

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:	FACTUM

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

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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

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INTRODUCTION

1. This appeal concerns the rights of beneficiaries or potential beneficiaries to participate in an advice and direction application concerning a trust that could result in the possible variance or deletion of their beneficiary status. The question for consideration is whether the *Trustee Act*¹ and the interests of justice necessitate representation of beneficiaries and potential beneficiaries, in particular where there is an acknowledgement of a clear conflict of interest of the Trustees.

2. Further, this appeal raises the question of whether it is appropriate to deviate from the principle of a trust indemnifying the legal costs of an applicant in an advice and direction application and to instead award punitive costs in the absence of any egregious litigation conduct.

PART I. FACTS

A. Background of the Trust

3. In 1985, the Canadian Chief of the Sawridge First Nation, Walter Patrick Twinn established the Sawridge Band Inter Vivos Settlement, dated April 15, 1959 (the “1985 Sawridge Trust”) to hold certain properties in trust for the Sawridge First Nation.²

4. The 1985 Sawridge Trust is administered by the trustees of the 1985 Sawridge Trust (references to the “Trustees” going forward refer to all of the trustees of the 1985 Sawridge Trust with the exception of Catherine Twinn who is a dissenting trustee for the matters set out herein).

B. Procedural History

5. The Trustees take the position that the definition of “Beneficiaries” in the trust may be at risk of being deemed invalid due to discrimination on the basis that beneficiaries are restricted to persons who were members of the Sawridge First Nation prior to the adoption by Parliament of the Charter compliant definition of Indian status.³ In 2011, the Trustees commenced proceedings to consider issues relating to the 1985 Sawridge Trust, including the issue of the definition of “Beneficiaries”.

6. Pursuant to an order of the Honourable Mr. Justice D.R.G. Thomas (the “CM Judge”) dated September 6, 2011, the Trustees were instructed to bring an application for the opinion, advice and direction of the Court respecting the administration and management of the property held under

¹ *Trustee Act*, RSA 2000, c T-8 (“*Trustee Act*”), s 42 [Appellants Book of Authorities (“AA”), Tab 1].

² The background of the Trust is set out in previous decisions in this Proceeding including *Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365 (“*Sawridge #1*”), aff’d 2013 ABCA 226 at para 1 [AA, Tab 2].

³ *Ibid.*

the 1985 Sawridge Trust and to specifically seek, among other things, a direction with respect to the definition of "Beneficiaries" contained in the 1985 Sawridge Trust and if necessary to vary the 1985 Sawridge Trust to clarify the definition of "Beneficiaries".⁴

7. Despite the Courts' direction, no application for direction or to vary the definition of "Beneficiaries" in the 1985 Sawridge Trust has ever been filed by the Trustees. Notwithstanding this, the CM Judge has operated as though there is an application and has made a number of procedural decisions⁵ relating to this issue and refers to an "Advice and Direction Application" in the Reasons for Judgment.⁶

8. One procedural decision of the CM Judge of particular relevance to this appeal is an application by the Office of the Public Trustee of Alberta (the "OPGT") to be added as a party to represent potentially affected minors and unborn beneficiaries. In a decision dated June 12, 2012. The CM Judge granted the application based on a finding of a conflict of interest resulting from the dual role of the Trustees in their personal capacities and in their roles as fiduciaries finding that the "Public Trustee's role is necessary due to the conflict of interest".⁷

9. The current parties to the litigation are the Trustees, the OPTG and Catherine Twinn, a trustee with independent representation.

C. The Application Under Appeal

10. Patrick Twinn, Shelby Twinn and Deborah A. Serafinchon (the "Appellants") are current or potential adult beneficiaries of the 1985 Sawridge Trust whose status as beneficiaries may be deleted, diluted or enhanced as a result of any change or variation of the definition of "Beneficiaries".

11. The Appellants brought an application to be heard on a predetermined case management meeting date, seeking orders: (1) to be added as parties; (2) requiring the payment of the legal fees associated with the representation of the Appellants from the 1985 Sawridge Trust; and (3) for an order for an accounting of the 1985 Sawridge Trust.⁸ The application is referred to as the

⁴ Order of the CM Judge dated September 6, 2011, Appeal Record 000001.

⁵ For references purposes the following decisions are the previous procedural decisions of the CM Judge: *Sawridge #1, 1985 Sawridge Trust v Alberta (Public Trustee)*, 2015 ABQB 799, time extension denied 2016 ABCA 51, *1985 Sawridge Trust (Trustee for) v Sawridge First Nation*, 2017 ABQB 299.

⁶ Reasons for Judgment at para 2, Appeal Record 000003.

⁷ *Sawridge #1* at paras 25 and 33 [AA, Tab 2].

⁸ Appeal Record 000002.

“Proceeding”. The issue of the accounting was adjourned from this hearing to be determined at a later date.

12. The CM Judge dismissed the application in its entirety, finding that it was not necessary to add the Appellants as parties pursuant to section 3.75(3) of the *Rules of Court*.⁹ He found that there was prejudice to the Trustees that would result from adding the Appellants to the Proceeding. With respect to Patrick and Shelby in particular, the CM Judge declared that they are current beneficiaries and held they are not necessary parties to the Proceeding because their interests are already represented. The CM Judge declared that Deborah is not a current beneficiary of the 1985 Sawridge Trust and denied her application to be added as a party on that basis.¹⁰

13. The CM Judge stated it was unnecessary to consider the application for advanced costs given his decision regarding adding the Appellants as parties to the Proceeding. The CM Judge awarded solicitor and client own indemnity costs of the application against Patrick and Shelby and costs against Deborah on a party/party basis¹¹ despite no representations on costs being made in the filed briefs.

PART 2. GROUNDS OF APPEAL

14. The Appellants respectfully submit that the CM Judge erred in law or principle or was wholly unreasonable in the exercise of his discretion in:

- (a) Misinterpreting or misapplying the test for adding a party pursuant to section 3.75(3) of the *Rules of Court* and ignoring critical and determinative legal principles and the CM Judge’s own previous decisions in determining that the Appellants should not be added as parties to the Proceeding;
- (b) Awarding solicitor and client own indemnity costs against Patrick and Shelby and denying advanced costs of the Appellants on the basis of a misinterpretation or misapplication of the legal principles for costs awards; and

⁹ *Alberta Rules of Court*, Alta Reg 124/2010 (“*Rules of Court*”), r 4.14 [AA, Tab 5].

¹⁰ Reasons for Judgment at para 27, Appeal Record 000005, para 34, Appeal Record 000006 and paras 40 – 44, Appeal Record 000007.

¹¹ Reasons for Judgment at para 54, Appeal Record 000008.

- (c) Exceeding his jurisdiction in providing advice and direction with respect to the 1985 Sawridge Trust in the absence of a constating application and in granting final relief as it relates to the Appellants on the issue of who is a current beneficiary.

PART 3. STANDARD OF REVIEW

15. The standard of review for decisions of a case management judge is correctness for questions of law and reasonableness with respect to discretionary decisions.¹² Absent an error in law, a high degree of deference is given to interim orders made by a case management judge.¹³ A discretionary decision will only be interfered with on appeal if it is based on an error in principle, or is wholly unreasonable.

16. If a case management judge fails to give sufficient weight to relevant factors, proceeds arbitrarily or on wrong principles or an erroneous view of the facts, or there is likely to be a failure of justice, appellate intervention is warranted.¹⁴

17. The exercise of discretion under the Rules of Court is reviewable on the reasonableness standard.¹⁵

18. A costs decision is reviewable on the standards of reasonableness with respect to the exercise of discretion to award costs and correctness with respect to a failure to give sufficient weight to relevant factors and reliance on wrong principles.¹⁶

19. Jurisdiction issues are a question of law for which the standard of review is correctness.¹⁷

PART 4. ARGUMENT

A. The CM Judge erred in misinterpreting or misapplying the test for adding a party pursuant to section 3.75(3) of the Rules of Court and ignoring critical and determinative legal principles and the CM Judge's own previous decisions in determining that the Appellants should not be added as parties to the Proceeding

20. Rule 3.75(3) of the *Rules of Court* sets out the test for adding a respondent to an originating application. The rule provides that the Court has discretion to add parties where the "Court is

¹² *Pintea v Johns*, 2016 ABCA 99 at para 7 [AA, Tab 3].

¹³ *Lofstrom v Radke*, 2017 ABCA 287 at para 4 [AA, Tab 4].

¹⁴ *Castledowns Law Office Management Ltd. v FastTrack Technologies Inc.*, 2012 ABCA 219 ("*Castledowns*") at paras 14-15 [AA, Tab 6].

¹⁵ *Castledowns* at paras 14-15 [AA, Tab 6]; *Hill v Hill*, 2013 ABCA 313 at para 54 [AA, Tab 8].

¹⁶ *Horst Tyson Dahlem v Canmore Legal Services*, 2017 ABCA 97 at para 11 [AA, Tab 7].

¹⁷ *Chisholm v Lindsay*, 2017 ABCA 21 at para 7 [AA, Tab 9].

satisfied the order should be made” but provides that “[t]he 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”.¹⁸

(a) The Court must be “satisfied the Order should be made”

21. The requirement that the Court must be “satisfied the Order should be made” has been interpreted to mean that “justice must require the addition of the parties”.¹⁹

22. The issues in the Proceeding include an interpretation and possible variation to the definition of “Beneficiaries” in the 1985 Sawridge Trust. The *Trustee Act* expressly provides that beneficiaries must consent in writing to any variation of a trust and also expressly states that neither the Court nor any other party (such as the Trustees or the OPTG) can consent on behalf of adult beneficiaries.²⁰ Further, the *Trustee Act* requires the Court to be satisfied that any variation is “of a justifiable character”. To be of a “justifiable character” the Court must “balance the intentions of the settlor with the wishes of the beneficiaries”.

23. Beneficiaries cannot provide meaningful and informed consent if they are not parties to the Proceeding and are thereby provided with full access, information and representation. Further, on the substantive hearing of the issue of the definition of “Beneficiaries”, the Court will not have the requisite information regarding the opinions, advice and “wishes of the beneficiaries” that it requires to meet its obligation to ensure that any variation is of a “justifiable character”.

24. Notwithstanding these clear statutory requirements, the CM Judge expressly declined to consider the consent requirements at all.²¹ This failure to consider such a critical and relevant factor results in an error in principle and is wholly unreasonable.

25. Justice clearly requires the addition of beneficiaries based on the requirements in the *Trustee Act*. The CM Judge seemingly acknowledges that beneficiaries have a role in the Proceeding but did not allow independent representation by Patrick and Shelby based on his conclusion that they are beneficiaries and, as such, are already represented by the OPTG.²² This is

¹⁸ *Rules of Court*, r 3.75 [AA, Tab 10].

¹⁹ *McFaul v Ranch-Lewchuk*, 2015 ABQB 706 at para 62 [AA, Tab 11].

²⁰ *Trustee Act*, s 42(5) [AA, Tab 1].

²¹ Reasons for Decision at para 45, Appeal Record 000007.

²² Reasons for Judgment at para 34, Appeal Record 000006.

incorrect and clearly based on an erroneous view of the CM Judge's own decision regarding the OPTG.

26. Adult beneficiaries are not represented in this Proceeding. The OPTG can only represent disabled adults, missing and unborn or minors during the course of the litigation.²³ Neither Patrick nor Shelby are disabled, or missing, or have been minors at any point during the course of the litigation.

27. Further, the interests of the Trustees are not necessarily aligned with and in fact may be diametrically opposed to the interests of the beneficiaries given the conflict of interest that has been acknowledged. As such, beneficiaries cannot be represented by the Trustees. They require independent representation to provide input and have their interests protected.

28. The Case Management Judge's determination that Patrick and Shelby are not necessary to the Proceeding is clearly based on an interpretation of his decision regarding the OPTG and it is wholly unreasonable given the requirements under the *Trustee Act* and is a reviewable error.

29. Further, apart from the requirements of the *Trustee Act*, it is clear that justice requires potential and current beneficiaries to be parties to the Proceeding given the effect on their status and rights. As the CM Judge has noted in a previous decision, "... 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".²⁴

30. A failure to consider the advice and opinions of parties whose important legal rights will be substantially impacted and even deleted is a failure of justice.

31. The CM Judge considered the importance of independent representation for both potentially excluded and affected children in his decision allowing the OPTG to act as a party, stating "it is plain and obvious that the interests of the affected children, potentially excluded or otherwise affected by changes proposed by the Trust, require protection which can only be ensured by means of independent representation".²⁵

²³ In *Sawridge #1* at para 33 [AA, Tab 2] the CM Judge held that the Public Trustee would be appointed as litigation representative of "minors who are children of current Band members" and "the children of applicants for Band membership who are also minors".

²⁴ *Sawridge #1* at para 25 [AA, Tab 2].

²⁵ *1985 Sawridge Trust v Alberta (Public Trustee)*, 2013 ABCA 226 at para 27 [AA, Tab 12].

32. The same circumstances exist for adult potential and current beneficiaries. The CM Judge failed to provide any justification for the inconsistent consideration of these factors in the two identical circumstances resulting in an error in principle and in a wholly unreasonable exercise of his discretion.

33. The fact that current and potential beneficiaries are not represented is particularly problematic in the circumstances given the previous acknowledgment by the CM Judge of a clear conflict of interest between the personal interests of the Trustees and their duties as fiduciaries.²⁶

34. The proposal of the Trustees is that the definition of "Beneficiaries" be varied to be limited to current members of the Sawridge First Nation. Membership in the Sawridge First Nation is determined by the Sawridge Band Chief and Council, which Council includes certain Sawridge Trustees. As a result of that conflict, the CM Judge found that separate representation of the minors was warranted in the Proceeding, stating:

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.²⁷

35. This effect of this Decision is to deny the Appellants representation notwithstanding the existence of the exact same conflict of interest and results in a failure to consider the appropriate considerations resulting in a fundamental error in principle and a wholly unreasonable exercise of discretion by the CM Judge.

(b) Prejudice

36. In *Amoco Canada Petroleum Co. v Alberta & Southern Gas Co.*, the Court held that the prejudice to be considered in adding a party to an action relates to the enjoyment of a party's legal rights and not to a party's commercial interests.²⁸

37. The CM Judge held that prejudice to the Trustees and the 1985 Sawridge Trust would result from adding the Appellants as parties. However, all of the factors referenced in support of his

²⁶ Sawridge #1 at para 25 [AA, Tab 2].

²⁷ *Ibid.*

²⁸ *Amoco Canada Petroleum Co. v Alberta & Southern Gas Co.*, 1993 CanLII 7084 (AB QB) at para 23 [AA, Tab 13].

finding of prejudice relate to the financial or commercial interests of the Trustees, including in particular the cost of litigation, and not to legal rights.²⁹

38. One factor regarding prejudice noted by the CM Judge is delay in the Proceedings. Although the Proceeding has been protracted to date, this is not the result of any conduct by the Appellants. To the contrary, the Appellants requested to become parties to the Proceeding at the first instance where the issue affecting their interests as beneficiaries was stated to be heard. Given that a trial on the issue of the definition of “Beneficiaries” has yet to even be scheduled, there is no prejudice to the Trustees in adding additional parties at this point in time.

39. To the contrary, there would in fact be prejudice to the Trustees if significant time and expense are expended in hearing the matter absent the beneficiaries, if the adult beneficiaries refuse to provide written consent to the variation of the trust at the end of the process.

40. There is significant prejudice to the legal interests of the Appellants in being denied party status given that their status as beneficiaries or potential beneficiaries and their entitlement to trust property could be significantly altered or even extinguished as a result of the Proceeding. Denying the parties an opportunity to participate in the Proceeding is highly prejudicial to their legal rights.

41. As such, the CM Judge has erred in law in failing to properly consider the correct type of prejudice in the test for adding a party under rule 3.75(3).

B. The CM Judge erred in awarding solicitor and client own indemnity costs against Patrick and Shelby and denying advanced costs of the Appellants on the basis of a misinterpretation or misapplication of the legal principles for costs awards

42. The Court has discretion in making costs awards, however the discretion is not unlimited. The general rule is that the unsuccessful party will be ordered to pay costs to the successful party.³⁰

43. An award of solicitor and own client indemnity costs is “reserved for exceptional circumstances”³¹ and is “rare and exceptional, and is of a punitive nature in itself”³². While a Court has discretion to make such an award “judicial authority to order solicitor-client costs is not totally

²⁹ Reasons for Judgment at para 27, Appeal Record 000005.

³⁰ *Babchuk v Kutz*, 2007 ABQB 88 (“Babchuk”) at para 5 [AA, Tab 14].

³¹ *College of Physicians & Surgeons*, 2009 ABQB 48 at para 20 [AA, Tab 15].

³² *Powermax Energy Inc. v Argonauts Group Ltd.*, 2003 AB4B 543 at para 29 [AA, Tab 16].

unfettered, and must be awarded in accordance with established legal principles regarding when such an 'exceptional' award is justified".³³

44. The established legal principles regarding when solicitor and client own indemnity costs are warranted include unreasonable misconduct during the litigation, behaviour that would hinder, delay or confuse the litigation, attempts to deceive the court and defeat justice; and positive misconduct by a party that is "so blatant and is calculated to deliberately harm the other party".³⁴ There is no evidence of any such conduct and the CM Judge cites none.

45. The CM Judge's award of solicitor and own client indemnity costs against Patrick and Shelby ignores or misapplies the well-established legal principles regarding when solicitor and client own indemnity costs are warranted.

46. There are no factual findings to support any conclusion that the litigation conduct of Patrick and Shelby was "reprehensible, scandalous or outrageous" or that there was any deliberate misconduct or bad faith by Patrick and Shelby. The participation of the Appellants in an application which could alter and even delete their status as beneficiaries is imperative. The Appellants application has not impacted or delayed the proceedings or used limited resources. The application was taken on a date when a case management appearance was already scheduled. The Court dealt with the matter quickly, ordering that briefs be filed, with no oral argument. Questioning on affidavits filed in support took place over 1 ½ days.

47. This case is distinguishable on its facts from cases where elevated costs awards have been awarded based on reprehensible egregious conduct. For example in the *Brown v Silvera* decision cited by the CM Judge, the Court found that elevated costs were warranted on the basis of reprehensible, scandalous, outrageous or fraudulent conduct constituting blameworthiness in the conduct of the litigation where the plaintiff did something to hinder, delay or confuse the litigation or there was an attempt to delay, deceive and defeat justice.³⁵

48. The CM Judge's misapplication of the appropriate legal principles is particularly evident when comparing the litigation conduct of the Appellants to the litigation conduct of Maurice

³³ *Stagg v Condominium Plan No. 882-2999*, 2013 ABQB 684 at para 32 [AA, Tab 17].

³⁴ *Meads v Meads*, 2012 ABQB 571 at para 597 [AA, Tab 18].

³⁵ *Brown v Silvera*, 2010 ABQB 224 at paras 31, 33 and 37 [AA, Tab 20]. Case is cited in the Reasons for Judgment at para 52, Appeal Record 000008.

Stoney in a similar application in this Proceeding determined by the same process at the same time. The CM Judge seemingly equates the conduct of the Appellants with the conduct of Mr. Stoney notwithstanding the extensive litigation over Mr. Stoney's behaviour, including an order restricting Mr. Stoney's access to Alberta courts on the basis of abusive litigation conduct.³⁶ The Appellants behaviour is not comparable in any way, with the actions of the Appellants being that they are justified and appropriate in the circumstances to protect their legal interests as beneficiaries or potential beneficiaries.

49. The CM Judge seems to allege that the Appellants knew or ought to have known that they had no participatory rights to be parties to the proceedings *ab initio*. There is no evidence of that knowledge and the application was made in good faith. As well, there is a presupposition or predetermination by the CM Judge that there will be increased costs, delay and expansion of the issues with the addition of the Appellants without evidence to support that determination.

50. Further, to the extent that any behaviour by Patrick and Shelby somehow amounts to the level of misconduct required to justify such a cost awards, such behaviour was identical to any conduct of Deborah. Given the purpose of punitive costs awards to deter improper litigation practices, the CM Judge has fundamentally erred in principle and was unreasonable in exercising his discretion in distinguishing the costs awards between the Appellants.

51. In his Reasons for Judgment, the CM Judge noted a parallel between this case and estate disputes referring to a "cultural shift" in Canada to deter meritless litigation activities by trust beneficiaries. He relied on case law in the estate context to justify the cost award against Patrick and Shelby.

52. In the estates context often the estate will indemnify the legal costs of an unsuccessful litigant, however the appropriateness of indemnification requires a Court to "scrutinize the litigation carefully to restrict unwarranted litigation and protect estates from being depleted by such litigation".³⁷ There are a number of factors to be considered in determining whether the court should award costs against an unsuccessful party in estate litigation: did the testator cause the litigation?; was the challenge reasonable?; was the conduct of the parties reasonable?; was there

³⁶ *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436 [AA, Tab 21].

³⁷ *Babchuk* at para 7 [AA, Tab 14].

an allegation of undue influence?; were there different issues or periods of time in which costs should differ?; and were there offers to settle?³⁸

53. This Proceeding does not involve estate litigation such as a claim against an estate or formal proof of will, rather it is an application for advice and direction relating to the interpretation of a trust. There is no basis to find a parallel to cost considerations in the estate litigation context here. None of the factors to be considered in determining whether the court should award costs to an unsuccessful party in estate litigation have any application. The Appellants: did not “cause the litigation”; their application to be included as parties is wholly reasonable based on their legal rights as beneficiaries; their involvement in the proceedings have been extremely limited and reasonable; and there is no allegation of undue influence.³⁹ Additionally, the Appellants are within the recognized exception of “interpretation of a will or trust”, for which costs do not follow the event.⁴⁰

54. The estate litigation cost principles are designed for adversarial litigation. In this case, this is not an adversarial application. It is an application by beneficiaries or potential beneficiaries to be added as parties to an advice and direction application relating to a trust. Estate litigation cost principles have no relevance or parallel here and the CM Judge’s application of those principles in this context is an error of law or error in principle or is a wholly unreasonable exercise of his discretion.

55. The CM Judge dismissed the application for advance costs by the Appellants. It is commonly accepted that where an action is brought by trustees for guidance from the court as to the construction or the administration of a trust “the costs of all parties necessarily incurred for the benefit of the estate will be paid from the fund”.⁴¹ The CM Judge failed to provide sufficient reason to justify a derivation from this principle and his decision on this issue amounts to a reviewable error.

C. The CM Judge Lacked Jurisdiction to Make the Order

56. The jurisdiction of the court to provide opinion, advice and direction on questions respecting the management or administration of trust property is set out in section 43 of the *Trustee*

³⁸ *Babchuk* at para 5 [AA, Tab 14].

³⁹ *Babchuk* at para 5 [AA, Tab 14].

⁴⁰ *Foote Estate (Re)*, 2010 ABQB 197 at para 21 [AA, Tab 19].

⁴¹ *Deans v Thachuk*, 2005 ABCA 368 at para 43 [AA, Tab 22].

Act.⁴² The Trustees have not filed an application on the issue of the definition of “Beneficiaries” in the 1985 Sawridge Trust and as such the CM Judge has exceeded his jurisdiction in determining matters related to the trust in the absence of a constating application.

57. If the CM Judge somehow does have jurisdiction to make decisions in this Proceeding, he also exceeded his jurisdiction in making a decision that effectively results in a final determination of a core issue to be considered: the meaning of “Beneficiaries” under the 1985 Sawridge Trust. In declaring that Patrick and Shelby are current beneficiaries under the 1985 Sawridge Trust and that Deborah is not a beneficiary,⁴³ the CM Judge made a final determination on whether they are beneficiaries which is outside the scope of his authority under rule 4.14.⁴⁴

58. Further, the CM Judge dismissed the claims for an accounting from the Trustees at paragraph 1 of his Reasons for Judgment. The issue of the accounting was adjourned from this hearing to be determined at a later date, and as such this issue was not properly before the CM Judge and he did not have jurisdiction to make such an order.

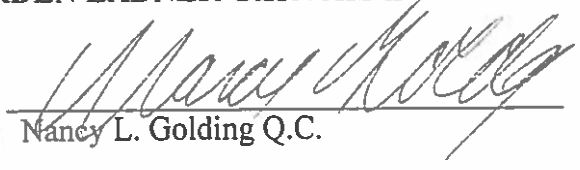
PART 5. RELIEF SOUGHT

59. That the within appeal be allowed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of September, 2017.

Estimated Time of Argument: 45 minutes.

BORDEN LADNER GERVAIS LLP

Per: 
Nancy L. Golding Q.C.

⁴² *Trustee Act*, s 43 [AA, Tab 1].

⁴³ Reasons for Decision at para 40, Appeal Record.

⁴⁴ *Alberta Rules of Court*, Alta Reg 124/2010, r 4.14 [AA, Tab 5].

LIST OF AUTHORITIES

Tab	Authority
1.	<i>Trustee Act</i> , RSA 2000, c T-8
2.	<i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2012 ABQB 365
3.	<i>Pintea v Johns</i> , 2016 ABCA 99
4.	<i>Lofstrom v Radke</i> , 2017 ABCA 287
5.	<i>Alberta Rules of Court</i> , Alta Reg 124/2010, r 4.14
6.	<i>Castledowns Law Office Management Ltd. v FastTrack Technologies Inc.</i> , 2012 ABCA 219
7.	<i>Horst Tyson Dahlem v Canmore Legal Services</i> , 2017 ABCA 97
8.	<i>Hill v Hill</i> , 2013 ABCA 313
9.	<i>Chisholm v Lindsay</i> , 2017 ABCA 21
10.	<i>Alberta Rules of Court</i> , Alta Reg 124/2010, r 3.75
11.	<i>McFaul v Ranch-Lewchuk</i> , 2015 ABQB 706
12.	<i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2013 ABCA 226
13.	<i>Amoco Canada Petroleum Co. v Alberta & Southern Gas Co.</i> , 1993 CanLII 7084 (AB QB), 10 Alta. L.R. (3d) 325
14.	<i>Babchuk v Kutz</i> , 2007 ABQB 88
15.	<i>Powermax Energy Inc. v Argonauts Group Ltd.</i> , 2003 ABQB 543
16.	<i>College of Physicians & Surgeons</i> , 2009 ABQB 48
17.	<i>Stagg v Condominium Plan No. 882-2999</i> , 2013 ABQB 684
18.	<i>Meads v Meads</i> , 2012 ABQB 571
19.	<i>Foote Estate (Re)</i> , 2010 ABQB 197
20.	<i>Brown v Silvera</i> , 2010 ABQB 224
21.	<i>1985 Sawridge Trust v Alberta (Public Trustee)</i> , 2017 ABQB 436
22.	<i>Deans v Thachuk</i> , 2005 ABCA 368