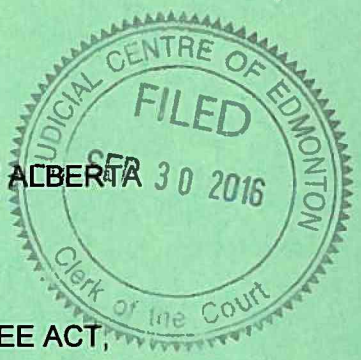
Clerk's stamp:



COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	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 and THE SAWRIDGE TRUST ("Sawridge Trusts")
APPLICANTS	ROLAND TWINN, WALTER FELIX TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO and CATHERINE TWINN, as Trustees for the Sawridge Trusts
DOCUMENT	**BRIEF OF THE SAWRIDGE TRUSTEES: APPLICATION FOR SECURITY FOR COSTS – Maurice Felix Stoney**
PARTY FILING THIS DOCUMENT	**SAWRIDGE TRUSTEES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Facsimile: (780) 423-7276 File No: 551860-1-DCEB

The Sawridge Trustees respectfully request that the Honourable Court review the within material only in the event that Mr. Maurice Felix Stoney is permitted to be a party or Intervenor in these proceedings.

TABLE OF CONTENTS

PART I - INTRODUCTION

1. The Sawridge Trustees request that the Honourable Court review the within material only in the event that Mr. Maurice Felix Stoney ("Stoney") is permitted by this Honourable Court to be a party or Intervenor in these proceedings.

2. If Stoney is granted either party or intervenor status, the Applicant Trustees (the "Sawridge Trustees") of the Sawridge Band *Inter Vivos* Settlement dated April 15, 1985 (the "1985 Trust") seek an order directing that Mr. Maurice Felix Stoney ("Stoney") pay security for costs into court pursuant to Rule 4.22 of the *Alberta Rules of Court* in respect of his participation in this action.

PART II– SUBMISSIONS

A. Relevant Facts

3. The Sawridge Trustees are currently before the Court to seek the advice and direction of the Court in regard to making any necessary variations to the 1985 Trust to deal with discrimination in the definition of beneficiary in the 1985 Trust.

4. The relevant facts in respect of Stoney's frequent and unsuccessful appearances before many levels of court and tribunals in respect of the same issue of membership in the First Nation are very well outlined in the affidavit of Chief Roland Twinn of the Sawridge First Nation ("First Nation") filed in respect of the application by Stoney. The facts are further analyzed in the brief filed by the First Nation . The Sawridge Trustees adopt the facts and arguments presented by the First Nation.

5. Stoney has already been unsuccessful in obtaining membership before at least 5 judicial or quasi-judicial hearings. Stoney is not a beneficiary of the 1985 Trust. Further, Justice Watson of the Alberta Court of Appeal stated that Mr. Stoney does not have a participatory right in relation to the proceedings on the trust.

   - *Stoney v 1985 Sawridge Trust*, 2016 ABCA 51, at para 20 **[TAB 1]**

6. Stoney was unsuccessful in obtaining an extension of time to appeal before Justice Watson and costs were awarded against him in favor of Sawridge First Nation and in favour of the Sawridge Trustees.

   - *Stoney v 1985 Sawridge Trust, supra* **[TAB 1]**

7. The amount awarded to the Sawridge Trustees has been reduced by a set-off of conduct monies payable to Stoney by the 1985 Trust for his attendance at a recent Questioning. Stoney has not paid the remainder of the costs.

8. As set out in the brief and affidavit filed on behalf of the First Nation, Stoney also owes the First Nation substantial costs from cost awards of courts in previous proceedings which remain unpaid.

B. The Law and Analysis

9. Security for costs always involves a balancing of two competing interests. The right to economic security of the party seeking security as matched to the right of legal process of the responding party.

10. Pursuant to Rule 4.22:

> *The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following:*
>
> *(a) whether it is likely the applicant for the order will be able to enforce an order or judgment against assets in Alberta;*
>
> *(b) the ability of the respondent to the application to pay the costs award;*
>
> *(c) the merits of the action in which the application is filed;*
>
> *(d) whether an order to give security for payment of a costs award would unduly prejudice the respondent's ability to continue the action;*
>
> *(e) any other matter the Court considers appropriate.*

11. The test for ordering for security for costs is well-established and includes:

(a) It is just and reasonable to order security for costs;

(b) Special circumstances exist; and

(c) Once special circumstances have been established, the onus shifts to the appellant to establish that the person has a reasonable prospect of success in the action;

- *Ellis v. Friedland*, 2001 ABCA 45, 277 AR 126 at paras 11-15 **[TAB 2]**

Just and Reasonable:

12. We submit that it is just and reasonable to order costs in this case as the Respondent Stoney has repeatedly litigated the same issue. He has pursued the issue of membership with the same frequency as a vexatious litigant but with no inherent consequences because he does not to pay the costs awarded against him. The courts have dismissed his numerous cases on the basis of res judicata

and issue estoppel. He has shown no respect for the finality of decisions issued by the court. His questioning shows that he does not respect the process of discovery as he simply refused to answer basic questions even though his counsel did not object. He has waited for 5 years from the start of this action and basically done nothing to participate. Specifically he did not follow the court orders to file an affidavit in accordance with a time schedule required by the court orders. He delayed filing an appeal and then unsuccessfully sought leave to extend time. Finally he has been found to be a stranger to the litigation by the Court of Appeal.

- Transcript of the Questioning of Stoney of September 23, 2016 at pgs. 41, l.16 to 42, l.25; pg 45, ll. 7 to 13; pgs 54, l. 7 to 55, l.6; pg 61, ll. 3 to 21; pgs 63, l. 13 to 65, l.2; pg 66, l.9 to page 67, l.19 **[TAB 3]**

- Order August 30, 2011, Justice Thomas **[TAB 4]**

Special Circumstances

13. In awarding security for costs if "special circumstance" is established, the burden shifts to the Respondent to establish a reasonable prospect of success.

14. In *Moses v. Weninger*, Hunt, J.A. held that where a portion of the trial costs remain outstanding there are special circumstances:

"If there are special circumstances, the onus shifts to the appellant to establish a reasonable prospect of success on the appeal...Ordering a poor appellant to pay security for costs where there is no reasonable prospect of success is not tantamount to a summary dismissal of the appeal...There is little prospect of success when the decision under appeal is discretionary, there is no obvious error in the judgment below, and the appellant has twice argued her case and twice lost..." [internal citations omitted]

- *Moses v. Weninger*, 2006 ABCA 52, 380 AR 230 at para 27 **[TAB 5]**

15. In *Moses, supra*, the Court granted security for costs on the basis that evidence showed that the appellant was impecunious and the appellant failed to rebut that evidence. In addition, the appellant had no reasonable prospect of success.

16. Stoney has failed to pay the costs ordered by the Court in three proceedings. This can only lead to the conclusion that Stoney either refuses to abide by court orders or that he cannot pay as he is impecunious. He refused to answer questions about the costs at the questioning

- Transcript of the Questioning of Stoney of September 23, 2016, pgs 47, l.15 to 48, l. 27; pgs 50 l.7 to 53, l.7 **[TAB 3]**

17. Failure to rebut any evidence of impecuniosity shifts the onus to Stoney to establish a reasonable prospect of success.

- *Ellis v. Friedland*, *supra* at paras 16 - 17. **[TAB 2]**
- *ABC Color & Sound Ltd v. Royal Bank*, (1990) 109 AR 156 at para 11. **[TAB 6]**

18. Special circumstances also exist because of the multiple legal proceedings commenced by Stoney which have had no success whatsoever. Those proceedings have needlessly expended the respective Courts' and tribunals' time and resources. It has also cost successful litigants a considerable amount in legal fees without any reimbursement.

Reasonable Prospect of Success

19. There is no genuine issue for hearing with respect to the Stoney's participation in this action.

20. When Stoney's family enfranchised he and his brothers and sisters were no longer members of the Sawridge First Nation. Thus he does not qualify as a beneficiary of the 1985 Trust and should not be a litigant in the action.

21. Based on the history of Stoney's attempt to become a member of Sawridge First Nation at the various levels of court and tribunals, the Sawridge Trustees oppose the Application on the merits and argue that this is a vexatious attempt to re-litigate issues which have been dealt with several times previously.

22. The Sawridge Trustees submit that the 10 living brothers and sisters are in positions similar to Stoney as they are all enfranchised and thus have no claim to membership and no claim to be a beneficiary of the 1985 Trust.

23. It is unlikely that Stoney would have the ability to pay any costs awards in this Action and it is further unlikely that the Sawridge Trustees would be able to enforce an Order or Judgment against the assets of Stoney.

24. Even if Stoney is not impecunious, he should not be permitted to continue to bring frivolous and vexatious actions which are costly, when he has a pattern of failing to abide by the Court orders to pay costs and failing to abide by the time lines imposed. He failed to abide by the time lines for filing affidavits in this action and failed to file an appeal on time resulting in an unsuccessful leave application.

25. Since participation in this action by Stoney and his 10 brothers and sisters will increase legal fees substantially, it is just and reasonable for Stoney to be required to post security for costs in this action, at least up to the end of Questioning.

26. The amount of fees, on a party and party basis (Column 1 of Schedule "C"), that will be required is attached at **TAB 7.**

PART III– REMEDY SOUGHT

27. The Sawridge Trustees respectfully seek an order:

(a) directing Stoney to pay Security for Costs into Court in the amount outlined in the attached Bill of Costs or in such further amount as this Honorable Court may direct.

(b) setting the value of the above security for costs, in any event, in an amount no less than $18,000.00 to satisfy costs awards already made against Stoney and possible future cost awards;

(c) directing that Stoney furnish the above security for costs within one month or such other time as may be specified in the Order;

(d) directing that, if the above security for costs is not paid with the time prescribed by the Order, Stoney et al shall be removed as a Party or an Intervenor in this Action without further Order of this Honourable Court;

(e) directing that the costs of this Application be payable to the Sawridge Trustees, forthwith and in any event of the cause; and

(f) directing such further Orders or directions as this Honourable Court deems just and appropriate

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th DAY OF SEPTEMBER, 2016.

DENTONS CANADA LLP

Per: 

for Doris C.E. Bonora
Solicitor for the Sawridge Trustees

In the Court of Appeal of Alberta

Citation: Stoney v 1985 Sawridge Trust, 2016 ABCA 51

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

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

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

Between:

Maurice Stoney

Applicant (Putative)

- and -

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

Respondents

- and -

Public Trustee of Alberta

Respondent

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

Application to Extend Time to File Appeal

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23] The application is dismissed.

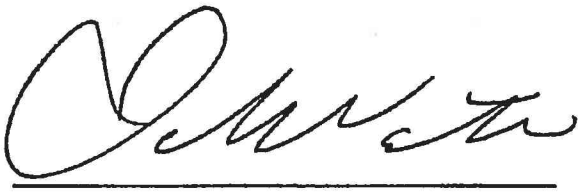
[Discussion with counsel re costs]

Watson J.A.:

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

Application heard on February 17, 2016

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



Watson J.A.

Appearances:

P.E. Kennedy
for the Applicant (Putative)

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

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

C. Osualdini
for the Respondent Catherine Twinn

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

Date: 20010215
Docket: 00-19072

IN THE COURT OF APPEAL OF ALBERTA

THE HONOURABLE MR. JUSTICE WITTMANN
IN CHAMBERS

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01 058 121

BETWEEN:

JOHN M. ELLIS

Appellant/Plaintiff

- and -

ROBERT FRIEDLAND

Respondent/Defendant

APPLICATION FOR AN ORDER FOR SECURITY FOR COSTS

MEMORANDUM OF DECISION

COUNSEL:
James C. Crawford, Q.C.
For the Appellant, John M. Ellis
Sean S. Smyth
Ariel Z. Breitman
For the Respondent, Robert Friedland

MEMORANDUM OF DECISION

Introduction

[1] The respondent in this appeal, Robert Friedland, applies pursuant to Rules 524(1) and 593(1.1) for security for costs of the appeal.

Facts

[2] The appellant, John M. Ellis, commenced an action against the respondent. He sold his shares in two companies to the respondent and executed a mutual release with the two companies. He later sought to set aside his sale of shares and set aside the release. He alleged that the sales and release were the result of duress, intimidation and threats. He also claimed the bargain was unconscionable.

[3] Prior to trial, an order granted January 29, 1999 by Power, J. required the appellant to post security for costs of the trial in the amount of $60,000,00. By further order of Power, J., dated January 25, 2000, the appellant was required to post a further $10,000.00. The appellant paid $70,000.00 into court prior to the trial.

[4] The action was tried, and by reasons dated September 20, 2000, the learned trial judge dismissed the appellant's claim and by his order dated November 28, 2000, the learned trial judge awarded costs to the respondent in the sum of $310,000.00.

[5] After trial, the respondent obtained a world wide *Mareva*-type injunction preventing the appellant or his wife from dealing with their assets in any manner which would prevent the respondent from recovering his costs.

[6] The appellant and his spouse had only one substantial asset, lands in Alberta. The respondent deposed that those lands had been subject to pre-trial manipulation by various transfers of ownership between the appellant and his wife. On September 22, 2000, the property was sold, allegedly for $450,000.00. The injunction order captured $410,000.00 of the proceeds for the sale which were in the hands of the vendors' solicitors.

[7] On December 5, 2000, Power, J. ordered distribution of the $410,000.00 and the $70,000.00 previously paid into court. He directed that the $70,000.00 paid into court as security for costs of the trial be paid to the respondent in partial satisfaction of his costs judgment. Of the $410,000.00, $205,000.00 was paid in further partial satisfaction of the costs judgment. The sum of $35,000.00 was paid into court and was subject to a further application to determine whether the respondent or the appellant's wife should receive the amount. A

further $25,000.00 was paid into court subject to an application to this Court for security for costs of the appeal. The remaining $145,000.00 and the injunction order were released.

[8] As a result, $35,000.00 of the respondent's trial costs judgment remains unsatisfied.

[9] The appellant no longer has any assets in Alberta. The appellant's counsel advises that the appellant is currently working in California where he lives with his wife.

[10] The respondent calculates that based on Schedule C, Column 4, of the Rules of Court, the costs of the appeal will amount to $17,200.00. The appellant does not dispute the applicability of Column 4. In addition, disbursements will amount to no less than $3,000.00. Further, the respondent has made and served a formal offer of judgment pursuant to R. 169 offering to accept an abandonment of the appeal without costs. Absent any special reason, if the respondent is successful on appeal, the costs of the fee portion of the appeal would double to $34,400.00.

The test for security for costs

[11] Rule 524(1) provides:

> No security for costs shall be required in appeals unless by reason of special circumstances security is ordered by a judge.

[12] Rule 593(1.1) provides:

> Notwithstanding subsection (1), the Court may order security for costs against any party where the Court, on its own motion or on the motion of any other party, finds that it is just and reasonable to do so in the circumstances.

[13] The effect of the two rules is that where it is just and reasonable to do so, and where the respondent to the appeal can demonstrate special circumstances, the court may order security for costs against the appellant: ***Rushton* v. *Owners Condo. Plan No. 8820668 et al.*** (1998), 219 A.R. 51 (C.A.) at 58. The respondent argues that the special circumstance in this case is the appellant's inability to pay the costs of the appeal.

[14] The case law has added a further criterion. Once the respondent proves that special circumstances exist, the onus then shifts to the appellant to establish that the appeal has some reasonable prospect of success: ***ABC Color & Sound Ltd.* v. *Royal Bank*** (1990), 76 Alta. L.R. (2d) 73 (C.A.) at 76-77.

[15] Where "there is no obvious error in the judgment", there is, without more, no reasonable prospect of success: ***Verth*** **v.** ***Howrie*** (1995), 31 Alta. L.R. (3d) 441 (C.A.) at 442.

Application of the test to this case

[16] The test for an order for security for costs is met in this application. The $25,000.00 paid into court is not sufficient to pay the costs of an appeal. A portion of the trial costs remain outstanding, namely $35,000.00. The appellant now resides outside of this jurisdiction and lacks any exigible assets in this jurisdiction. Together, these facts clearly constitute special circumstances for the purposes of R. 524(1).

[17] Therefore, the onus is on the appellant to establish that he has a reasonable prospect of success on appeal.

[18] The appellant's grounds for this appeal rest largely on disputing the learned trial judge's findings of fact based on the evidence and disputing the learned trial judge's decision to decline to exercise his discretion to grant equitable relief. The appellant appears unlikely to be able to establish that the learned trial judge's conclusions were unreasonable or based on an overriding and palpable error.

[19] The learned trial judge addressed each of the allegations raised by the appellant to support his claim. The learned trial judge's conclusions regarding each allegation appear to have been carefully considered and based on the evidence before him. For example, he found that the appellant had not acted under duress when he transferred the shares to the respondent and signed a mutual release. In particular, based on the evidence, the learned trial judge concluded that there were no physical threats by the respondent or anyone on his behalf against the appellant or his family. The learned trial judge also found that the evidence did not support the appellant's allegation that the respondent threatened to pursue criminal charges.

[20] With respect to the threats of civil litigation, the learned trial judge found that the appellant's deceptive behaviour would have justified litigation and perhaps dismissal. He found that the appellant fundamentally altered a share exchange agreement and an employment agreement and then misled the respondent regarding those two critical documents. This behaviour precipitated the threats of litigation. The learned trial judge was not persuaded that the threat of litigation was abusive or improper and suggested that the appellant did not appear to appreciate the serious nature of his conduct.

[21] Nor did the learned trial judge conclude there was economic duress. He found that the appellant had other choices; he was free to sell his shares to another investor for a better price subject to the respondent's right of first refusal. The learned trial judge also found that the appellant's behaviour suggested there was no coercion. The appellant did not protest the sale or take any steps to avoid it until a year and a half after the sale had been made. In addition, the learned trial judge found that the appellant made his bargain, including the obtaining of the release after receiving, and choosing to ignore, legal advice, considering his options and negotiating to obtain the terms in the release. He concluded there was no actionable duress and such pressure as was applied was legitimate in the context of the appellant's conduct.

[22] The learned trial judge also concluded that the transaction was not unconscionable. He held that the test required that there be an inequality of bargaining position and that the bargain was improvident. He concluded that there was no significant inequality such that the appellant was in the respondent's power. He also found that the bargain was not improvident because the appellant received back his original purchase price and obtained a release of all claims against him. The learned trial judge found that. had the appellant not made his bargain, the shares would have been worthless if the respondent had withdrawn his support for the venture.

[23] Moreover, in light of the appellant's conduct, he concluded that community standards would not find the bargain unconscionable.

[24] The appellant is unable to point to an error of law made by the learned trial judge. To succeed in his appeal, the appellant would require this Court to make new fact findings and/or to overturn the learned trial judge's exercise of discretion. The appellant would have to demonstrate that the learned trial judge made an overriding and palpable error or that he exercised his discretion unreasonably. The standard of appellate review for such grounds creates a heavy onus on the appellant. In this application, he has been unable to establish that he had a reasonable prospect of succeeding.

[25] Thus, applying the test in R. 593(1.1), it is just and reasonable to order security for costs as there is no reasonable prospect of success on appeal.

Amount for security for costs

[26] The respondent has satisfied the test for an order for security for costs for the appeal. Those costs if doubled are estimated to total $34,400.00. Disbursements are estimated to be at least $3,000.00.

[27] In addition, this Court has held that where security for trial costs could have been obtained or where it is the appellant's fault that assets are not available to the respondent,

unpaid trial costs may form part of the security for costs of the appeal: ***Verth* v. *Howrie*, *supra*** at 442. In this case, the respondent's unpaid trial costs, $35,000.00 shall form part of the amount to be paid into court.

Relief

[28] The appellant shall pay to the Clerk of the Court of Queen's Bench court as security for costs a total of $72,400.00 which shall include the amounts pursuant to paragraph 5 of the order of Power, J., granted December 5, 2000, as amended by his order of December 14, 2000, being $25,000.00 plus any accrued interest.

[29] For greater certainty, the $35,000.00 referred to in paragraph 6 of the order of Power, J. dated December 5, 2000 may only be used to fund the security for costs ordered here upon compliance with the terms of paragraph 6.

[30] The appeal of this matter shall be stayed until the full amount of security for costs is paid into court.

[31] If the full amount of security for costs is not paid by March 16, 2001, the appeal will be dismissed with costs to the respondent.

APPEAL HEARD on January 16, 2001

MEMORANDUM FILED at Calgary, Alberta,
this 15th day of February, 2001

WITTMANN, J.A.

APPEAL #00-19072 A.D.2001

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

JOHN M. ELLIS

Appellant/Plaintiff

- and -

ROBERT FRIEDLAND

Respondent/Defendant

MEMORANDUM OF DECISION

7P

	Clerk's stamp:
COURT FILE NUMBER	1103 14112
COURT OF QUEEN'S BENCH OF ALBERTA JUDICIAL CENTRE	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")
APPLICANTS	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
DOCUMENT	**Order**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Attention: Doris C.E. Bonora Reynolds, Mirth, Richards & Farmer LLP 3200 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3W8 Telephone: (780) 425-9510 Fax: (780) 429-3044 File No: 108511-001-DCEB

Date on which Order Pronounced: August 31, 2011

Name of Justice who made this Order: D. R. C. Thomas

UPON the application of the Trustees of the 1985 Sawridge Trust (the "Applicants" or the "Trustees"); AND UPON hearing read the Affidavit of Paul Bujold, IT IS HEREBY ORDERED AND DECLARED as follows:

Application

1. An application shall be brought by the Trustees of the 1985 Sawridge Trust for the opinion, advice and direction of the Court respecting the administration and management of the property held under the 1985 Sawridge Trust (hereinafter referred to as the "Advice and Direction Application"). The Advice and Direction Application shall be brought:

    a. To seek 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".

    b. To seek direction with respect to the transfer of assets to the 1985 Sawridge Trust.

Notice

2. The Trustees shall send notice of the Advice and Direction Application to the following persons, in the manner set forth in this Order:

    a. The Sawridge First Nation;

    b. All of the registered members of the Sawridge First Nation;

    c. All persons known to be beneficiaries of the 1985 Sawridge Trust and all former members of the Sawridge First Nation who are known to be excluded by the definition of "Beneficiaries" in the Sawridge Trust created on August 15, 1986, but who would now qualify to apply to be members of the Sawridge First Nation;

    d. All persons known to have been beneficiaries of the Sawridge Band Trust created on April 15, 1982 (hereinafter referred to as the "1982 Sawridge Trust"), including any person who would have qualified as a beneficiary subsequent to April 15, 1985;

    e. All of the individuals who have applied for membership in the Sawridge First Nation;

    f. All of the individuals who have responded to the newspaper advertisements placed by the Applicants claiming to be a beneficiary of the 1985 Sawridge Trust;

    g. Any other individuals who the Applicants may have reason to believe are potential beneficiaries of the 1985 Sawridge Trust;

    h. The Office of the Public Trustee of Alberta (hereinafter referred to as the "Public Trustee") in respect of any minor beneficiaries or potential minor beneficiaries; and

    i. The Minister of Aboriginal Affairs and Northern Development Canada (hereinafter referred to as the "Minister") in respect, *inter alia,* of all those

persons who are Status Indians and who are deemed to be affiliated with the Sawridge First Nation by the Minister.

(those persons mentioned in Paragraph 2 (a) – (i) shall collectively be referred to as the "Beneficiaries and Potential Beneficiaries")

3. Notice of the Advice and Direction Application on any person shall not be used by that person to show any connection or entitlement to rights under the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to entitle a person to being held to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust, nor to determine or help to determine that a person should be admitted as a member of the Sawridge First Nation. Notice of the Advice and Direction Application is deemed only to be notice that a person may have a right to be a beneficiary of the 1982 Sawridge Trust or the 1985 Sawridge Trust and that the person must determine his or her own entitlement and pursue such entitlement.

Dates and Timelines for Advice and Direction Application

4. The Trustees shall, within 10 business days of the day this Order is made, provide notice of the Advice and Direction Application to the Beneficiaries and Potential Beneficiaries in the following manner:

   a. Make this Order available by posting this Order on the website located at www.sawridgetrusts.ca (hereinafter referred to as the "Website");

   b. Send a letter by registered mail to the Beneficiaries and Potential Beneficiaries for which the Applicants have a mailing address and by email to the Beneficiaries and Potential Beneficiaries for which the Applicants have an email address, advising them of the Advice and Direction Application and advising them of this Order and of the ability to access this Order on the Website (hereinafter referred to as the "Notice Letter"). The Notice Letter shall also provide information on how to access court documents on the Website;

   c. Take out an advertisement in the local newspapers published in the Town of Slave Lake and the Town of High Prairie, setting out the same information that is contained in the Notice Letter; and

   d. Make a copy of the Notice Letter available by posting it on the Website.

5. The Trustees shall send the Notice Letter by registered mail and email no later than September 7, 2011.

6. Any person who is interested in participating in the Advice and Direction Application shall file any affidavit upon which they intend to rely no later than September 30, 2011.

7. Any questioning on affidavits filed with respect to the Advice and Direction Application shall be completed no later than October 21, 2011.

8. The legal argument of the Applicants shall be filed no later than November 11, 2011.

9. The legal argument of any other person shall be filed no later than December 2, 2011.

10. Any replies by the Applicant shall be filed no later than December 16, 2011.

11. The Advice and Direction Application shall be heard January 12, 2012 in Special Chambers.

Further Notice and Service Provisions

12. Except as otherwise provided for in this Order, the Beneficiaries and Potential Beneficiaries need not be served with any document filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument.

13. The Applicants shall post any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, on the Website within 5 business days after the day on which the document is filed.

14. The Beneficiaries and Potential Beneficiaries shall serve the Applicants with any document that they file with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument, which service shall be completed by the relevant filing deadline, if any, contained in this Order.

15. The Applicants shall post all of the documents the Applicants are served with in this matter on the Website within 5 business days after the day on which they were served.

16. The Applicants shall make all written communications to the Beneficiaries and Potential Beneficiaries publicly available by posting all such communications on the Website within 5 business days after the day on which the communication is sent.

17. The Beneficiaries and Potential Beneficiaries are entitled to download any documents posted on the Website by the Applicants pursuant to the terms of this Order.

18. Notwithstanding any other provision in this Order, the following persons shall be served with all documents filed with the Court in regard to the Advice and Direction Application, including any pleading, notice of motion, affidavit, exhibit or written legal argument:

    a. Legal counsel for the Applicants;

    b. Legal counsel for any individual Trustee;

    c. Legal counsel for any Beneficiaries and Potential Beneficiaries;

    d. The Sawridge First Nation;

    e. The Public Trustee; and

f. The Minister.

Variation or Amendment of this Order

19. Any interested person, including the Applicants, may apply to this Court to vary or amend this Order on not less than 7 days' notice to those persons identified in paragraph 17 of this Order, as well as any other person or persons likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Justice of the Court of Queen's Bench in Alberta

809772; August 31, 2011

In the Court of Appeal of Alberta

Citation: Moses v. Weninger, 2006 ABCA 52

Date: 20060215
Docket: 0501-0219-AC
Registry: Calgary

06 054 056

Between:

Terry Moses

Appellant

- and -

William Weninger, Richard E. Edwards, ATB Financial (formerly known as Alberta Treasury Branches), Bill Wigley carrying on business as Bill Wigley Auction Services, and BDO Dunwoody Limited

Respondents

Reasons for Decision of
The Honourable Madam Justice Constance Hunt

Application for Leave to Appeal under Rule 505(6)

Reasons for Decision of
The Honourable Madam Justice Constance Hunt

[1] The Appellant, Terry Moses ("Moses"), seeks leave pursuant to Rule 505(6) to appeal my November 1, 2005 order ("Order") to a three-member panel. The application is dismissed.

Background

[2] In his Statement of Claim, Moses claimed damages of $700,000, representing his alleged loss of shareholders' equity in a company (which operated as Mr. Tux) of which he was the sole owner and director. He claimed further damages of $300,000 representing the value of his lost opportunity to build on the share value of Mr. Tux. Moses's allegations against the BDO defendants (BDO Dunwoody Limited and its employees Weninger and Edwards) included negligence, breach of contract and professional malpractice in failing to advise him of the commercial proposal provisions of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 (as amended) (the "***BIA***") and thereafter in their conduct during the ensuing bankruptcy proceedings. He also claimed negligence against all the defendants in the disposal of Mr. Tux's inventory.

[3] Briefly, these claims arose after Moses assigned Mr. Tux into bankruptcy and BDO was appointed trustee. BDO was also appointed receiver by ATB Financial, a creditor of Mr. Tux. BDO contracted with Bill Wigley to liquidate Mr. Tux's inventory.

[4] Moses' Statement of Claim was struck. Neither the Master (who allowed the initial application under Rule 129) nor the Queen's Bench chambers judge who heard the application *de novo* (and ordered the Statement of Claim struck pursuant to Rule 129 and summarily dismissed the action in favour of the defendant pursuant to Rule 159) gave written reasons. Nor was I provided with transcripts of their oral reasons. The respondents suggested that the primary reason for the success of their application was that Moses had no cause of action against them in his personal capacity. Moses appealed the striking of his claim.

[5] Moses applied to stay the enforcement of the costs orders granted below, and the respondents applied for security for costs of the appeal. My Order denied the stay application and awarded security for costs of $10,000 each to the three sets of respondents (Bill Wigley, ATB Financial, and the BDO defendants).

Leave to Appeal a Single Justice of Appeal's Order

[6] Rule 505(6) of the Alberta Rules of Court provides:

> No judgment given or order made by one justice of appeal shall be subject to any appeal, except by leave of the justice giving the judgment or making the order.

In two cases a judge recused himself from hearing a leave application concerning his own decisions: ***Prefontaine v. Minister of National Revenue*** (2001), 293 A.R. 369 (C.A.), 2001 ABCA 288; ***Liu v. Tangirala*** (2005), 371 A.R. 71 (C.A.), 2005 ABCA 243. In ***Liu***, he clarified that in ***Prefontaine*** he had not done so on a constitutional basis, but rather because of concerns about an apprehension of bias.

[7] In ***Vysek v. Nova Gas International Ltd.***, 2002 ABCA 112, (2002), 303 A.R. 209 (C.A.), another judge observed at para. 17:

> Rule 505(6) imposes a mild form of gate keeping, designed to deploy judicial resources when they are needed to address serious issues and end the costly appeal motion cycle when they are not. This is achieved most efficiently by having the judge who heard the appeal motion consider the leave application, "because of that judge's familiarity with the evidence, the issues and the need for further review": ***Pugh v. Schepanovich*** (1993), 159 A.R. 397 at 400 (Q.B.). Judges have the necessary skills to determine whether a matter they have considered raises an important issue that merits scrutiny by three other judges.

[8] Although additional materials put before the Court by Moses during oral argument make passing reference to ***Prefontaine***, the issue of whether Rule 505(6) gives rise to an apprehension of bias was not seriously pursued. Moses did not ask that I recuse myself. I see no reason to do so.

The Test for Leave to Appeal Under Rule 505(6)

[9] In ***Standards of Review Employed by Appellant Courts***, (Edmonton: Juriliber, 1994), former Justice R. P. Kerans states at pp.70-72:

> The very existence of [a requirement for leave to appeal] indicates that only appeals meeting some standard of worthiness should receive permission to proceed. This standard may be "a matter of general public importance" or it may be "a strong likelihood of success" or any other standard the leave court chooses.
>
> The Ontario Court of Appeal has adopted a fairly explicit leave policy for those cases where leave is required. It has indicated leave will be granted if an "arguable

question" arises involving one of these issues:

(a) the interpretation of a statute or Regulation of Canada or Ontario including its constitutionality;

(b) the interpretation, clarification or propounding of some general rule or principle of law;

(c) the interpretation of a municipal by-law where the point in issue is a question of public importance;

(d) the interpretation of an agreement where the point in issue involves a question of public importance.

The Court will of course consider also cases where special circumstances would make the matter sought to be brought before the Court a matter of public importance or would appear to require that in the interest of justice leave should be granted - such as the introduction of new evidence, obvious misapprehension of the Divisional Court of the relevant facts or a clear departure from the established principles of law resulting in a miscarriage of justice.

The outlining of the foregoing criteria is not to say that in cases in which there is clearly an error in a judgment or order of the Divisional Court, it is not the duty of the Court of Appeal to grant leave so that it might correct the error. However, the possibility that there may be error in the judgment or order will not generally be a ground in itself for granting leave.

It would seem that in the second category, more than merely an "arguable" case must be put to the leave judge. The British Columbia Court of Appeal similarly requires, in the case of an interlocutory order "an obvious error."

On the other hand, the leave policy may leave the entire question to the ad hoc judgment of the leave judge, who might even grant open-ended leave, permitting appeal on any issue. With respect, that largely undermines the idea of leave.

[10] The annotation to Rule 505(6) in Stevenson & Côté's ***Alberta Civil Procedures Handbook 2006*** (Juriliber: Edmonton 2006) states that the applicable test to be used in determining whether to grant leave includes "whether there is an issue of law, whether discretion is involved, and whether there is an arguable ground": ***Vysek v. Nova Gas International Ltd.*** (2002), 303 A.R. 221 (C.A.), 2002 ABCA 136, at para. 16. In ***R. v. Knight*** (2003), 57 W.C.B. (2d) 196 (Alta. C.A.), 2003 ABCA 114, Côté J.A. refused to grant leave under R. 505(6) on the ground that "Knight had failed to provide any valid reason for granting leave to appeal. He did not argue any error of law, and there was no important issue raised.".

[11] The Court of Appeal of British Columbia has held that when a panel reviews a decision of a single appeal judge, it should ask "was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts": ***Haldorson v. Coquitlam (City)***, 2000 BCCA 672

at para. 7. That Court has also said that a panel should interfere only if "satisfied that the Chambers Judge was wrong in the legal sense and not merely that he exercised a discretion incorrectly": ***Frew v. Roberts***, [1990] B.C.J. No. 2175, (1990), 29 B.C.L.R. (3d) 34 (B.C.C.A) at para. 36. Although these cases deal with the standard of review of the chambers judge by a panel, they inform the question of what test should be applied on a leave application under Rule 505(6).

[12] It is also worthwhile to consider the nature of the decision in regard to which leave is sought. Stays and security for costs orders are both exercises of discretion. Absent an error of law, reasonableness is the applicable standard in reviewing an exercise of discretion: ***Decock v. Alberta*** (2000), 255 A.R. 234 (C.A.), 2000 ABCA 122 at para. 13.

[13] Absent a question of general public importance, it is my view that the test governing an application under Rule 505(6) is whether

(i) there is a possible error of law;
(ii) a discretion has been unreasonably exercised; or
(iii) the chambers judge misapprehended important facts.

Parties' Positions

[14] Moses submits that if I do not grant leave he will be denied natural justice. In effect, he says, this will end his appeal. Presumably natural justice will be denied because if he does not have the resources to post security for costs, his main appeal will be dismissed. He also argues that he is prejudiced because "the respondents are aggressively pursuing collection of their trial costs", but adduces no evidence to support this claim. In oral argument he stated that it would be unfair if a lack of resources prevented a person from pursuing an appeal.

[15] His second argument is that in the security for costs application, the respondents did not discharge their burden of proving "special circumstances" because they did not prove he had no assets. On this point, the respondents point to the evidence that no real property registered in Moses's name was found in their search of Alberta Land Titles.

[16] The respondents' position is that there are no grounds for granting leave. They say I applied the correct tests properly. They submit that Moses is not denied natural justice. They question his allegation that impecunious appellants are prevented from having their appeals heard. The safety net, they say, is that if the appellant discharges the burden of proving that the appeal has a reasonable prospect of success, security for costs may not be ordered. It is only absent a reasonable prospect of success of the appeal that an appellant's impecuniosity becomes critical.

Analysis

A. Stay of Enforcement of Bill of Costs

[17] In determining whether to grant the stay of enforcement, I applied the tri-partite test (***RJR-MacDonald Inc. v. Canada (A.G.)***, [1994] 1 S.C.R. 311), which requires the applicant to show:

1. Serious question - Preliminary and tentative assessment of the merits of the case: is it a serious question as opposed to a frivolous and vexatious one?
2. Irreparable harm - Would the applicant suffer irreparable harm (harm that is difficult to compensate in damages) if the stay is refused?
3. Balance of convenience - If the stay is refused, will the applicant suffer greater harm than the respondent would suffer if the stay were granted?

[18] Although my reasons were not explicit on the "serious question" part of the test, I did not conclude that Moses failed on this part of the test. Rather, I concluded that he had not shown irreparable harm.

[19] Irreparable harm refers to the nature, not the magnitude, of the harm. Harm that is unquantifiable in monetary terms is irreparable. Harm is irreparable where damages cannot be collected. Impecuniosity is a relevant factor to consider but is not determinative: ***RJR-MacDonald Inc. v. Canada (A.G.)***.

[20] There can be irreparable harm if refusal to grant the stay renders the appeal nugatory: ***Triple Five Corp. v. United Western Communications*** (1994), 19 Alta. L.R. (3d) 153 at 155, [1994] A.J. No. 278 at para. 6 (C.A.), motion for a stay of execution dismissed: [1994] S.C.C.A. No. 226.

[21] Having to pay money alone is not irreparable harm: ***Kassian v. Hill*** (2002), 303 A.R. 391, 2002 ABCA 140. Proof of irreparable harm may be shown where the amount of the judgment exceeds the ability of the ordinary citizen to repay: ***Edmonton (City) v. Westinghouse Canada Inc.*** (1996), 187 A.R. 153 (C.A.); see also ***Re Evans (Bankrupt)*** (1992), 135 A.R. 46 (C.A.), and ***Costello v. Calgary (City)*** (1995), 178 A.R. 81 (C.A.).

[22] I determined that Moses had failed to provide evidence of irreparable harm. The unpaid taxed costs were in the sums of $13,053 (BDO defendants) and $12,541 (ATB Financial). Presumably Wigley's as-yet untaxed costs would be similar. There is no evidence that if Moses paid these amounts, he would be unable to recover them if he succeeded on his substantive appeal. BDO and ATB are major corporations who would easily be able to repay. There is no evidence that the respondent, Wigley, could not repay the costs if required to do so.

[23] The only possible argument is that Moses's impecuniosity means that a refusal of his stay application will determine his substantive appeal. As I noted in my reasons at para. 5, no evidence was adduced by Moses in this respect. Even in the most current application he only refers to the "possibility" of his inability to pay. That is not evidence of irreparable harm.

[24] I am satisfied that I properly applied the correct legal test and came to a reasonable conclusion. The test for granting leave is not met in regard to my refusal to grant a stay of the costs order.

B. Security for Costs

[25] In ***Gusky v. Rosedale Clay Products***, [1917] 34 D.L.R. 727 at 728 (Alta. C.A.) it was held that:

> The successful litigant should be entitled to an order for security upon proof of the appellant's poverty unless the appellant satisfies the judge or court to whom the application is made that the case is one in which an appeal may properly be taken with some reasonable prospect of success.

This decision has been cited with approval many times.

[26] The following principles guide the Court in determining whether to grant security for costs: ***Freyberg v. Fletcher Challenge Oil and Gas Inc.*** (2003), 330 A.R. 130, 2003 ABCA 208:

- security will not be ordered unless there are special circumstances;
- special circumstances are required for good reason: appellate costs are a small portion of litigation costs and the appellant must pay the bulk of these costs in providing the appeal books;
- there must be some proof that costs may not be recovered or recovered only with great difficulty;
- where there is a reasonable prospect of success on appeal, the application will fail.

[27] One of the factors that may show special circumstances is that a portion of the trial costs remain outstanding: ***Ellis v. Friedland*** (2001), 277 A.R. 126 (C.A.), 2001 ABCA 45 at para. 16. If there are special circumstances, the onus shifts to the appellant to establish a reasonable prospect of success on the appeal: ***Ellis v. Friedland***, at para. 16. Ordering a poor appellant to pay security for costs where there is no reasonable prospect of success is not tantamount to a summary dismissal of the appeal: ***Vysek v. Nova Gas International Ltd.*** (2002), 303 A.R. 221, 2002 ABCA 136 at para. 20, refusing leave to appeal from (2002), 303 A.R. 33, 2002 ABCA 5. There is little prospect of success when the decision under appeal is discretionary, there is no obvious error in the judgment

below, and the appellant has twice argued her case and twice lost: ***Sorochan v. St. Albert Protestant Separate School District No. 6***, 2002 ABCA 260 at para.9.

[28] A three-member panel of this Court, hearing an appeal of a single judge's security for costs order disagreed that, by upholding the order, "we thus turn our faces away from justice ... we do not equate agreeing with [the appellant] with fulfilling our oaths to do justice": ***Sunlife Trust Co. v. Gramaglia*** (1996), 187 A.R. 31 (C.A.) at para. 6, leave to appeal to S.C.C. denied at [1996] S.C.C.A. No. 360.

[29] The respondents' evidence showed that Moses was impecunious. Moses failed to rebut that. He provided no evidence that would lead to a different conclusion, either on November 1, 2005 or on this application. His Notice of Motion in this application simply states that there is the "possibility" that he would be unable to post costs. Given this, the onus of proving a reasonable prospect of success on appeal shifts to Moses.

[30] I have carefully reconsidered whether there is a possible legal error or an unreasonable exercise of my discretion in concluding that he does not have a reasonable chance of success on his appeal, or whether there are other grounds upon which I should grant leave. During the hearing of this application, I specifically asked Moses to explain the merit in his appeal. Nothing he said in reply shed any light on this subject, including that he would have a "fairer chance" in front of three judges. I remain of the view that his prospects for success are dim, because this is not the kind of case where he has a personal action against the respondents.

Conclusion

[31] The application for leave is dismissed. As I indicated during the oral hearing, pursuant to my Order the respondents must apply by notice of motion to have the appeal struck if Moses does not pay the ordered security for costs.

[32] I direct counsel for ATB to prepare the necessary order arising from these Reasons. Rule 323 is waived.

Application heard on February 6, 2006

Reasons filed at Calgary, Alberta
this 15th day of February, 2006

Hunt J.A.

Appearances:

Terry Moses
for the Appellant

Sean E. Fairhurst
for the Respondent BDO Dunwoody Limited, and
agent for counsel for William Weninger, Richard E. Edwards and Bill Wigley

Douglas S. Nishimura
for the Respondent ATB Financial

9p.

ORIGINAL

COURT FILE NUMBER: 1103 14112

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

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

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND NO. 19

QUESTIONING ON AFFIDAVIT

OF

MAURICE STONEY

P. E. Kennedy, Ms.	For Maurice Stoney
D. C. Bonora, Ms. E. M. Lafuente, Ms.	For the Trustees of the Sawridge Band Inter Vivos Settlement
C. C. Osualdini, Ms.	For Cathrine Twinn
Joanne Lawrence, CSR(A)	Court Reporter

Edmonton, Alberta
September 23, 2016

page 8, is that your signature there, sir?
A Page 8? Yes.
Q Okay. And you see above where it says, "certification"? And do you understand, sir, that you were certifying that everything in this application was true? Did you understand that, sir?
MS. KENNEDY: Did you read that before you signed it?
A Oh, right, the appeal. This is the application form?
MS. KENNEDY: Yeah. Did you read this --
A Yeah. Yeah.
MS. KENNEDY: -- before you signed it?
A Yeah.
Q MS. LAFUENTE: Yes. So you were -- everything in it that you stated in this application, sir, was it true?
MS. KENNEDY: I don't think that he can answer that question without going back and reading every single line.
Q MS. LAFUENTE: Okay. Sir, when you certified that everything was true on page 8 of the application, were you being truthful?
MS. KENNEDY: Do you want to look through this? Because, you know, they've produced it. You haven't produced it.

A No. No, I won't answer them questions.
MS. KENNEDY: Do you remember if --
A Leave it for the courts.
Q MS. LAFUENTE: Sorry, sir. Did you say that you won't answer that question and you're going to leave it for the courts?
A Yes.
Q Okay.
A This last part here, to my knowledge, is biassed. From what I gather, it's biassed.
Q Sorry. What is biassed?
A This last certification. It says in one part, "no right of appeal." That's biassed, isn't it?
Q Well, sir, if you -- if you read before that, it says that "I understand that if any of the information provided is found to be false or misleading, then this shall be sufficient grounds for the denial of my application, and there shall be no right of appeal."
A Yeah, I read that. Yeah.
Q Okay. Sir, you're not going to answer the question as to whether you were -- you understood this -- or, sorry, that you were certifying this to be true?
A No.
Q Okay.
OBJECTION TO QUESTION:

A Yes, it was.
Q You had the support of chief and council at the time you submitted this application?
A Well, not in writing. Verbally.
Q By whom?
A By one of the councillors.
Q Okay. And, sir, you would agree with me that in 2011, this is after you had brought the Statement of Claim suing the band for damages; right? You brought -- you brought your application for membership in 2011; correct? Sir, this document is 2011?
A I won't answer. I won't answer that.
Q Sir, this document was signed in 2011; correct?
MS. KENNEDY: That's when it's dated.
MS. LAFUENTE: Okay.
MS. KENNEDY: The other document is a court document which has a date on it.
Q MS. LAFUENTE: Okay. Sir, you were also involved prior to 2011 in starting a new band; is that correct?
MS. KENNEDY: Don't answer that.
How does that relate to the Affidavit?
MS. LAFUENTE: It relates to his application for membership.
MS. KENNEDY: There is nowhere in any of

Q MS. LAFUENTE: Okay. Sir, so you appealed that to the Appeal Committee?
A Yes.
Q Okay. And that was dismissed; is that correct?
A Yes.
Q Okay. And we've since referred to the decision of Justice Barnes, but I understand, sir, that you brought an application for judicial review of that decision to the Federal Court; is that correct?
A I did that?
MS. KENNEDY: Yes.
A Yeah.
Q MS. LAFUENTE: Yes, you did, sir?
A Yes.
Q Yes? Okay. Sir, are you aware that when Justice Barnes's decision was issued that you were ordered to pay costs to Sawridge First Nation?
MS. KENNEDY: He is not answering that question.
A No.
MS. LAFUENTE: And what is the basis for objecting to that?
MS. KENNEDY: The issue of the costs and what happened with that has nothing to do with this proceeding.
MS. LAFUENTE: Are you suggesting that the fact that he may not have paid costs owing to

Q MS. LAFUENTE: Sir --
MS. KENNEDY: And we will be arguing about issue estoppel. That's quite correct.
OBJECTION TO QUESTION:
Did you appeal this to the Federal Court of Appeal?
Q MS. LAFUENTE: Sir, in this matter that you are attempting now to become a party or an intervener of, did you seek an appeal of Justice Thomas's order and then go to -- sorry, and seek an extension of time to file an appeal of Justice Thomas's order?
MS. KENNEDY: With respect to a point from a decision in December of 2015?
MS. LAFUENTE: Yes.
MS. KENNEDY: You have the Court of Appeal decision of Mr. Justice Watson. You can read it.
Q MS. LAFUENTE: Okay. Sir, I'm going to put to you that you were ordered to pay costs in the amount of $898.70 on June 14th of 2016 to Sawridge First Nation, and these costs are not paid. Would you agree with that?
MS. KENNEDY: Well, that's not entirely correct because part of those costs are paid by setoff agreed to this morning with respect to the conduct money to be here this afternoon.
MS. BONORA: Ms. Kennedy, if you listen to

the question, it was we didn't set off the costs against the costs owing to Sawridge First Nation. We set off the costs owing to the Sawridge trustees. There were two sets of costs included in the appeal.

MS. KENNEDY: Well, you're here today, I assume, asking questions on behalf of the Sawridge trustees. You're not here on behalf of asking questions for the Sawridge First Nation, and in fact, the Sawridge First Nation is not a party or an intervener to this action yet, and there will be no question with respect to costs payable to them.

MS. LAFUENTE: Okay. So if you would have listened carefully to the question I asked, about costs to the Sawridge First Nation.

MS. KENNEDY: Well, then don't answer it because it's not relevant. They're not a party to this proceeding or an intervener.

OBJECTION TO QUESTION:

Sir, I'm going to put to you that you were ordered to pay costs in the amount of $898.70 on June 14th of 2016 to Sawridge First Nation, and these costs are not paid. Would you agree with that?

Q MS. LAFUENTE: Okay. Sir, I just want to confirm as well there were costs payable to the trustees as a result of the dismissal of the time

to extend -- sorry, the extension of time application?

MS. KENNEDY: And as I just previously stated, those costs were set off against part of the moneys owed for conduct money to be here today.

Q MS. LAFUENTE: Is it not true that there are -- there are -- even taking into account --

MS. KENNEDY: There are some costs remaining. Part of those costs have been paid off by setoff in terms of being here today.

Q MS. LAFUENTE: Okay. So, sir, what I'm asking, then -- and I'm asking for your answer -- there are --

MS. KENNEDY: And he is not giving it.

MS. LAFUENTE: Ms. Kennedy, I find it very difficult that you have not heard the question, and you are already indicating that your client is not going to answer it.

MS. KENNEDY: That's correct.

MS. LAFUENTE: I just want to put that on the record.

MS. KENNEDY: That's fine. You go right ahead and do that.

MS. LAFUENTE: Prior to asking it, it's a little difficult to understand the basis of the objection.

Q MS. LAFUENTE: Sir, do you still owe costs to

the trustees for that application to the Court of Appeal?

A I won't answer that.

OBJECTION TO QUESTION:

Sir, do you still owe costs to the trustees for that application to the Court of Appeal?

Q MS. LAFUENTE: Okay. Sir, turning, then, to paragraph 40 -- 4 -- sorry, 14 of your Affidavit, you indicate, "For 30 years I have been seeking to have my membership rights in Sawridge be recognized." Do you see that?

A Yes.

Q Okay. And would you agree with me, sir, that includes the filing of the Statement of Claim which was later struck? Did you do -- did you undertake those actions?

MS. KENNEDY: We've already dealt with that. You've already --

MS. LAFUENTE: I asked him --

MS. KENNEDY: -- asked questions on those, and he has answered, and we've got the --

MS. LAFUENTE: Okay.

MS. KENNEDY: -- transcript on that.

Q MS. LAFUENTE: And you would agree with me, sir, that you also applied for membership, which was denied --

MS. KENNEDY: Oh --

Q MS. LAFUENTE: Excuse me. Appealed to the Appeals Committee, an application for judicial review brought and denied; correct?

MS. KENNEDY: These questions have already been answered.

Q MS. LAFUENTE: Okay. And, sir, did you also bring a human rights complaint against Sawridge First Nation?

A I won't answer that.

Q You won't answer that?

A No.

Q On what basis?

MS. KENNEDY: Again, that's against the Sawridge First Nation. What does that have to do with an action to be added as a party or interested party as a beneficiary?

MS. LAFUENTE: So, again, you keep characterizing your application as an application to become a beneficiary.

MS. KENNEDY: Yes.

MS. LAFUENTE: It's an application to become a party or an intervener.

MS. KENNEDY: As a beneficiary.

MS. LAFUENTE: Okay.

MS. KENNEDY: And what is the human rights complaint about?

MS. LAFUENTE: Okay. Well, we can go to the human rights complaint.

OBJECTION TO QUESTION:

Okay. And, sir, did you also bring a human rights complaint against Sawridge First Nation?

Q MS. LAFUENTE: Sir, I've put in front of you a letter addressed to Chief Roland Twinn of the Sawridge First Nation attaching the decision of the Canadian Human Rights Commission. This letter is dated April 29th, 2015. Do you see that in front of you?

A Yes.

Q Okay. And I'm going to turn to the last page of this, which is a -- which is entitled the record of decision. Okay. And it states at reasons for decision: (As read)

> The complainant has been a party to two different proceedings before the Federal Court with respect to the matters raised in this complaint: an action against respondent which was struck by the Federal Court of Appeal in 2000 and an application for judicial review which was dismissed in May 2013. The essence of the complaint, i.e. the

to the 1986 trust, beneficiary status is restricted to members?

Q MS. LAFUENTE: Okay. Sir, have you ever read the 1985 trust?

A I won't answer that.

Q Why won't you answer that question? It's factual, sir. Have you read it?

MS. KENNEDY: No.

MS. LAFUENTE: Sorry --

A No.

MS. LAFUENTE: -- Ms. Kennedy, are you saying "no" as in he shouldn't answer the question, or are you providing him an answer?

MS. KENNEDY: I'm telling him no because it's a legal -- we're talking about legal arguments with respect to these documents.

MS. LAFUENTE: So your word "no" is meant to advise him not to answer the question, the factual question, as to whether he has read the trust deed?

MS. KENNEDY: That's right.

MS. LAFUENTE: Okay.

OBJECTION TO QUESTION:

Sir, have you ever read the 1985 trust?

Q MS. LAFUENTE: Sir, have you read the 1986 trust deed?

A I won't answer that.

MS. KENNEDY: In one particular portion, yes.
MS. LAFUENTE: Okay.
MS. KENNEDY: And what it says with respect to the rest of it is the wording in the trust deed which is what we're arguing about before the Court.
MS. LAFUENTE: And that's what you're attempting to bring before this Court by being added as a party.
MS. KENNEDY: That's what we're arguing in terms of our ability to be before the Court as a beneficiary.
Q MS. LAFUENTE: Okay. Sir, going back to paragraph 12 of your Affidavit, we talked about this first sentence here before, "All of our applications for membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose applications you mean when you say "our applications," the word O-U-R?
A I won't answer it.
Q Why won't you answer that, sir? It's your Affidavit, and I want to know what you mean when you say, "Our applications were ignored."
A Did you ask that question before?
Q No. I'm asking what you mean by the word, "Our" -- the words, "our applications." Whose applications?

A No, I won't answer that.
Q Sir, why aren't you answering that question?
A I'll leave it up to the courts.
Q You -- I'm going to point out that your counsel did not put an objection on the record but that you are refusing the answer the question because you want to leave it up to the courts.
MS. KENNEDY: That's what he said.
Q MS. LAFUENTE: Okay. So, sir --
MS. KENNEDY: You don't have to repeat it.
Q MS. LAFUENTE: -- how is the Court supposed to -- how is the Court supposed to understand what you mean by the word "our" if you won't tell us what you mean?
MS. KENNEDY: Okay. Now, let's not get into arguments with him, and that's what you're doing by characterizing the way he has made an answer. He has made an answer. You may not like it, but he has made an answer.
MS. LAFUENTE: Okay.
OBJECTION TO QUESTION:
Okay. Sir, going back to paragraph 12 of your Affidavit, we talked about this first sentence here before, "All of our applications for membership in Sawridge were ignored," and we were focussing on your application. Can you tell me whose

applications you mean when you say "our applications," the word O-U-R?

Q MS. LAFUENTE: Sir, do you have any information as to whether your siblings have applied for membership in Sawridge First Nation?

A Siblings? Yes, some of them -- some of them did, but they were all denied.

Q Who -- who made application?

A Uh, brothers.

Q Which brothers?

A Bill.

Q Okay.

A And... I just can't recall right now. I'd have to -- I'd have to look at their response and stuff like that.

Q But you've brought this application --

A They did --

Q -- on behalf of all of you.

A They were supposed to send in their applications because we talked about this before, and -- and I told them that maybe you should do -- maybe you should be sending in your applications.

Q Okay.

A But -- now, whether it's -- they've done it or not, I'm not really sure. I can't answer that.

Q Okay. Okay.

A And another thing, if they did, they were -- it

would be automatically thrown out anyways. Their point of view would be, what is the use?

MS. LAFUENTE: Sir, I probably only have a few more questions for you, so I'm going to suggest we just take a 10-minute break, if that's okay with you, and then we'll reconvene and hopefully finish up quite quickly. Okay?

(ADJOURNMENT)

Q MS. LAFUENTE: Sir, earlier, you had indicated that you were bringing this application and representing your brothers and sisters in doing so. Can you tell me, are any of them incapacitated and unable to represent themselves in this litigation, in this application?

A I won't answer that.

MS. KENNEDY: I'm going to tell you that I have done a number of actions in QB and in the Federal Court as representative actions where one brother or sister acts for the entire family, and that is the standard method of proceeding, and that is the method of proceeding that's been used since 1997.

MS. LAFUENTE: So is the answer that they are incapacitated or this is the choice?

MS. KENNEDY: This is the choice.

MS. LAFUENTE: And this is a representative action?

MS. KENNEDY: Yes. On behalf of a family, yes. That's the way you go. Each of them have exactly the same characteristics. They're all members of the same family. They all have the same interest.

MS. LAFUENTE: Okay. In going through what we've asked and what's been answered and what has been objected to today, it's clear that we have a very different view as to what's relevant and what ought to be answered, and so, today, we're going to adjourn --

MS. KENNEDY: Sure.

MS. LAFUENTE: -- this questioning, and we'll proceed after we deal with the application -- sorry, the objections --

MS. KENNEDY: Sure.

MS. LAFUENTE: -- and get some further Court direction as to that.

MS. KENNEDY: Yeah. Okay. Good.

PROCEEDINGS ADJOURNED SUBJECT TO UNDERTAKINGS 2:47 P.M.

90241 001

Appeal No. 10818

IN THE COURT OF APPEAL OF ALBERTA

BETWEEN:

ABC COLOR & SOUND LTD. and ABC RENTALS LTD.

Appellants
(Plaintiffs)

THOMAS C. LANE and MOLLY E. LANE

Appellants

AND:

ROYAL BANK OF CANADA

Respondent
(Defendant)

COLLINS BARROW LIMITED

Not a Party to this Appeal
(Defendant)

AND BETWEEN:

THE ROYAL BANK OF CANADA

Respondent
(Plaintiff)

AND:

THOMAS C. LANE, MOLLY E. LANE
and ABC COLOR & SOUND LTD.

Appellants
(Defendants)

REASONS OF THE HONOURABLE MADAM JUSTICE HETHERINGTON

Counsel:
Frank Foran
for the Respondent

Keith E. Laws
for the Appellants

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The respondent, The Royal Bank of Canada, has applied for an order directing that the appellants ABC Color & Sound Ltd. and ABC Rentals Ltd., or their directors, Thomas C. Lane and Molly E. Lane, post security for the costs of this appeal. It has not sought any order against Mr. and Mrs. Lane as appellants.

The respondent has made this application under Rule 524 of the Alberta Rules of Court, which reads as follows:

> "524. (1) No security for costs shall be required in appeals unless by reason of special circumstances security is ordered by a judge."

I will deal first with the application as it relates to Mr. and Mrs. Lane as directors of the appellant companies. The respondent contends that the special circumstances in regard to them arise out of the history of these two actions.

Mr. and Mrs. Lane are the only directors of the appellant companies. On January 9, 1984, the respondent appointed Collins Barrow Limited as receiver and manager of these companies pursuant to a debenture. On the 1st day of June, 1984, the respondent took action against Mr. and Mrs. Lane and ABC Color, claiming the balance owing to it by ABC Color, payment of which Mr. and Mrs. Lane had guaranteed. Mr. and Mrs. Lane defended this action on their own behalf and on behalf of ABC Color. On the 15th of November, 1984, Mr. and Mrs. Lane commenced action in the

name of the appellant companies against the respondent and Collins Barrow. They alleged, among other things, breach of contract, negligence and the wrongful appointment of a receiver. Collins Barrow did not commence or defend any action on behalf of the company.

In the first action described above the trial judge gave judgment in favour of the respondent against ABC Color and Mr. and Mrs. Lane for the balance owing by ABC Color to the respondent. In addition he ordered them to pay the respondent's costs. ABC Color and Mr. and Mrs. Lane appealed. In the second action the trial judge dismissed the claims of the two appellant companies against both Collins Barrow and the respondent. He directed the companies to pay the costs of Collins Barrow and the respondent. In addition, he ordered Mr. and Mrs. Lane, as "the real instigators of the litigation", to pay the costs of Collins Barrow and the respondent. The appellant companies and Mr. and Mrs. Lane appealed only as against the respondent.. In the meantime the respondent has not received any payment in relation to its costs.

The respondent does not dispute the right of the directors to commence and defend these actions in the name of the appellant companies. It says, however, that special circumstances arise when they do so, in that they cannot thereby prejudice the position of the respondent. In this regard counsel for the

respondent referred me to two cases, First Investors Corporation Ltd. et al. v. Prince Royal Inn Limited et al., [1988] 5 W.W.R. 375 (Alta.C.A.), and Newhart Developments Ltd. v. Co-operative Commercial Bank Ltd., [1978] 2 All E.R. 896 (C.A.). The issues in these cases were not the same as the issue on this application. However, the principles of law set out in them are relevant to it.

In Newhart the issue was whether the directors of a company in receivership could commence an action on behalf of the company without the consent of the receiver. The court held that they could, provided that the proceedings did not threaten the interests of the debenture holders. In that case the court found that the interests of the debenture holders could not have been adversely affected, because the company was not called on to finance the action and would not have to meet any claim for costs if the action failed. In addition the company had been provided with an indemnity against any liability for costs. Lord Justice Shaw, with whom Lord Justice Stephenson concurred, stated at p. 901:

> "What, of course, the directors cannot do, and to this extent their powers are inhibited, is to dispose of the assets within the debenture charge without the assent or concurrence of the receiver, for it is his function to deal with the assets in the first place so as to provide the means of paying off the debenture holders' claims. But where there is a right of action which the board (although not the receiver) would wish to pursue, it does not seem to me that the rights or function of the receiver are affected if the company is

> indemnified against any liability for costs (as here). I see no principle of law or expedience which precludes the directors of a company, as a duly constituted board . . . from seeking to enforce the claim, however ill-founded it may be, provided only, of course, that nothing in the course of the proceedings which they institute is going in any way to threaten the interests of the debenture holders."
>
> (Emphasis added)

In First Investors solicitors who had acted for the board of directors of a company both before and after it was put into receivership, sought an order approving payment of their account out of an unsecured creditor's fund. The chambers judge held that after the appointment of the receiver, the directors had no authority to retain and instruct the solicitors on behalf of the company. He therefore denied the solicitors' claim in so far as it related to services rendered after the appointment of the receiver. The solicitors successfully appealed this order. In his reasons for judgment Mr. Justice Harradence, writing for the court, referred to the Newhart case. He then said:

> "Similarly, in the case at bar, there is no threat to the interests of debenture holders connected with Prince Royal; due to somewhat unusual circumstances, a fund was made available to allow for debts to unsecured creditors, of which the law firm . . . is one. Thus, nothing in the course of these proceedings, including its costs, pose a threat to the interests of the debenture holders. It therefore follows that the duty of the receiver to protect the debenture holders will not be mitigated under these circumstances."

The court allowed the appeal and directed that any disputed facts arising from the accounts in question be determined by a judge of the Court of Queen's Bench.

These cases are authority for the proposition that the directors of a company in receivership can only commence or defend an action without the consent of the receiver, if they can do so without threatening the interests of the debenture holders. In this case the interests of the respondent debenture holder are threatened. If it is successful in this appeal and either of the appellant companies is ordered to pay its costs, it will not be able to collect those costs because neither company has any assets. In these special circumstances I think that it is appropriate to make an order for security for costs against Mr. and Mrs. Lane, who have appealed in the names of the appellant companies.

I therefore grant the application of the respondent insofar as it relates to Mr. and Mrs. Lane as directors of the appellant companies, and direct that they post security for the respondent's costs of this appeal in the amount of $4,000 within 30 days of the date of this order.

I must then deal with the application as it relates to

the appellant companies. The respondent contends that the special circumstances in this case are that the appellant companies are in receivership and the receiver has disposed of all of their assets. This is not disputed by the appellants. The onus then shifts to the appellants to establish that the appeal has some reasonable prospect of success. Authority for this proposition can be found in the decisions of this court in Gusky v. Rosedale Clay Products, [1917] 2 W.W.R. 441 (Alta.S.C.A.D.) and Leathem v. Indelco Financial Corporation Ltd., [1984] 4 W.W.R. 359 (Alta.C.A.).

In Leathem Mr. Justice Kerans quoted with approval (at p. 361) the following passage from the judgment of Mr. Justice Walsh in Gusky (at p. 442):

> "The successful litigant should be entitled to an order for security upon proof of the appellant's poverty unless the appellant satisfies the Judge or Court to whom the application is made that the case is one in which an appeal may properly be taken with some reasonable prospect of success. Each case should be dealt with upon its own merits and for this reason it seems impossible to lay down the rule with any more precision."

The appellants' grounds of appeal are described in an exhibit to an affidavit sworn to by Mr. Lane. I need not set them out. Counsel for the respondent very fairly conceded that the appeal has some reasonable prospect of success. In these circumstances, and in view of the order which I have made against

Mr. and Mrs. Lane as directors of the appellant companies, I will not order these companies to post security for the respondent's costs of this appeal.

DATED at CALGARY, Alberta
this 21st day of August,
A.D. 1990

HETHERINGTON, J.A.

Form 44
[Rule 10.35(1)]

Clerk's Stamp:

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	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 and THE SAWRIDGE TRUST ("Sawridge Trusts")
APPLICANTS	ROLAND TWINN, WALTER FELIX TWINN, BERTHA L'HIRONDELLE, CLARA MIDBO and CATHERINE TWINN as Trustees for the Sawridge Trusts
DOCUMENT	**BILL OF COSTS**
PARTY FILING THIS DOCUMENT	**SAWRIDGE TRUSTEES**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP 2900 Manulife Place 10180 - 101 Street Edmonton, AB T5J 3V5 Attention: Doris C.E. Bonora Telephone: (780) 423-7100 Fax: (780) 423-72764 File No: 551860-1-DCEB

TAXABLE FEES (Column 1)

Expected Schedule "C" costs to the date of Questioning

ITEM NO.	DESCRIPTION	COLUMN 1 AMOUNT
1(1)	Commencement documents, affidavits, pleadings, related documents.	$1,000.00
	Disclosure under Part 5 [Disclosure of Information]	
3(1)	Disclosure of records under Part 5 [Disclosure of Information], including affidavit of records.	$500.00
3(2)	Review of opposite party documents (once per action): the	$500.00

	equivalent of a ½ day fee under item 5(2).	
Oral Questioning under Part 5 [Disclosure of Information]		
5(1)	Preparation for questioning under Part 5: the equivalent of ½ day attendance fee.	$500.00
5(1)	Preparation for questioning under Part 5: the equivalent of ½ day attendance fee.	$500.00
5(2)	First ½ day or portion of it for attendance for questioning under Part 5 of parties or witnesses.	$500.00
5(2)	First ½ day or portion of it for attendance for questioning under Part 5 of ten witnesses – date to be determined (10 x $500.00).	$5,000.00
Disbursements		**$5000.00**
Costs already awarded		**$4600.00**
Total		**$19,600.00**

Person responsible for preparation of this Bill of Costs:

DATED at Edmonton, Alberta, this 30th day of September, 2016.

DENTONS CANADA LLP

Doris C.E. Bonora
Solicitor for the Applicants

PART IV - LIST OF AUTHORITIES AND ATTACHMENTS