigation (***Babchuk*** at para. 6);

3. Payment of an unsuccessful party's costs out of the estate requires analysis of a number of factors:

    A. Did the testator cause the litigation?

    B Was the challenge reasonable?

    C. Was the conduct of the parties reasonable?

    D. Was there an allegation of undue influence?

    E. Were there different issues or periods of time in which costs should differ?

    F. Were there offers to settle? (***Babchuk*** at para. 8);

4. There is a residual discretion where factors such as who initiated the proceedings (***Babchuk***, para. 70), and the size of the estate (***Babchuk***, para. 72) may be relevant;

5. Costs for a successful claimant in family relief claims are generally awarded on a solicitor and client basis (***Petrowski***, para. 62);

6. Costs in favour of an unsuccessful family relief claimant are an exception to the basic rule that costs follow the event (***Petrowski***, para. 68 and para. 74);

7. Estate litigation is no longer treated as an exception to the basic rule that costs follow the event, approving ***St. Onge Estate v. Breau***, 2009 NBCA 36 (***Petrowski***, paras. 76 - 78);

8. Costs will normally follow the event in estate litigation, unless the challenge to the estate was reasonable (***Petrowski*** at para. 78), or on the basis of a public policy exception recognizing society's interest in only probating valid wills (***Petrowski*** at para. 79).

[17] I agree with these statements as to the general law relating to estate action costs in Alberta.

[18] In ***Petrowski***, Moen J. considered the issue of solicitor client costs in favour of the estate or executor, and stated at para. 14:

> While costs are almost entirely in the discretion of the court, solicitor-client costs should only be resorted to where the facts so warrant. This is not such a case. While the Plaintiff was unsuccessful, there is no evidence of unreasonable or vexatious conduct which would warrant an elevation from party-party costs.

[19] I echo her words in that respect.

[20] In ***Anderson Estate***, 2009 ABQB 663, Veit J. was not referred to ***Babchuk***, but came to the same conclusion as did Moen J. with respect to ***St. Onge Estate***. She emphasized, at para. 9, that in pursuing estate litigation, the parties should carefully scrutinize "the merits of a claim; determine who bears the onus of proof, and whether the litigation falls withing one of the recognized exceptions (to the costs follow the event rule in modern litigation)".

[21] The "recognized exceptions" as noted by the New Brunswick Court of Appeal are:

1. Cases involving the validity of a will;

2. Cases involving the interpretation of a will or trust;

3. Cases involving dependant or family relief claims (wills variation cases);

4. Cases where the cause of the litigation takes its origin in the fault of the testator or those interested in the residue; and

5. Cases where there are sufficient and reasonable grounds concerning the testator's testamentary capacity or whether there was undue or influence on the testator.

[22] Those categories of exceptions are not the creation of the New Brunswick Court of Appeal; rather they flow from ***Mitchell v. Gard***, (1863), 164 E.R. 1280 (Ct. of Adm.) (***St. Onge Estate***, paras. 54 and 55).

[23] Veit J. accepted the general statement of law in ***St. Onge Estate*** (at para. 113) but recognized that there may be exceptional cases where an unsuccessful litigant who did not fall within the recognized exceptions might still get some measure of costs. There, however, the unsuccessful claimant was denied costs and was ordered to pay party/party costs to the estate.

[24] The first three exceptions noted above are included in the category of cases arising out of the "fault" of the testator. As noted by Clark J. in ***Riva v. Robinson***, (2000), 263 A.R. 389 (Q.B.):

> If...the conduct of the testator or beneficiary has been the cause of the dispute or if the circumstances justified investigation into the will, then the estate should bear the costs of unsuccessful litigants. (At para. 7)

Application to this case

Costs of the Residual Beneficiaries

[25] In my view, the only necessary parties to this litigation were the Applicants and the Executor. While the Edmonton Community Foundation and the Lord Mayor of Melbourne were added as party Respondents, they were added at their request, and by consent. Under Mr. Foote's wills, these two charities stand to inherit the vast majority of Mr. Foote's $120,000,000.00 estate. They have already received millions of dollars each from Mr. and Mrs. Foote during Mr. Foote's lifetime, and as a result of the establishment of a charitable foundation in the British Virgin Islands before Mr. Foote's death, these two charities will share over $100,000,000 US held in the BVI.

[26] These two beneficiaries had a significant interest in the outcome of application for advice or directions, in that the choice of laws would have a significant effect on the family relief claims Anne and the children intend to bring, and the validity or enforceability of the poison pill clause might have a significant effect on the willingness of Anne and the children, or some of them, to bring a family relief claim at all. Nevertheless, their involvement in these proceedings was entirely as a result of self-interest.

[27] No allegations were made by any of the Applicants with respect to the conduct of the two charities. There was no suggestion of any undue influence or impropriety on the part of the charities. Rather, the application was in relation to the relatively neutral question of Mr. Foote's domicile, and the interpretation of his will (i.e. the validity and enforceability of the poison pill clause).

[28] Throughout the proceedings before me, the Executor took no position adverse to or contrary to the interests of the residual beneficiaries. Indeed, the Executor diligently and vigorously argued the same position as taken by the residual beneficiaries: that Mr. Foote was domiciled in Norfolk Island. The Edmonton Community Foundation took no position with respect to forum, so its participation in the forum application was unnecessary.

[29] The sole purpose of the charities' involvement in these proceedings was to protect their inheritance. There is of course nothing wrong with that. But claimants seeking advice or directions and who are not making allegations of misconduct or impropriety on the part of beneficiaries, should not generally be exposed to the jeopardy of costs of other beneficiaries who choose to participate to protect their positions.

[30] Under the *Surrogate Court Rules* (55 and following), the Applicants were required to serve the two charities with notice of their application, and the two charities, as residual beneficiaries, had status to respond to the application. But the *Rules* are silent as to payment of their costs of participating, other than under *SR* 62 which deals with initial determinations by the court as to classes of parties and representation of various parties and classes. There was no such application before me during this litigation. Rather, the participation of the charities in the litigation was done by consent. The consent order dealing with their participation is silent on the issue of costs.

[31] For the purposes of *SR* 62, I do not see that the two charities, as residual beneficiaries, needed separate representation in the proceedings at the expense of the Estate, or to the jeopardy of the Applicants. It is possible that it was necessary for the charities to have representation as a class of beneficiaries to ensure that the Executor responded to the application in a way that maximized the benefit to the beneficiaries. Here, there was no suggestion before me that the Executor was inclined or was ever inclined to take a position adverse to the interests of the two charities. Indeed, throughout these proceedings, I would describe the Executor and the charities as being joined at the hip.

[32] In any event, to properly deal with the application and determine in the first instance forum and secondly domicile, the charities' participation was unnecessary. That is not to say it was not helpful, as amongst the Executor and the beneficiaries there was a sharing of work. But that could have just as easily been accomplished by instructions to the Executor's lawyer and not full participation by counsel for the Lord Mayor and counsel and second counsel for the Edmonton Community Foundation.

[33] The status of the charities in this case was and is more like the role of intervenors. They have a legitimate interest in the outcome, but have no position adverse to that of the Respondent Executor. Generally, intervenors participate in litigation at their own cost. They bear no risk (outside misconduct) of paying costs to the parties regardless of success; they have no expectation of recovering their costs, regardless of success.

[34] There were undoubtedly valid reasons why the charities wanted active, individual representation in these proceedings. They stand to receive many tens of millions of dollars each, regardless of the outcome of the Applicants' intended family relief claims. The cost of participation is relatively insignificant in terms of their overall inheritance. But there is no reason why the Applicants should bear any of their costs.

[35] An applicant should ordinarily be at risk for costs only with respect to the Executor and any person interested in the estate who must be separately represented and is not able to ride on the Executor's coat-tails. In those circumstances, an application under *SR* 62 would appear to be the appropriate first step: determine who needs to be separately represented, and whether the costs of representation will be borne by the Estate.

[36] Obviously, where there are allegations of undue influence, fraud or other misconduct on the part of someone other than the executor (or even the executor where it is necessary for the estate to be separately represented) applicants may be at risk for the costs of more than just the Estate. But those cases are the exception rather than the rule. Persons who are only participating to protect their inheritances, and who have no position adverse to the Executor, should normally be responsible for their own costs. Barring misconduct in the litigation, they should not be at risk for other parties' costs.

[37] As a result, I deny the two charities any cost recovery from the Applicants. The charities have not sought costs payable out of the Estate, and while Anne and the children have suggested that should happen, I will not make such an order in the absence of a specific application.

Comments on Charities' Application

[38] I am constrained to add that the charities' application for costs from the Applicants on a solicitor and client basis was inappropriate and unseemly. No conceivable basis for such a cost award was made out or even argued. As noted by Moen J. in ***Petrowski***, *infra*, solicitor and client costs in estate matters are limited to situations where the unsuccessful claimant has been unreasonable or vexatious.

[39] Solicitor and client costs are exceptional. As I noted in ***College of Physicians and Surgeons of the Province of Alberta v. J.H.***, 2009 ABQB 48, there are a number of circumstances where solicitor and client costs may be appropriate or even necessary to do justice. The cases emphasize the conduct of the action and tend to follow McBain J.'s comment in ***Fleck v. Stewart***, (1981), 118 A.R. 345 (Q.B.) that:

> An award of solicitor-client costs is to be made to express a court's disapproval of the conduct of the litigation by a party to it. The general rule is party-party costs, and departure from that general rule requires cogent justification. (At pg. 356)

[40] The only case cited by the charities where solicitor client costs were awarded against unsuccessful Applicants was ***Re Serdahety Estate***, 2005 ABQB 861. There, Johnstone J. refused to award the unsuccessful claimant costs out of the estate, and granted the executors solicitor and client costs against the claimants after a specified date. The executor and the estate were jointly represented. In making the cost award, Johnstone J. noted that the executor and estate had bettered an offer of judgment, and she held that it was unreasonable for the claimants to have proceeded to challenge the will after full disclosure had been provided to them and they declined to put forward any medical evidence to contradict the estate's evidence.

[41] There is absolutely no similarity between that case and the case at bar. There, the claimants had alleged suspicious circumstances, undue influence on the part of most of the residuary beneficiaries and lack of testamentary capacity. They also alleged that the will had been obtained by the misrepresentation or fraud of some of the residuary beneficiaries. Costs, including solicitor and client costs, had been awarded against them during the course of the litigation because of their conduct in the litigation.

[42] In particular, Johnstone J. noted at para. 55: "[t]hroughout the litigation, they chose to pursue a highly oppositional course of conduct with little or no substantive basis for their position. There were numerous examples of arbitrary conduct and bad faith. It was the most egregious of obstructionist litigation I have observed. It was tantamount to what I would categorize as the shotgun approach to surrogate warfare".

[43] She noted further at para. 59: "I find the Respondents' obstructionist conduct and motivation of greed to be egregious".

[44] For the charities to rely on ***Sedahely Estate*** and claim solicitor and client costs from Anne and the children is inappropriate.

[45] Firstly, Anne and the children successfully opposed the Lord Mayor's attempt to have the litigation dismissed here for *forum non-conveniens*. Secondly, the outcome of this litigation was not clear. Eldon Foote had maintained his Canadian citizenship, was extremely loyal to Alberta, and was in the process of moving to Victoria. The Applicants' position was not frivolous, and document production and discovery did not make the result at trial a foregone conclusion. Further, there was nothing whatsoever in the conduct of the litigation for which Anne or the children should be criticized.

[46] It was not unreasonable for the charities to seek party and party costs, and even party and party costs on an elevated scale because of the size of the estate. But groundlessly to seek an award of solicitor and client costs from the testator's closest family members, the effect of which

would undoubtedly cause financial ruin to some or all of them, was totally without merit, and is unseemly of any litigant, let alone charitable organizations.

Costs for the Executor/Estate

[47] The Executor and Estate seek solicitor and client costs with respect to their successful defence of the Applicants' allegation of an Alberta or British Columbia domicile. The Executor/Estate made no submissions with respect to their unsuccessful position that the Alberta Courts should decline jurisdiction on the basis of *forum non-conveniens*.

[48] Because of my acceptance of the principles stated by Moen J. in ***Babchuk*** and ***Petrowski***, I will follow the same format as did Moen J.

A. Did the testator cause the litigation?

[49] The answer to this question is yes. For the purposes of family relief claims, it was necessary to determine where Mr. Foote was domiciled at the date of his death. While the merits of any family relief claims are not before me, having regard to the magnitude of Mr. Foote's Estate and the contents of his wills, it is not surprising that his wife and children would seek family relief. Mr. Foote left a tiny fraction of his estate to his wife and children. He directed that his widow move out of the home he and she shared for more than 20 years, within 2 years from his death, and that the home be sold. His will contained punitive provisions in the event a beneficiary contested his testamentary intent. It is certainly not clear that any family relief claims might be successful, but the poison pill provision suggests that Mr. Foote assumed that his family would not be content with his wills and might challenge them.

[50] In Alberta, poison pill clauses such as that contained in Mr. Foote's wills (without deciding the point) are very arguably contrary to public policy and are at a minimum mean spirited. The validity and enforceability of such a provision is a significant matter of interpretation, and in my view fits within the first exception to the "modern rule" of costs in estate litigation: interpretation of the will. I have already ruled that it was appropriate that the Applicants seek advice or directions in Alberta. The interpretation of this provision is within the scope of public interest in the administration of estates and is a significant factor in assessing costs.

B. Was the challenge reasonable?

[51] The questionable nature of a poison pill clause invites legitimate litigation. Mr. Foote must have contemplated family relief challenges when he essentially disinherited his immediate family, having regard to the size of his Estate. It was, in my view, reasonable for his family to bring this application to determine the extent of their jeopardy in the event they sought family relief. They succeeded in establishing that Alberta was a legitimate forum to determine domicile and to interpret the wills. The questions as to domicile and interpretation were invited by the terms of the wills and the uncertainty as to Mr. Foote's domicile. In the context of whether the

testator's conduct necessitated the litigation, I think it is fair to say that Mr. Foote's conduct in the manner in which he drafted his wills and disposed of his estate, preferring charities to his family, invited the present litigation. This factor suggests that the first exception to the modern rule is applicable here.

C. Was the conduct of the parties reasonable?

[52] All parties conducted themselves reasonably in the litigation. They cooperated and no one can or should be criticized for the manner in which the matter was litigated. There is no basis to sanction or punish any party in this regard.

D. Was there an allegation of undue influence?

[53] No one has suggested that Mr. Foote was not of sound and disposing mind. This is a neutral factor here.

E. Were there different issues or periods of time in which costs should differ?

[54] Counsel suggested that following document production and discoveries it should have been clear to the Applicants that they would not succeed in establishing that Mr. Foote was domiciled elsewhere than Norfolk Island. I can dismiss this argument summarily. There were reasonable arguments for each of Norfolk Island, Alberta and British Columbia domicile. This was not an easy case to decide. It was not unreasonable for the Applicants to have the issue of domicile tried. This is not a factor in regard to costs.

F. Were there offers to settle?

[55] No offers were put in evidence, so this is a neutral factor.

Conclusion on costs to the Estate

[56] This is clearly a case that falls within the exceptions to the "modern rule". The questions that are the subject matter of this litigation result from the manner in which Mr. Foote chose to draft his will and dispose of his Estate. Further, the public interest is invoked as a result of the poison pill clause. While that issue will now have to be dealt with in accordance with Norfolk Island law, it was necessary to determine Mr. Foote's domicile before that issue can be addressed.

[57] These factors dictate that the Estate and the Executor should not recover costs from Anne and the children, despite the fact that the Estate was successful in arguing that Mr. Foote's domicile was Norfolk Island.

[58] I have the same concerns about the Executor and Estate seeking solicitor and client costs from Anne and the children. There was no arguable basis to do so. Indeed, the request smacks of

bully tactics which are wholly inappropriate in litigation. But having regard to the position taken by the residual beneficiaries that they themselves should have solicitor client costs for their participation in the litigation, the Executor likely had little choice but to seek solicitor client costs to attempt to prevent depletion of the Estate (and the residual beneficiaries' interests in it) by the costs of this litigation.

[59] In summary, the Executor and the Estate are not entitled to recover any costs from Anne and the children.

Costs for the Applicants

[60] As this case falls within the exception to the modern rule of costs following the event, the Applicants' costs need to be addressed. As I have determined above, this litigation was necessitated because of the conduct of Mr. Foote. The Applicants have conducted themselves properly in the litigation, prosecuted it in a diligent and efficient manner and avoided unfounded allegations against the executor and any beneficiaries. There is no basis to criticize their conduct.

[61] The pursuit of this litigation was reasonable. No offers of judgment or settlement were bettered by the Executor or Estate.

[62] In my judgment, this is an appropriate case for the Applicants to recover their costs, on a solicitor and client basis, from the Estate. If the Applicants and the Executor are unable to agree on these costs, I will reserve jurisdiction to resolve any issues so it will be unnecessary for the parties to appear before the taxing officer.

[63] Having regard to the complexity of the matter and the size of the Estate, it was reasonable for Anne and the children to involve counsel and second counsel.

Summary

[64] I have concluded that the two residual beneficiaries, the Edmonton Community Foundation and the Lord Mayor of Melbourne Charitable Fund are not entitled to recover any costs from the Applicants. The Executor and the Estate are not entitled to recover any costs from the Applicants.

[65] The Applicants are entitled to their solicitor and client costs, payable forthwith from the Estate, including the costs of this cost application.

Heard on the 10th day of March, 2010.
Dated at the City of Edmonton, Alberta this 22nd day of March, 2010.

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

Appearances:

John M. Hope, Q.C., and Bryan Kwan
Duncan & Craig LLP
for Trudy David, Douglas Foote, Debbie Entwistle, Dean Foote & Laurie Evans

Scott J. Hammel and Sandra L. Hawes
Miller Thomson LLP
for Anne Foote

Daniel Hagg, Q.C.
Bryan & Company LLP
for the Estate of Eldon Douglas Foote

Bruce Comba
Emery Jamieson LLP
for the Lord Mayor's Charitable Fund

Karen Platten and Anita Mohan
McLennan Ross LLP
for the Edmonton Community Foundation

Court of Queen's Bench of Alberta

Citation: Brown v. Silvera, 2010 ABQB 224

Date: 20100406
Docket: 4803 123800
Registry: Edmonton

Between:

Thomas Edward Brown

Plaintiff
(Defendant by Counterclaim)

- and -

Angela Elizabeth Silvera

Defendant
(Plaintiff by Counterclaim)

Memorandum of Decision on Costs
of the
Honourable Madam Justice A.B. Moen

I. Introduction

[1] The successful party, Ms. Silvera applies for solicitor and own client costs based on two things: first, the matrimonial property agreement provided for solicitor and his own client costs in the event that the parties had to enforce the agreement, and second, Mr. Brown's conduct during the litigation was such as to lead to solicitor and own client costs.

[2] Ms. Silvera also applies for double solicitor and own client costs by virtue of formal offers made but not accepted before trial.

[3] This was a long and acrimonious dispute over matrimonial property on which I rendered a judgment on September 1, 2009. The trial was long. Ms. Silvera was entirely successful at trial.

I awarded her $15,095,778.76 in restitution and interest for matrimonial property which was a larger award than the formal offer made by Ms. Silvera and rejected by Mr. Brown early in the litigation.

[4] Ms. Silvera at trial was awarded a judgment considerably larger than either offer.

[5] Ms. Silvera also applies for expert costs, including the costs of an expert that assisted her in preparation for trial and for cross-examination of Mr. Brown's expert and other witnesses.

[6] Ms. Silvera had retained her lawyer for the litigation on the basis of a contingency agreement for 25% of the judgment.

[7] The issues that this case raise are:

A. Can this court award solicitor and own client costs to the Plaintiff by Counterclaim?
   1. Should the clause concerning costs in the matrimonial property agreement be applied in this case?
   2. Was there misconduct on the part of Mr. Brown which would lead to solicitor and own client costs?

B. What is the quantum of costs in this case?

C. Given the Formal Offer, should the court award double costs?

D. What experts' fees should be awarded?

II. Discussion

[8] Costs are in the discretion of the Court (*Alberta Rules of Court*, Alta. Reg. 390/1968, s. 601(1) [the "*Rules*" or individually, a "*Rule*"]). Generally there are three categories of costs:

1. solicitor and own client/indemnity costs which allow for a complete indemnification of legal fees and other costs for the successful party,

2. solicitor-client costs which allow for the recovery of reasonable fees which are not necessarily equivalent to a full indemnity costs, and

3. party-party costs which are the general rule and are departed from in rare and exceptional circumstances.

[9] Silvera applies for solicitor and own client costs doubled.

A. Can this court award solicitor and own client costs to the Plaintiff by Counterclaim?

[10] Silvera applies for solicitor and own client costs (full indemnification) on two bases:

1. the Minutes of Settlement and Matrimonial Property Agreement dated 6 November, 2000, between the parties ("Minutes") provided for solicitor and own client costs to be awarded; and

2. in any event, Mr. Brown's misconduct during the trial should lead to an award of solicitor and own client costs in favour of Ms. Silvera.

[11] Brown argues that the clause in the Minutes ought not to be applied in this case because Silvera did not plead it and that in any event he did not exhibit any misconduct that should lead to an award of solicitor and own client costs.

[12] Counsel for Silvera cites ***Alberta Permit Pro v. Booth***, 2008 ABQB 167, 459 A.R. 320 for the proposition that formal pleadings are not always required. Counsel for Brown relies on ***Laurentian Bank of Canada v. Ellacott***, 1998 ABCA 382, 228 A.R. 63, which is discussed in ***Alberta Permit Pro***, for the proposition that solicitor and ownclient costs ought to be denied if the covenant/agreement to pay such costs is not pled.

[13] In ***Alberta Permit Pro v. Booth***, at paras. 25-27, the Court considered whether a party may enforce a clause that provides for solicitor and own client costs even though the clause had not been pled. Justice Read identified one line of jurisprudence in which courts have indicated that in the case of solicitor and own client costs a party seeking to assert a covenant or agreement for party and party costs must also plead that covenant or agreement: ***Laurentian Bank of Canada v. Ellacott***; and ***Marianayagam v. Bank of Montreal***, 2000 NWTCA 2.

[14] Read J. identified a second line of jurisprudence that provides that any costs, including solicitor-client costs, need not be pled as a consequence of *Rule* 120, which states:

> **120** In any pleading costs need not be claimed and it is not necessary to ask for general or other relief, both of which may always be given to the same extent as if they had been asked for.

[15] In reviewing the case law (paras. 30-36), Read J. found that there is no absolute rule requiring that costs be pled, as many decisions relied on *Rule* 120, while others did not specifically mention this *Rule*: ***Alnashmi v. Arabi***, 2000 ABQB 320, 80 Alta. L.R. (3d) 366; ***Guaranty Trust Co. of Canada v. Richer Right of Way Clearing Ltd.***, [1988] A.J. No. 848 (Q.L.) (Alta. C.A.); ***Wynn v. Tse***, [1981] A.J. No. 469 (Q.L.), 11 A.C.W.S. (2d) 123 (Alta. Q.B.); ***Saballoy Inc. v. Techno Genia SA*** (1993), 16 C.P.C. (3d) 333 at 335, 39 A.C.W.S. (3d) 253 (Alta. C.A.); ***V.A.H. v. Lynch*** (1998), 1998 ABQB 1020, 238 A.R. 201; and ***369413 Alberta Ltd. v. Pocklington***, 1998 ABQB 860, 233 A.R. 388.

[16] In attempting to reconcile the decisions from the Alberta Court of Appeal, Read J. suggested that the decisions share the same underlying principle that pleading costs serves the important role of giving notice to the other party against whom solicitor and own client costs are sought in order to avoid surprise. At para. 41, Read J. observed:

> [T]here will be instances where pleadings need not disclose that a party seeks costs on a solicitor and client basis. Clearly, one example of this is where misconduct arises during the course of litigation and, at its conclusion, a party seeks costs paid on a solicitor and own client basis.

[17] Read J. indicated at para. 42 that this approach to pleadings would logically:

> ... extend to instances where no surprise would result from a party to an action not specifically referencing or repeating a covenant or agreement to pay costs on a solicitor and client basis. If no surprise would result from not pleading those provisions then, logically, reference to the relevant provisions is unnecessary. [Emphasis added.]

[18] Following this approach, Read J. concluded that two sophisticated businessmen who had adequate legal advice did not need to be formally notified of the costs provision in the contract they had negotiated: para. 45. Accordingly, Read J. concluded that the Defendant in ***Alberta Permit Pro*** was entitled to solicitor and own client costs under the terms of the agreement, as fair notice had been provided based on the parties' understanding of the agreements and the fact the solicitor-client costs had been pled in the counterclaim: para. 48.

> ***1. Should the clause concerning costs in the matrimonial property agreement be applied in this case?***

[19] Silvera did not plead solicitor and own client costs, nor solicitor-client costs in her Statement of Defence and Counterclaim.

[20] The Minutes provide as follows:

> 20.1 Costs of Enforcement of Agreement. If a party to this Agreement is forced to take steps to enforce the Agreement as a result of the default of the other party, then the party enforcing the Agreement shall be entitled to receive from the defaulting party all costs associated with the enforcement of the Agreement, *including legal costs on a solicitor and own client basis*. [Underlining in the original, italics added for emphasis.]

[21] At trial, it was established that Brown defaulted on the agreement with respect to the Material Non-Disclosure clause 20.8, and the Misrepresentation or Undo Influence clause 20.3.

Brown argued in the costs application that costs ought not to be awarded to Silvera pursuant to the cost clause in the Minutes because she did not specifically plead those Minutes. The court must therefore address the issue of whether solicitor-client costs stemming from indemnification provisions of a contract may be awarded even if the provisions were not pled.

[22] ***Alberta Permit Pro*** makes it clear that it is *effective* notice that is required for solicitor-client costs, rather than formal pleadings. In ***Brown v. Silvera***, a number of factors indicate that effective or fair notice was in fact given to Brown. The contract containing the indemnification provision was drafted by Brown's counsel on his instructions and signed by both parties who received legal advice from their lawyers. As well, Brown himself is an experienced businessman who is expected to have a good understanding of the contractual agreement.

[23] I also note that solicitor-client costs have been formally pled in this application by Brown - both in his Statement of Claim and his Statement of Defence to Counterclaim. He was well aware of the concept of solicitor-client costs. In fact, in his Statement of Defence to Counterclaim, he pled solicitor-client costs *and* punitive costs. I observe that his pleading was not for solicitor and own client costs.

[24] As there is no indication that Brown did not have effective notice, one must conclude that Silvera may rely on the indemnification provisions without pleading the contractual clause in making her claim for solicitor-client costs on a contractual basis.

[25] Therefore, I find that Silvera did not have to plead solicitor-client costs, nor solicitor and own client costs specifically. The clause in the Minutes applies and will be enforced. On this basis, I award Silvera solicitor and own client costs. I will discuss later what this means in the context of this case.

2. *Should solicitor and own client costs be awarded in any event, on account of Brown's conduct during the litigation?*

[26] If I am wrong about the Minutes applying with respect to the award of costs, then I will consider whether Silvera ought to be awarded costs on the basis of solicitor and own client costs, simply solicitor-client costs or party-party costs taking into account Brown's conduct during the litigation and to some extent, his conduct leading to the necessity for litigation.

[27] With respect to the issue of the necessity of litigation, in ***Brown v. Silvera***, 2009 ABQB 523, I concluded that: (1) Brown had systematically deceived and misled Silvera as to the financial circumstances faced by the family, and to the full scope of the family's corporate property; (2) Brown deliberately misstated the value of the matrimonial corporate assets when the Minutes were negotiated and signed; and (3) Brown had psychologically exploited Silvera via the manner in which Brown provided misleading and incorrect information concerning the prospects for the companies and the family finances: paras. 670 - 671. During the course of the trial, I also found that Brown was generally not credible in his evidence: para. 670.

[28] Specific details of Brown's misconduct during the negotiations can be found in the judgment at paras. 65-67, 74, 75, 89-92, 126, 140, 165, 166, 173 to 179, 185, 223, 224, 233, 238, 239, 241, 244, 257, 259, and 596.

[29] In ***Powermax Energy Inc. v. Argonauts Group Ltd.***, 2003 ABQB 543, 16 Alta. L.R. (4th) 90, Chrumka J. indicated that an order of solicitor and own client costs made against a Defendant is rare and exceptional, and is of a punitive nature in itself: para. 29. See also ***Boje v. Boje Estate; Boje Estate, Re***, 2005 ABCA 73, 250 D.L.R. (4th) 271 at para. 39.

[30] An overview of the case law indicates that the court has much discretion in awarding full indemnity costs or solicitor-client costs on the basis of party misconduct.

[31] In ***College of Physicians & Surgeons***, 2009 ABQB 48 at paras. 4-23, 468 A.R. 101, Graesser J. summarized the relevant points of law relating to the award of solicitor-client costs on the basis of party misconduct. Recognizing that solicitor-client costs are reserved for exceptional circumstances, Graesser J. observed the following points on the issue of party misconduct:

- Solicitor-client costs are awarded where the conduct of a party has been 'reprehensible, scandalous or outrageous': ***Walsh v. Mobil Oil Canada***, 2008 ABCA 268 at para. 112, 440 A.R. 199; ***Hamilton v. Open Window Bakery Ltd.***, 2004 SCC 9 at para. 26, [2004] 1 S.C.R. 303; ***Young v. Young***, [1993] 4 S.C.R. 3 at 134, 108 D.L.R. (4th) 193;

- The conduct must have occurred during the course of the litigation: ***Polar Ice Express Inc. v. Arctic Glacier Inc.***, 2009 ABCA 20 at para. 21, 446 A.R. 295;

- Solicitor and client costs might suffice to satisfy the objectives of deterrence and punishment that would otherwise be served by a punitive damage award: ***Colborne Capital Corp. v. 542775 Alberta Ltd.***, 1999 ABCA 14 at para. 294, 228 A.R. 201; ***College of Physicians*** at para. 39;

- In order for costs to be awarded on an indemnity basis or solicitor-client basis, as opposed to a party-party basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case: ***Jackson v. Trimac Industries Ltd.*** (1993), 138 A.R. 161, 8 Alta. L.R. (3d) 403 (Alta. Q.B.), costs orders affirmed 20 Alta. L.R. (3d) 117, 155 A.R. 42 (Alta. C.A.);

- It is a well-established principle that the court may sanction a party by way of costs where allegations of morally reprehensible conduct by such party are proven to be groundless by the trier of fact; whether to award increased costs in such situations is a matter of discretion to be exercised judicially by the trial judge: ***Davis v. 850015 Alberta Ltd.***, 2003 ABPC 68 at para. 33, 335 A.R. 172, citing ***Zwicker v. Schubert; Harach v. Schubert***, 1999 SKQB 49 at para. 54, 184

Sask.R. 35; and

- Misconduct during the litigation can surely be found if there is no reasonable basis on which to commence, or continue, litigation: ***College of Physicians*** at para. 33.

[32] In finding that the application had proceeded on the basis of groundless allegations and that this type of conduct in litigation should be discouraged, Graesser J. concluded that it was appropriate to award solicitor-client costs in favour of the College.

[33] On the topic of awarding costs on a full indemnity basis, Hutchinson J. in ***Jackson v. Trimac Industries Ltd.*** (1993), 138 A.R. 161, 8 Alta. L.R. (3d) 403 (Alta. Q.B.), affirmed on costs, 155 A.R. 42, 20 Alta. L.R. (3d) 117 (Alta. C.A.), stated that, in order for costs to be awarded on an indemnity basis or a solicitor-client basis, the court must conclude that the case fits within the parameters of a rare and exceptional or unusual case. The Court provided (at para. 28) the following examples of cases resulting in the identification of a rare and exceptional case:

- circumstances constituting blameworthiness in the conduct of the litigation by that party: ***Reese v. Alberta*** (1992), 133 A.R. 127, 5 Alta. L.R. (3d) 40 (Alta. Q.B.);

- cases in which justice can only be done by a complete indemnification for costs: ***Foulis v. Robinson*** (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134 (Ont. C.A.);

- where there is evidence that the plaintiff did something to hinder, delay or confuse the litigation, where there was no serious issue of fact or law which required these lengthy, expensive proceedings, where the positively misconducting party was "contemptuous" of the aggrieved party in forcing that aggrieved party to exhaust legal proceedings to obtain that which was obviously his: ***Max Sonnenberg Inc. v. Stewart, Smith (Canada) Ltd.***, 48 Alta. L.R. (2d) 367, [1987] 2 W.W.R. 75 (Alta. Q.B.);

- an attempt to deceive the court and defeat justice, an attempt to delay, deceive and defeat justice, a requirement imposed on the plaintiff to prove facts that should have been admitted, thus prolonging the trial, unnecessary adjournments, concealing material documents from the plaintiffs and failing to produce material documents in a timely fashion: ***Olson v. New Home Certification Program of Alberta*** (1986), 69 A.R. 356, 44 Alta. L.R. (2d) 207 (Alta. Q.B.);

- where the defendants were guilty of positive misconduct, where others should be deterred from like conduct and the defendants should be penalized beyond the ordinary order of costs: ***Dusik v. Newton*** (1984), 51 B.C.L.R. 217, 24 A.C.W.S. (2d) 465 (B.C.S.C.), varied on other grounds 62 B.C.L.R. 1; 31 A.C.W.S. (2d) 199 (B.C.C.A.);

- defendants found to be acting fraudulently and in breach of trust ***Davis v. Davis*** (1981), 9 Man. R. (2d) 236, 8 A.C.W.S. (2d) 153 (Man. Q.B.);

- the defendants' fraudulent conduct in inducing a breach of contract and in presenting a deceptive statement of accounts to the court at trial: ***Kepic v. Tecumseh Road Builders*** (1987), 23 O.A.C. 72, 18 C.C.E.L. 218 (Ont. C.A.),

- fraudulent conduct: ***Sturrock v. Ancona Petroleums Ltd.*** (1990), 111 A.R. 86, 75 Alta. L.R. (2d) 216 (Alta. Q.B.);

- an attempt to delay or hinder proceedings, an attempt to deceive or defeat justice, fraud or untrue or scandalous charges: ***Pharand Ski Corp. v. Alberta*** (1991), 122 A.R. 81, 122 A.R. 395 (Q.B.).

[34] The Court in ***Jackson*** further stated (at para. 32) that:

> Where the positive misconduct of the party which gives rise to the action is so blatant and is calculated to deliberately harm the other party, then despite the technically proper conduct of the legal proceedings, the very fact that the action must be brought by the injured party to gain what was rightfully his in the face of an unreasonable denial is in itself positive misconduct deserving of indemnification whether punitive damages are awarded or not. Such positive misconduct must be taken into account one more time on the costs issue to use the words of Madam Justice Veit in *Sonnenberg*. [Emphasis added.]

[35] In ***Jackson*** the Court awarded costs on an indemnity basis to provide complete indemnity to the successful litigant of all costs within the four corners of the litigation. Indemnification does not mean that there is a carte blanche to charge the client anything. The contract must be established and so must the hourly rates being charged (at para. 37).

[36] Whether a party has conducted themselves in a way which leads to solicitor-client costs, solicitor and own client costs or party-party costs is a matter of fact.

[37] As set out above, some cases consider the conduct of the party leading to the commencement of the litigation, particularly where the conduct has been fraudulent and there has been a breach of trust. In the case before me, I found Brown had misrepresented critical facts leading to a settlement. Although I did not call it fraud, it is in the nature of fraudulent conduct. I made several findings at trial about Brown's credibility and lack of good faith during the negotiations and subsequent to those negotiations. I also found that he deliberately misstated his corporate assets. Further, I found that he engaged in psychological exploitation of Silvera during the negotiation process (see paras. 238-244, 596, 612, 632).

[38] This misconduct during negotiations leading to the Minutes can be considered during a cost application even though it was before the litigation commenced, because costs can be used to punish someone for their behaviour leading to the necessity for litigation. This is to discourage

others from bad faith conduct in their negotiations. Not only will they face a judgment for the amount they should have paid in the first place, they will also face punitive cost consequences. In this case, Brown pled solicitor-client costs and punitive costs. Some of the case law considers solicitor and own client costs to be punitive, but punitive costs can go beyond a complete indemnity for legal fees.

[39] The very fact that the action had to be brought to gain what was Silvera's right in the first place and that Brown's conduct during settlement negotiations was unreasonable can be characterized as positive misconduct deserving of sanction by way of indemnification of Silvera's legal costs: ***Jackson*** at pp. 13 and 14.

[40] I find that Brown's misconduct in the negotiations for the Minutes is one factor to consider in determining if Silvera should be indemnified for her legal costs. In this case, he acted in bad faith during those negotiations and is deserving of punishment through a costs award. Although I consider Brown's pre-litigation conduct, his conduct during the litigation process, I find, is sufficient to support an award of solicitor and own client costs.

[41] I am considering his conduct during the negotiations and leading up to the commencement of the litigation process because my award of damages was strictly related to a quantum to which Silvera would be entitled as a division of matrimonial property. I did not consider nor award any punitive damages to sanction Brown's conduct during the matrimonial property negotiations. Therefore, the only place where his misconduct necessitating the litigation can be sanctioned is in the costs award. Brown is deserving of such a sanction and a message should be sent to litigants that misconduct of the kind described in the judgment is deserving of sanction by the courts and will be sanctioned by the courts.

[42] However, most of the cases discussing solicitor and own client cost awards look at the conduct of the parties *during* the litigation process. Therefore, I must look at the conduct of Brown once the dispute commenced after he entered into the Minutes.

[43] To determine if Brown's conduct during the litigation is deserving of sanction through the award of costs beyond party and party costs in favour of Silvera, I must consider the course of the litigation and determine whether Brown acted in a way as to slow the litigation and increase the costs of Silvera through unnecessary interlocutory applications and other related litigation. I will look at the steps taken to trial and I will also look at the course of the litigation through the eyes of the case management judge who gave many decisions in case management. I observed behaviour during the trial relating to expert evidence which also provides some insight to Brown's conduct throughout. Finally, I shall discuss the settlement offers made before trial as some evidence about conduct during the litigation.

[44] A review of my judgment soon reveals that this dispute was not an honest difference between the parties but rather an attempt by Brown to keep Silvera from what was rightfully hers: see ***Jackson v. Trimac Industries Ltd.; Jackson v. McCaig***, 155 A.R. 42, 20 Alta. L.R. (3d) 117 (Alta. C.A.), at para. 30.

[45] Having reviewed the procedural history of ***Brown v. Silvera***, I have noted various points in the litigation that may be attributed to Brown's (mis)conduct. The record shows:

(a) multiple examinations of Brown and several applications by Silvera to hold Brown in contempt for failing to produce documents or other information;

(b) Brown failed to appear at scheduled Examinations for Discovery; and

(c) Brown's refusal to produce documents relating to an accounting file which were ultimately ordered to be produced by Brown just before the trial of the action and which documents were important for the opinion of Silvera's expert, Siebert.

[46] A review of the court record reveals that Silvera was required to pursue orders requiring Brown to:

(a) attend discovery,

(b) answer undertakings,

(c) produce corporate documents,

(d) produce current statements of assets, and

(e) prepare an Affidavit of Records and produce expert reports.

[47] I particularly note that Brown refused to produce the whole of the Price Waterhouse Coopers ("PWC") file until just before trial and only as a result of an order of Justice Belzil, the case management justice, made in November, 2007. The PWC file was produced on December 13, 2007, less than a month before trial. In it were important documents that were instrumental in proving that the value of Somagen in June, 2000 was $10 million. These documents were so central to this case that they should have been produced in the early stages of the litigation and had they been, it would have been apparent early to Brown's counsel and his expert that the value of the matrimonial property was greater than had been revealed. Perhaps there would have been no need for a trial.

[48] Further, I note that as early as June, 2004, our Court found Brown in contempt for failing to attend Examinations for Discovery.

[49] I note that Brown claims that delay was due to Silvera because she had not requested documents. This is a specious claim because it is the duty of the Defendant (and the Plaintiff) to produce all relevant documents in their possession. Document production is not an exercise to be done at the request of the other party.

[50] My findings in this regard are also governed by my own experience after the trial when Brown did not produce his argument in the time I allotted for the argument (relating to trial) until there were two applications by Arès to force him to do so.

[51] Brown also entered into two side shows which took legal time and cost Silvera unnecessary legal fees. The first was following an *ex parte* application made by Silvera's counsel (Arès) for a preservation order of Brown's corporate documents; in response Brown applied for a declaration of contempt against Arès. The second was the attempt by Brown to remove Arès as counsel of record for Silvera.

[52] The contempt application was brought before Lefsrud J. in ***Brown v. Silvera***, 2004 ABQB 527 who declined to make a finding of contempt, but he found reason to award costs against Arès personally. Lefsrud J. accepted Brown's affidavit evidence and accepted the conduct of Mr. Tumbach (Brown's lawyer) and of Brown during the negotiations for the Minutes as not evasive or obstructionist. I found exactly the opposite after hearing four weeks of evidence. Throughout my decision, I made a number of findings in regards to Brown's lack of credibility in his evidence (paras. 140, 160, 170, 178, 596, and 670), and I expressed disapproval of Brown's inadequate disclosure of information for purposes of the trial to Silvera's expert and his own expert, Smith, (paras. 274, 421, 554, and 576). In terms of Brown's conduct during the negotiation of the Minutes, I found that Brown deliberately misstated to Silvera the value of the matrimonial corporate assets when the Minutes were negotiated and signed: paras. 596 and 670.

[53] Unfortunately, in an *ex parte* matter, the court is acting quickly and on the basis of affidavits.

[54] I also note that usually *ex parte* applications are dealt with shortly after they are granted by a review of the order by the court when the respondent brings the matter back to court. Contempt is a very unusual response. To have proceeded with a contempt application was overkill.

[55] The second matter was the unsuccessful attempt in 2005 to remove Arès as counsel of record for Silvera before Justice Belzil. The affidavit that was sworn by Brown alleges things that would be a basis for a review of Ms. Arès by the Law Society of Alberta. It also alleges certain things that would bring Ms. Arès husband, Bailey, into disrepute in his profession. These are serious allegations. I have reviewed that sealed affidavit while preparing these reasons relating to costs, I shall say no more, except that it is another attempt by Brown to complicate the litigation process and to drive up Silvera's costs.

[56] Another issue that created a problem for the Plaintiff by Counterclaim and for the Court was Brown's handling of expert evidence. Aside from his failure to produce to Silvera crucial documents early, he stalled in producing an expert's report and he failed to give his expert critical information to assist in preparing a valid expert's report.

[57] A review of the sequence of events concerning the provision of expert reports is as

follows and set out in my decision at paras. 245 - 247 as follows:

> [245] Lorne D. Siebert, CA, CBV (Siebert) gave evidence for the Plaintiff as to the value of the businesses as at the valuation date. His report for the Plaintiff is dated November 24, 2005 (the "Siebert Valuation Report").
>
> [246] On November 28, 2008, very shortly before trial (the trial commenced on January 14, 2008), and two years after the Siebert Valuation Report, the Defendant put forward an expert report prepared by Gordon Smith (Smith) and Theresa Reichert of Deloitte & Touche LLP (the "Deloitte Valuation Report"). That report determined the value of Brown's interest in Somagen and Langerin. The case management judge permitted that report to be filed out of time on the basis that Siebert could prepare a rebuttal report and file it during the trial. Siebert filed his rebuttal report on February 5, 2008 (the "Siebert Rebuttal Report"). Siebert gave evidence at trial based on the Siebert Valuation Report and then gave rebuttal evidence.
>
> [247] In the Deloitte Valuation Report Smith did not rebut the evidence given by Siebert in the Siebert Valuation Report. Nevertheless, at trial, the Defendant sought to elicit rebuttal evidence from Smith. Specifically, the Defendant sought to elicit opinion evidence from Smith about the use by Siebert of a Standard Industrial Classification ("SIC") which Siebert used as one of the bases for an industry risk premium that affected the valuation of Somagen and Sebia US. The Plaintiff objected. There was legal argument as to the admissibility of that evidence and I ruled that Smith could give the evidence but that Siebert could provide a supplementary rebuttal report on that evidence. Smith provided that Supplementary Rebuttal Report in writing on February 29, 2008, after the trial was over.

[58] I note that Silvera's expert ("Siebert") compiled the Plaintiff by Counterclaim's report in **November, 2005** which I note is a full two years before the trial actually commenced. It is clear that the Defendant by Counterclaim, Brown, could easily have responded to that report in a timely fashion. In fact the *Rules* require him to do so within 60 days (*Rule* 218.12). However, he did not. Nor did Brown file an expert report of his own, even though he knew that trial was coming.

[59] On the other hand, on September 19, 2007, Silvera's counsel made an application asking for direction for the filing by Brown of expert reports. Trial was looming and there was no expert report from Brown. A review of my Judgment reveals that this trial was a complicated matter involving a complex accounting analysis. It was ludicrous for Brown to think that he could go to trial without expert evidence in the face of Siebert's report. I can only conclude that Brown was treating this matter in a cavalier fashion, perhaps thinking that he would get yet another adjournment and be able to stall the proceedings even further.

[60] However, an order was made on September 27, 2007, by Justice Belzil, the case management justice, requiring Brown to advise Silvera on the status of the expert reports among

other things. This lead to an application filed by Brown's counsel on December 14, 2007, for leave to adduce evidence at trial (which was scheduled to commence January 14, 2008) and to enter expert reports of Smith and Reichert dated November, 2007. On December 17, 2007, Silvera provided an affidavit addressing her concerns about the difficulties of providing a rebuttal report before the January 14, 2008 trial date. Belzil J. on January 11, 2008, granted leave to Brown to enter a report dated November 28, 2007, but not a report dated November 29, 2007. Leave was granted to Silvera, allowing her to file a rebuttal report by February 4, 2008.

[61] On December 18, 2007, Belzil J. also provided that Silvera and her counsel and expert could attend at Price Waterhouse Coopers, accountants for Brown's companies, and review the file. It was not until then that Silvera and her expert, Siebert, became aware of critical information. This was on the eve of trial and Brown had steadfastly prior to that refused to provide complete document production.

[62] After Silvera's expert provided the Siebert Valuation Report in November, 2005, there was a significant delay on Brown's part before he provided an admissible report from his own expert in December, 2007/January 2008. This delay left Silvera with a very tight schedule in December in terms of producing a rebuttal report in time for the January trial date, as well as preparing for the trial itself.

[63] Siebert then filed a rebuttal report on February 5, 2008 (the "Siebert Rebuttal Report") in the middle of trial. Silvera's expert, Siebert, gave evidence at trial based on the Siebert Valuation Report of 2005 and also gave rebuttal evidence to Smith's expert report filed on January 11, 2008.

[64] However, when Smith, Brown's expert, gave evidence at trial he raised a completely new issue about the reliability of the business valuations in Siebert's 2005 report given Siebert's use of certain SIC numbers. This issue is discussed fully in the judgment. Smith's evidence was given after Siebert gave evidence and on a subject which was not fully explained in the November, 2005 Siebert report. Further, Brown had not filed a rebuttal report to discuss this issue, as he should have. This new issue forced the court to allow Smith's evidence and to order that Silvera could adduce a further rebuttal report to address the issue of SIC numbers. That Supplementary Rebuttal Report was provided by Siebert on February 29, 2008, after the trial was over [*Ibid.* at para. 247]. Properly, Brown should have provided a rebuttal to the November, 2005 Siebert report and that should have been done long before the trial was to start. This would have given notice to everyone and would not have resulted in the ambush of Silvera at trial.

[65] Brown's sloppiness or deliberate obstructionism served to make it very difficult indeed for Silvera to organize her case and put it forward in an orderly manner.

[66] In addition to all of this, Brown did not provide his expert with all the facts necessary for Smith to give an opinion based on proven facts. This no doubt caused Smith embarrassment as he was cross-examined on facts about which he had not been advised for the purpose of his

opinion. See my judgment for a discussion in many places about Brown's lack of candour in providing evidence which could have been relied on for the opinions of both Smith and Siebert.

[67] The file for this case is long and complicated. I could show many more instances of Brown's misconduct, but a review of the file would suffice. Looking at the steps that were taken and the orders made in case management, it is clear that Brown contributed extensively to the necessity for the trial and for the difficulties at trial by resisting at every turn producing what he ought to have produced without question. However, had he done that it would have shown early in the litigation that he had hidden assets from Silvera when they were "negotiating" the Minutes. He started with deception toward Silvera in those negotiations and he continued to the end of trial. The trial was unnecessary and prolonged. Brown instructed his counsel to file applications for contempt of Ms. Arés, to get her off the file, and finally a lawsuit to divert her from her responsibilities toward her client's case.

[68] Finally, Brown also rejected two offers by Silvera. In and of itself, a refusal to accept offers is not misconduct. However, taken in the context of the complexity of the litigation and Brown's consistent attempts to avoid going to trial, misleading Silvera along the way, I will consider the history of the Formal Offers and Brown's responses.

[69] Shortly after Silvera filed and served the Statement of Defence and Counterclaim in February, 2004, and before discovery, Silvera filed a formal offer to settle the litigation for $1.875 million. Notably at about the same time Brown was in the process of selling 80% of Somagen for about $30 million. Clearly, he ought to have known at the time that Silvera's offer was well within his ability to pay and it would have put an end to the litigation. Instead the litigation was prolonged and finally heard in January 2008. Brown rejected the offer and responded with his own offer of $1000 (March 22, 2004).

[70] Shortly before the trial was scheduled to commence, Silvera made another offer to settle by letter of $8.75 million plus costs of $1 million to which Brown responded with a Formal Offer of $700,000 plus interest and costs (January 11, 2008). Neither offer was remotely close to the award of about $15 million. Silvera's offer was substantially below her success at trial. At the time of the offer, Brown knew the extent of the fortune he had amassed using in part her funds. His response was clearly one that intended the fight to continue through litigation. He ought to have known that Silvera's resources were limited and that the cost of the case in court would be difficult for Silvera to meet.

[71] All of the above and much more that I have not reviewed contribute to my finding that Brown exhibited conduct which ought to be sanctioned by solicitor and own client costs. Such an award should send a clear message to parties who engage in such conduct that they may be facing not only their own costs but also full costs for the party opposite.

B. What is the quantum of costs in this case?

[72] During argument, it came to the Court's attention from counsel for Brown that Silvera and her counsel have a contingency agreement which would make 25% of the matrimonial award payable to Arès as a result of the successful claim. Arès confirmed the contingency contract. I did not have a copy of the agreement but it was common between the parties as to its existence. This raises the issue of the effect of the contingency agreement (between Silvera and Arès) on a third party (Brown) who may be held to indemnification of solicitor and own client costs.

[73] The case of ***Goertz v. Goertz Estate***, 1998 ABQB 592, 225 A.R. 142 provides guidance on the issue. In ***Goertz***, Sulyma J. considered the meaning and effect of the term "solicitor and client costs" in an order and how that term related to payment of such costs to a litigant, who had a contingency agreement with her lawyer. The Court recognized three scales of costs in Alberta: (1) party-party; (2) solicitor-client; and (3) solicitor and own client (or full indemnity basis).

[74] Referring to ***Max Sonnenberg Inc. v. Stewart, Smith (Can.) Ltd.*** (1986), 48 Alta. L.R. (2d) 367, [1987] 2 W.W.R. 75 (Alta. Q.B.), the Court stated that it is only the solicitor and own client category of costs that entitles a client to complete indemnity based on the client's contract with his lawyer. As for the middle scale of solicitor-client costs, the Court in ***Goertz*** indicated that such costs "allows only the recovery of reasonable fees [and] will not necessarily be equivalent to contractual fees which may be owed": para. 6. In ***Goertz*** Sulyma J. concluded that the wording of the order ("solicitor and client costs") is consistent on the second scale such that the order allowed only for the recovery of reasonable fees and not the contingency percentage fee provided by the contract: para. 9.

[75] Here, I have found that Silvera is entitled to her costs on a solicitor and own client basis (not solicitor-client basis) given the terms of the Minutes and given Brown's conduct in the litigation. Clearly, on the law, Silvera is entitled to full indemnification, but does this mean full indemnification for all time spent on the file by counsel, or full indemnification for the contingency agreement?

[76] On the topic of full indemnity costs, the Court in ***Powermax***, at para .17 also referenced Veit J.'s approach in ***Max Sonnenberg***, at para. 13 where she found that "solicitor and his own client" included contingency fees because, she noted, that in Alberta, lawyers are entitled to act on a contingency basis:

> Thus, where the scale is "solicitor and his own client", if the solicitor's contract with his own client is that he will be paid for his work at the rate of $300 per hour or on the basis of 35 per cent of the recovery, it is that fee which can be recovered against an unsuccessful defendant.

[77] Having found that Silvera is entitled to her costs on a full indemnification basis, and having found that there is a contingency agreement (25% of the matrimonial award provided by the contingency agreement) between Silvera and her counsel, I find that Silvera is entitled to her costs on a full indemnity basis which means that Silvera is entitled to be paid her legal fees as set out in the contingency agreement at 25% of the award.

C. Given the Formal Offer, should the court award double costs?

[78] As set out above, shortly after Silvera filed and served the Statement of Defence and Counterclaim in February, 2004, she filed a formal offer to settle the litigation for $1.875 million. Brown rejected the offer and responded with his own formal offer of $1000 (March 22, 2004).

[79] The *Rules* which apply to this discussion are *Rule* 170(1) and 174(2) and (2.1):

> 170.(1) At any time after the issuance of the statement of claim but before the commencement of the trial, the plaintiff may serve on the defendant an offer specifying the terms under which the plaintiff is willing to settle the plaintiff's claim or, if more than one claim is made, any one or more of the plaintiff's claims.
>
> 174.(2) Where a plaintiff, with respect to the matters specified by him in his offer to settle under Rule 170, recovers a judgment equal to or more favourable that the judgment offered, the judge ... shall, unless for special reason, award the plaintiff double the amount of costs (excluding disbursements) he would otherwise have recovered for all steps in relation to the claim after the service of the offer.
>
> (2.1) Subrule ..(2) does not require a judge ... in awarding solicitor-client costs to award double solicitor-client costs, but the judge ... in the judge's ... discretion, award costs exceeding solicitor-client costs.

[80] The purpose of this rule is to penalize litigants where they fail to compromise on the basis of a reasonable offer. In this case, the offer made in 2004 by Silvera was more than reasonable. That offer was met with a contemptuous response when Brown offered $1000.00.

[81] The case law on double solicitor-client costs suggest that:

1. awarding costs beyond indemnity serves the purpose of marking the court's disapproval of a party's conduct and deterring certain conduct: ***Fullerton v. Matsqui (District)*** (1992), 19 B.C.A.C. 284 at para. 23, 74 B.C.L.R. (2d) 311 (B.C.C.A.);

2. on the issue of awarding double costs pursuant to *Rule* 174(2) and subsection (2.1) provides the judge with the discretion to decline doubling of solicitor-client costs: ***Boje***;

3. the intrinsic nature of solicitor-client costs may constitute a special reason to refuse doubling solicitor-client costs: ***Boje***; and

4. where punitive damages and/or indemnity costs have been awarded, that may serve as a special reason for limiting / refusing to double solicitor-client costs: ***Powermax***, and ***Al-Asadi v. Alberta Motor Assn. Insurance Co.***, 2003 ABQB 289, 334 A.R. 242.

[82] In this case, punitive damages were not awarded.

[83] Bearing in mind that there has been a claim for double costs by Silvera, it is necessary to consider whether the punitive nature of solicitor and own client costs constitutes a special reason to deny double costs in this case (as discussed in ***Boje***; ***Al-Asadi***; and ***Powermax***). In light of the outcomes in ***Boje*** and ***Powermax*** (where the courts declined to award double solicitor and own client costs), it may be significant to note that I have yet to find a relevant case where double costs have been awarded on a full indemnity basis.

[84] Here we have a situation where Brown knew by virtue of the Minutes that he would face solicitor and own client costs in the event that he failed in the law suit. Those Minutes *did not* specify solicitor-client costs but went for the more punitive scale of solicitor and own client costs. When Brown was served with the Formal Offer, it must have been and surely ought to have been in his mind that a failure at trial could mean double solicitor and own client costs.

[85] Further, Brown ought to have know or been advised by his lawyer that sometimes in cases such as these, counsel enters into contingency agreements with their clients taking a chance that there will be success at trial and the lawyer will be rewarded for her efforts.

[86] Even in these circumstances the best that Brown should have believed is that he would be faced with his own costs and with double solicitor and own client costs in the event he lost at trial.

[87] In considering whether I should order double contingency fees, I take into account that Brown knew full well, because he asked for it to be included in the agreement, that Silvera's success at trial would mean full indemnification of her solicitor costs. I also note that I do not have to engage in a reasonableness analysis as that is saved for solicitor and client costs.

[88] However, it is conceivable that Brown and his counsel only considered that the risk was full indemnification doubled. Given the amount of the judgment for Silvera, 25% for legal fees, it would seem that the amount is greater than it would have been on a full indemnity basis for all the work done on an hourly basis by Silvera's legal counsel within the four corners of the

litigation. I do not have any information on this point and am speculating based on my experience as a judge.

[89] As to whether Brown should pay double the contingency fee given the formal offer, I am also taking into account in my analysis my discussion above regarding Brown's conduct during the litigation and leading up to the litigation. This conduct is deserving of sanction by the court. Consequently, I find that he should pay more than the contingency.

[90] Finally, I note that I do not have to award double contingency costs because an award of costs is in my discretion and at all times I must be fair.

[91] Although I have found that Brown knew or ought to have known that he would be facing double contingency fee costs and have awarded full indemnification on the basis of the contingency fee, in this consideration I am not going to award double contingency fee.

[92] To be fair, I am awarding an additional amount in the amount of solicitor and client fees. Although this is not double, it reflects the sanction that this court gives for the conduct exhibited by Brown throughout. It would not be fair to simply award a single contingency agreement as that would let Brown off scott free as to his reprehensible conduct leading to the litigation, necessitating the litigation and his conduct leading to and at trial.

D. What experts' fees should be awarded?

[93] It was the position of Brown at the costs application that the only disbursements that were at issue were the fees claimed for Mr. Siebert and Mr. Bailey of Ernst and Young. He accepted the other costs set out in the Disbursement Summary for Silvera saying that those disbursements appeared to be reasonable save and except for the quantum of Siebert's fees and the fees for Bailey in their entirety.

[94] Silvera provided the backup documentation for the fees. With respect to Siebert's fees, I find that they are reasonable taking into account that Siebert was caught unawares by the criticism by Smith of the SIC codes Siebert used in his 2005 report (see my judgment). Siebert, in order that the trial could proceed without an adjournment, and in the face of other pressing work, nevertheless produced a rebuttal report in a timely fashion. Professionals when faced with demands on a time limited basis often charge a premium. As I have no evidence to suggest that Siebert's fees in this regard are excessive, I award his expert's fee of $168,499.48.

[95] Counsel for Brown submits that some of the professional fees claimed appear excessive and would appear to be more properly classified as taxable fees rather than disbursements. In particular, counsel for Brown suggests that Mr. Bailey's charges ("Bailey Valuations") for assisting Arès in preparing for the trial are especially high. According to the proposed Bill of Costs, Mr. Bailey's fees amount to $186,506.25.

[96] Rule 600 states that "costs" include "all the reasonable and proper expenses which any party has paid or become liable to pay for the purpose of carrying on or appearing as party to any proceedings" [Emphasis added.]. Rule 601(1) further indicates that the Court may consider the complexity of the proceedings in determining the issue of costs. A quick survey of certain relevant case-law suggests that the court has the discretion to allow costs in the form of a disbursement for the use of experts in assisting counsel at trial even though the experts do not testify: ***Nova, an Alberta Corp. v. Guelph Engineering Co.*** (1988), 89 A.R. 363, 60 Alta. L.R. (2d) 366 (Alta. Q.B.); ***Petrogas Processing Ltd. v. Westcoast Transmission Co.*** (1990), 105 A.R. 384, 73 Alta. L.R. (2d) 246 (Alta. Q.B.); and ***Sidorsky v. CFCN Communications Ltd.*** (1995), 167 A.R. 181, 27 Alta. L.R. (3d) 296 (Alta. Q.B.), varied 206 A.R. 382, 53 Alta. L.R. (3d) 255 (Alta. C.A.).

[97] In ***P.(S.F.) v. MacDonald***, 1999 ABQB 322, 242 A.R. 134, Veit J. further clarified that the test of whether an expert's expense is reasonable is whether it was reasonable at the time the expense was incurred: para. 37. In ***Hague v. Liberty Mutual Insurance Co.***, [2005] O.T.C. 290, 21 C.C.L.I. (4th) 300 (Ont. Sup. Ct. J.), the Court suggested that fees paid to experts should be recoverable "[i]n cases where there is a degree of technical complexity [as] it is 'reasonably necessary for the conduct of the proceeding' that counsel will need expert assistance to better understand those aspects of the issues involved": para. 19.

[98] The complexity of the financial matters and corporate valuations as disclosed in my decision in ***Brown v. Silvera*** suggests that it was reasonably necessary for Arès to require additional assistance from an expert for the purpose of running the trial. In view of Arès' presentation during the long trial, it is certainly arguable that the expert assistance enhanced Arès' performance as Silvera's counsel in addressing complex issues and examining witnesses effectively. I certainly found the subject matter to be complex. Further, Arès was caught by surprise as to Smith's criticism of Siebert's use of certain SIC codes that were critical to Siebert's building up of the value of Brown's assets. I also note that Arès was very good counsel at trial in taking the expert through the complex evidence and in cross-examining Smith. I conclude that it was essential (not just reasonably necessary) for Arès to have technical assistance throughout the trial, particularly where the evidence related to the value of the companies, not just in cross-examining the expert. Further, it is reasonable for a lawyer to have technical expertise in assisting her to prepare the background for her own expert reports. Technical assistance in a complex scientific or accounting matter is essential as counsel cannot be expected to know the minutiae in such areas. I noticed how smoothly the evidence went in at trial in the areas requiring technical expertise. It is my view that this would not have happened but for the assistance of Bailey. Therefore, I find that his assistance not only assisted Arès but also the court.

[99] Arès provided detailed accounts from Bailey as to his assistance prior to trial and at trial. I find nothing unusual about those accounts and find that there is no duplication with the efforts of Siebert. Indeed, Arès pointed out in argument that but for the assistance of Bailey, Siebert would not have been able to provide his rebuttal report and his extra rebuttal report required because of Brown's ambush through Smith at trial.

V. Conclusion

[100] I find that the Minutes of Settlement contained a clause providing for solicitor and own client costs in the event of litigation to enforce the Minutes. I find that the litigation before me falls within the four corners of the Minutes and therefore, Silvera is entitled to full indemnification for her legal costs under the Minutes.

[101] I also find that Brown's conduct throughout the litigation invites solicitor and own client costs as a sanction for such behaviour. I refer to the whole of the file which reveals numerous unnecessary applications and steps in the litigation.

[102] I find that Silvera is entitled to full indemnification for solicitor and own client costs which in this case are contingency fees.

[103] With respect to whether she is entitled to double costs, I find that Silvera is entitled to a set of solicitor and client fees in addition to the contingency fees awarded.

[104] Finally, I find that Silvera is entitled to her costs for both experts - Siebert and Bailey.

[105] The Plaintiff by Counterclaim shall have her costs of this application but because she is paying her counsel on a contingency basis which has already been awarded, the costs associated with the costs application will be included in the contingency agreement.

Heard on the 26th day of January, 2010.
Dated at the City of Edmonton, Alberta this 6th day of April, 2010.

A.B. Moen
J.C.Q.B.A.

Appearances:

Louise Arés, Q.C.
Arés Law
for the Plaintiff

Stephen English, Q.C. and Amy Bassili
Prowse Chowne LLP
for the Defendant

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: Deans v. Thachuk, 2005 ABCA 368

Date: 20051027
Docket: 0403-0156-AC
Registry: Edmonton

Between:

Dennis Black Deans, Nelson Russling, Terence Day, and James Sharp on their own behalf and on behalf of all beneficiaries of the Edmonton Pipe Industry Pension Plan

Appellants
(Plaintiffs)

- and -

Bob Thachuk, Cliff Williams, Rob Kinsey, M.B. Strong, R. Garon, H. Cicconi, J. Curtis, J. Falvo, H. Morissette, R. Shirriffs, R. Auger, G. Dobson, N. Frederiksen, R. Dubord, W. Shaughnessy, P. Stalenhoef, G. Panas, H. Blakely and L. Matychuk

Respondents
(Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Anne Russell
The Honourable Mr. Justice Douglas Sirrs

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice M.T. Moreau
Dated the 2nd day of April, 2004
Filed on the 21st day of May, 2004

circumstances. With respect to special circumstances, Lane J. in ***Townsend v. Florentis***, [2004] O.T.C. 313, 2004 CarswellOnt 1402 at paras. 56-57 (S.C.J.) noted:

> [T]here must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required. . . . The mere 'leveling of the playing field', although an admirable objective, would deprive the Third Test [in ***Okanagan***] of any real meaning . . ..

[42] Issues specific to trust cases may also be relevant in this context. Trust litigation may entail unique obligations to preserve the trust fund for the beneficiaries: see ***Liddell v. Deacou*** (1873), 20 Gr. 70 (Ont. Ch.); ***Cummings v. McFarlane*** (1851), 2 Gr. 151 (Ch. Upper Canada); and ***Andrews v. Barnes*** (1887), 39 Ch. D. 133 at 135 (Ch.) per Kay J., aff'd (1888), 39 Ch. D. 133 at 141. In ***Mediterranea Raffineria Siciliana Petroli S.p.a. v. Mabanaft G.m.b.h.*** (December 1, 1978, Eng.C.A.) [unreported], cited in ***Bankers Trust Co. v. Shapira***, [1980] 3 All E.R. 353 at 357 (C.A.), Templeman L.J. noted that the courts of equity would not hesitate to use their powers to protect and preserve a trust fund in interlocutory proceedings to ensure that it is not entirely depleted before trial. The obligation to protect the Fund from depletion includes not only the duty to protect it from costs of an unmeritorious suit, but as well the duty to protect it from mismanagement.

[43] In ***Re Buckton***, *supra,* Kekewich J. identified three categories of cases involving costs in trust litigation. The first are actions by trustees for guidance from the court as to the construction or the administration of a trust. In such cases, the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund. The second are actions by others relating to some difficulty of construction or administration of a trust that would have justified an application by the trustees, where costs of all parties necessarily incurred for the benefit of the trust will also be paid from the fund. The third are actions by some beneficiaries making claims which are adverse or hostile to the interests of other beneficiaries. In those cases, the usual rule that the unsuccessful party bears the costs will apply.

[44] The chambers judge held that the present case is adversarial because damages are being sought rather than declaratory relief. That factor weighed against an award of interim costs in her decision, presumably because she was concerned that a damage award in favour of the appellants could jeopardize the Fund. Ultimately, she determined there was insufficient evidence of special circumstances to warrant the exercise of the Court's authority to grant interim costs.

[45] However, the chambers judge overlooked the following factors:

1. The action involves allegations of bad faith, conflict of interest, gross negligence,