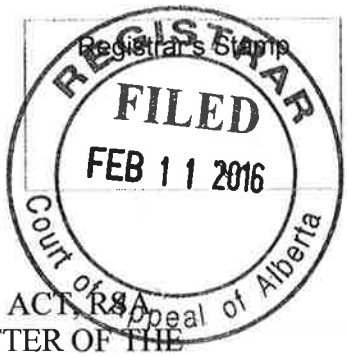
COURT OF APPEAL FILE NUMBER:	1603-0033AC
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	Edmonton



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")

APPLICANT:	MAURICE STONEY
STATUS ON APPEAL:	APPELLANT
RESPONDENTS:	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	**Memorandum of Argument in Response to Application for a Filing Extension**

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NATURE OF THE APPLICATION

[1] The Applicant seeks an extension of time to file an appeal of a case management decision made by the Honourable Mr. Justice D.R.G. Thomas on December 17, 2015 (the "Decision"). The Respondent opposes this extension on the basis that the Applicant is not a party in the proceedings and has no right to file an appeal. Further, the Applicant has not met the test for an extension of time to appeal. Finally, it would be an abuse of process to permit the Applicant to participate on the grounds stated.

ARGUMENT

[2] These proceedings were initiated in 2011 by the Sawridge Trustees whereby they sought the advice and direction of the Court in respect of certain matters relating to the 1985 Sawridge Trust. The Sawridge Trustees asked the Court to review the definition of "beneficiaries" contained in the 1985 Trust Deed, and if necessary to vary the definition to remove discriminatory provisions. Further, the Court is being asked to deem the transfer of assets into the 1985 Trust as being appropriate.

[3] The Decision by the case management judge was in large part an effort to refocus the proceedings so that the substantive relief being sought by the Sawridge Trustees could be heard without delay. The Applicant's appeal of the Decision does nothing to further this goal, and the application for an extension of time for the filing of the appeal should be dismissed, with costs.

Standing

[4] To have standing in an appeal, an individual must either be a party in the proceedings or must be intimately and heavily affected by the decision in question such that a right to appeal arises. Generally speaking, non-parties rarely have rights, powers, or duties in an action.

Dreco Energy Services Ltd. v. Wenzel, 2008 ABCA 36, at paras. 5 and 8. **[Tab 1]**

[5] The Applicant is not a party in these proceedings, was not an applicant or respondent in the application giving rise to the Decision, and did not participate in the application below. The Applicant has never sought intervener status in these proceedings.

[6] The Decision does not "intimately and heavily affect" the Applicant. Rather, it has no effect on the Applicant at all.

[7] The Decision is a case management ruling on a document production application made by the Public Trustee. The Decision also contains directions to the Public Trustee and the Sawridge Trustees in an effort to refocus matters in the proceedings.

[8] The Applicant's Notice of Appeal suggests that issues were determined by the case management judge without prior notice to the Applicant. In fact, the Applicant's counsel was present in Court during the application. All of the issues determined are procedural and do not affect the Applicant in any way nor contain any directions with respect to the Applicant.

[9] The Notice of Appeal also refers to issues relating to the determination of the jurisdiction of the Federal Court regarding the issue of membership, and compliance with the *Constitution Act, 1982* and Treaty No. 8. The affidavit of the Applicant filed in support of the within application deals extensively with the Applicant's right to membership in the First Nation.

[10] It would appear that the Applicant is attempting to intermeddle in these proceedings to resurrect arguments relating to his membership status that were dismissed in previous proceedings in the Federal Court, the Federal Court of Appeal and the Canadian Human Rights Commission.

Huzar v. Canada, F.C.J. No. 873 (FCA) at paras. 3 and 5. **[Tab 2]**
Stoney v. Sawridge First Nation, 2013 FC 509 at paras. 5 – 7, 15, 17 – 23. **[Tab 3]**
Record of Decision under Section 40/41, Canadian Human Rights Commission. **[Tab 4]**

[11] The Applicant's status as a member of the Sawridge First Nation has no place in these proceedings. Any attempt by the Applicant to reargue the membership issue is an abuse of process.

[12] Given that the Applicant is not a party, did not participate in the application before the case management judge, and is attempting to resurrect issues which are *res judicata,* it is submitted that the Applicant has no standing to file an appeal and any appeal would be an abuse of process.

Extension of Time to File an Appeal

[13] In order to grant an extension of time to file an appeal, the Court must be satisfied, *inter alia,* that: a) there was a *bona fide* intention to appeal while the right to appeal existed; b) there is an explanation for the failure to appeal in time; c) there is an absence of serious prejudice; and d) there is a reasonable chance of success.

Attila v. AMEC Americas Limited, 2015 ABCA 206, paras. 4-13 ("*Attila*"). **[Tab 5]**
Cairns v. Cairns [1931] 4 D.L.R. 819 (ASCAD) ("*Cairns*"). **[Tab 6]**

[14] Extensions of time will not be made unless "weighty reasons" are given, and there is a heavy burden on the Applicant to show cause why the extension should be given.

Cairns, at paras. 22 and 32. **[Tab 6]**

There was no *Bona Fide* Intention to Appeal

[15] The Applicant must "show a *bona fide* intention to appeal held while the right to appeal existed."

Cairns, at para. 33. **[Tab 6]**

[16] The Decision was rendered on December 17, 2015. The Applicant acknowledges that its counsel received notice of this decision on January 11, 2016. The Applicant filed its Notice of Appeal on January 25, 2016. The Applicant has not led any evidence to show that he had a *bona*

fide intention to appeal the Decision while the right to appeal existed. The application must be dismissed on this basis alone.

There is no Explanation for the Failure to Appeal in Time

[17] The Applicant must "show that the failure to appeal was by reason of some very special circumstance which serves to excuse or justify such failure."

Cairns, at para. 33. **[Tab 6]**

[18] There is a suggestion that the Applicant's cousins live in northern British Columbia, and are difficult to contact, however there is no such evidence as it relates to the Applicant himself. The Applicant's cousins are not parties and did not file an appeal of the Decision. No special circumstance has been shown that serves to excuse or justify the failure to appeal in time.

The Respondents Will Suffer Prejudice If the Extension is Granted

[19] The case management judge has directed the parties to refocus on the task at hand. The Applicant, however, wishes to argue matters that have already been decided in previous judicial proceedings and are irrelevant in these proceedings. The Applicant has previously failed to pay costs awarded against him in the action he commenced against the Sawridge First Nation.

Stoney v. Sawridge First Nation, 2013 FC 509, at para. 6. **[Tab 3]**

[20] The Applicant failed to make any submissions before the case management judge, despite having counsel present at the application. He now seeks to advance arguments for the first time before the Court of Appeal. These arguments should have been submitted in the Court below where all parties would have been in a position to address the submissions being made.

[21] Further, to allow the Applicant to participate in this already complex legal proceeding through the method being advocated would be tantamount to granting standing without first obtaining Court recognition. There are Court procedures in place which should be followed in order for the Applicant to participate in this action.

There is No Merit to the Appeal

[22] Case management decisions should not be lightly disturbed given that the justice has "conducted extensive hearings and has a good deal of familiarity with the facts." Absent an error of law or a palpable overriding error of fact, the case management judge should be given deference. With respect to discretionary decisions, intervention is warranted only when the judge has "misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice".

Broda v Broda, 2002 ABCA 133, 2002 CarswellAlta, at para 19. **[Tab 7]**
Balogun v Pandher, 2010 ABCA 40, 2010 CarswellAlta 77 at para 7 ("*Balogun*"). **[Tab 8]**

[23] The Decision is a procedural ruling that includes a direction to the parties that the case management judge felt was necessary to refocus the proceedings. This discretionary ruling should be afforded due deference.

[24] Moreover, the case management judge has the authority to rehear any matter previously decided during the process and the Decision given does not finally decide the rights of the interested parties.

Armstrong v Shapiro, 2005 ABCA 83, 2005 CarswellAlta 209 at para 4. **[Tab 9]**
Balogun at para 9. **[Tab 8]**

RELIEF SOUGHT

[25] The Respondents request that the application be dismissed with costs.

All OF WHICH IS RESPECTFULLY SUBMITTED this 10 day of February, 2016.

REYNOLDS MIRTH RICHARDS &FARMER LLP

Per: _____
Marco Poretti

DENTONS CANADA LLP

Per: _____
Doris Bonora

LIST OF AUTHORITIES

Tab 1

2008 ABCA 36
Alberta Court of Appeal

Dreco Energy Services Ltd. v. Wenzel

2008 CarswellAlta 131, 2008 ABCA 36, [2008] A.W.L.D. 996, 163 A.C.W.S. (3d) 891, 421 W.A.C. 51, 429 A.R. 51

Dreco Energy Services Ltd. and Vector Oil Tool Ltd., Applicants (Respondents) and Kenneth Hugo Wenzel, Kenneth H. Wenzel Oilfield Consulting Inc. and KW Downhole Tools Inc., (Not Parties to the Appeal) and Wenzel Downhole Tools Ltd., Respondent (Appellant)

E. Picard J.A., J. Côté J.A., P. Costigan J.A.

Heard: January 24, 2008
Judgment: January 31, 2008
Docket: Edmonton Appeal 0703-0339-AC

Counsel: P. Banks, C. Bond, for Applicants / Respondents
R.J. Wasylyshyn, L.M. Levesque, for Respondent / Appellant

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Practice on appeal — Parties — General principles

Judge varied confidentiality order and lifted implied undertaking to allow plaintiffs to use information on examination for discovery in related action — Defendant in second action appealed decision — Plaintiffs brought motion to quash appeal — Motion granted — Defendant even if properly intervenor in first action had no right of appeal — Order did not direct defendant's conduct and was not intended to protect it — It was undesirable to add defendant as party to first action at this late stage and especially so if only for purpose of appeal — In any event, defendant did not suffer any prejudice from order made — Order did not make admissible in second action evidence that was inadmissible — Order allowed defendant to raise objections to use of evidence in second action.

Table of Authorities

Cases considered:

Van de Perre v. Edwards (2001), 2001 SCC 60, 19 R.F.L. (5th) 396, [2001] 11 W.W.R. 1, 204 D.L.R. (4th) 257, *(*sub nom. *P. (K.V.) v. E. (T.))* 275 N.R. 52, *(*sub nom. *K.V.P. v. T.E.)* 156 B.C.A.C. 161, *(*sub nom. *K.V.P. v. T.E.)* 255 W.A.C. 161, 94 B.C.L.R. (3d) 199, 2001 CarswellBC 1999, 2001 CarswellBC 2000, [2001] 2 S.C.R. 1014 (S.C.C.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 38 — referred to

R. 38(3) — referred to

MOTION by plaintiffs to quash appeal by non-party to action.

Per Curiam:

1 There are two somewhat similar lawsuits started some years apart, with different defendants. They are running parallel, and are to be tried separately. The present appellant is not a party to the first suit.

2 In that first suit, the case management judge made an order pursuant to October 25 written reasons 2007 ABQB 635. The formal order was entered on November 6, 2007. The order appealed does three things. Its para. 1 declares that certain affidavits and transcripts of cross-examination thereon are not subject to the implied undertaking against collateral use of the fruits of discovery. Its para. 2 varies an existing confidentiality order, and lifts the same implied undertaking, "to allow the plaintiffs to use the transcripts of examination for discovery of employees or former employees in this [first] action in any examination for discovery in [the second] action" on certain protective terms. Its para. 3 similarly varies that existing confidentiality order with respect to documents got by discovery of records or by forensic inspection.

3 The notice of appeal calls the appellant "intervener". It is neither a plaintiff nor a defendant. In fact, it appears that it moved to become an intervener in the Court of Queen's Bench only after the making of the order under appeal. And that was for the limited purpose of varying a different order.

4 The respondents (plaintiffs) move to quash the appeal on the ground that an intervener cannot appeal. We know of no Alberta legislation or Rule which governs who may appeal most types of civil order or judgment. Case law governs. Many judges of the Supreme Court of Canada and various provincial appeal courts have held that an intervener cannot appeal.

Counsel for the appellant tries to distinguish the cases cited by the respondent, for example by pointing out that British Columbia legislation expressly bars appeals by interveners. But no one cited any decision saying that interveners can appeal.

5 It is true that one can find the odd case allowing an appeal by a non-party intimately and heavily affected by an order, such as someone whose property is seized or removed by the very order. Some of them may be cases of mere shortcuts, where the appellant obviously has the right to be added as a party, but no one bothers to do so. Whether such a person has a strict right to appeal need not be decided here. This is not such a case. The order appealed does not command or forbid the appellant to do anything.

6 Confidentiality orders and the implied undertaking rule are both designed to protect the secrets and privacy of one party to the suit in which they arise: the party giving the evidence in question, or giving the answers or producing the records by discovery in that suit. None of the parties to the present Queen's Bench action has appealed the order in question here. If they thought that this order harms any of them, they could have appealed. Confidentiality orders are rarely intended to protect anyone who gave no such information in that suit. By definition, the implied undertaking cannot refer to such a person. Still less are such orders or deemed undertakings intended to protect non-parties.

7 As a fallback position, counsel for the appellant said that he relied on Rule 38, and sought to be added as a party. When it was pointed out that he had not filed any notice of motion to be added, he pointed out that Rule 38(3) even allows the Court to add missing but necessary parties without any motion. It is undesirable and dangerous that the Court of Appeal do that at such a very late stage in the litigation, for such a vital party. See the Supreme Court of Canada's warning and criticisms about that, in *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, [2001] 11 W.W.R. 1 (S.C.C.) , 22-23 (paras. 47-50). The Queen's Bench action number in the first suit (in which this appeal is filed) begins "0203", which presumably means it was started in Edmonton in 2002. So the appellant has had over 5 years to move to be made a party, but has presumably not done so. It cannot have done so successfully.

8 In any event, what counsel for the appellant asked us for was limited: that his client be added as a party to the first suit, only for purposes of this appeal. We doubt that that can be done; if it can, is undesirable. The Rules of Court and decided cases give a party a long list of rights, powers, and duties. Generally speaking, non-parties rarely have rights, powers, or duties in a suit. To allow someone to be a party merely to appeal one order, risks giving that person rights and powers, but not duties. Could he get relief if he wins, but pay no costs if he loses? Having got the procedural relief he wanted, could he than have himself removed as a party on the ground that no one has a cause of action against him?

9 Since counsel for the appellant argued that he would be prejudiced if his client could not appeal, we went beyond mere status and inquired into the nature of the prejudice or injustice suggested. He seemed to think that the order under appeal put into evidence in the second suit against him, information gathered largely without his participation, even his knowledge, in the first suit.

10 That suggestion of *ex parte* injustice is not correct. Both the implied undertaking restricting the use of information got through discovery, and confidentiality orders, merely add an extra impediment to attempts to use evidence for purposes outside the original lawsuit. If those impediments are removed, then the information in question simply has the same status as all other information lying about in the great wide world.

11 The first rule of the law of evidence is that courts will not receive all information as evidence. Much of it is inadmissible: most hearsay, for example, and all irrelevant information. Therefore, waiving the implied undertaking rule, or lifting a confidentiality order, has no effect on such inadmissibility. What is inadmissible as evidence for other reasons other than confidentiality or implied undertakings remains inadmissible. To lift a confidentiality order or the implied undertaking merely allows the parties to another action to *tender* the information as evidence. It has no influence whatever on the judge or master's decision about whether to accept it as evidence. The usual common-law rules of evidence (as modified by statute or Rules of Court) still apply.

12 Indeed, that is express here. As noted, the order which the appellant seeks to upset contains conditions. Paragraph 2(c) says that the appellant

> may raise before the case management judge and the trial judge in [the second] action ... any objections to this process on the grounds of denial of natural justice, or on other proper grounds, and that judge may vary this order as appears just in the circumstances.

13 Similarly, para. 3(b) says that any

> objections by the [appellant] to the use or of [sic] documents claimed by [the appellant] to be the [appellant's] records shall be determined by the case management judge in [the second] action ...

14 It appears to us that the case management judge whose order is appealed has considered the various arguments of prejudice which counsel for the appellant later put to us, and amply provided for them. Therefore we cannot agree that this order works fundamental injustice against the non-party appellant, nor that we should somehow override the appellant's non-party status in the first suit.

15 Counsel for the appellant complained that some of his clients' past or present employees had been examined for discovery in the first suit in his absence. But he did not suggest that they had been denied the right to bring counsel. It is their own right to choose counsel or to decline counsel.

16 Counsel for the appellant presumed that answers given on examination for discovery in the first suit by his client's present or former employees, could simply be read in as evidence in the second suit against his employer client. He cited no authority for that. We gravely doubt that proposition. See the cases cited in 3 Stevenson & Côté, *Civil Procedure Encyclopedia*, p. 45-7, n. 4 (Part C.3)

17 At the end of argument by counsel for the appellant, we orally quashed the appeal, promising reasons to follow. Those reasons are found here.

Motion granted.

End of Document

Tab 2

2000 CarswellNat 1132, 2000 CarswellNat 5603, [2000] F.C.J. No. 873, 258 N.R. 246

2000 CarswellNat 1132
Federal Court of Appeal

Huzar v. Canada

2000 CarswellNat 1132, 2000 CarswellNat 5603, [2000] F.C.J. No. 873, 258 N.R. 246

Her Majesty the Queen, in Right of Canada, Department of Indian and Northern Affairs Canada and Walter Patrick Twinn, as Chief of the Sawridge Indian Band and the Sawridge Indian Band, Defendants (Appellants) and Aline Elizabeth Huzar, June Martha Kolosky, William Bartholomew McGillivray, Margaret Hazel Anne Blair, Clara Hebert, John Edward Joseph McGillivray, Maurice Stoney, Allen Austin McDonald, Lorna Jean Elizabeth McRee, Frances Mary Tees, Barbara Violet Miller (nee McDonald), Plaintiffs (Respondents)

Décary J.A., Evans J.A., Sexton J.A.

Judgment: June 13, 2000
Docket: A-326-98

Counsel: *Mr. Philip P. Healey*, for Defendants/Appellants.
Mr. Peter V. Abrametz, for Plaintiffs/Respondents.

Subject: Public; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Native law --- Bands and band government — Miscellaneous issues

Practice --- Pleadings — Amendment — Application to amend — Practice and procedure

Administrative law --- Action for declaration

Table of Authorities

Statutes considered:

Federal Court Act, R.S.C. 1985, c. F-7
s. 2(1) "federal board, commission or other tribunal" [rep. & sub. 1990, c. 8, s. 1(3)] — considered

s. 18(3) [en. 1990, c. 8, s. 4] — considered

s. 18.1 [en. 1990, c. 8, s. 5] — considered

APPEAL from order granting plaintiffs' motion to amend statement of claim and dismissing defendants' motion to strike the claim.

***Evans J.A.*:**

1 This is an appeal against an order of the Trial Division, dated May 6th, 1998, in which the learned Motions Judge granted the respondents' motion to amend their statement of claim by adding paragraphs 38 and 39, and dismissed the motion of the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, to strike the statement of claim as disclosing no reasonable cause of action.

2 In our respectful opinion, the Motions Judge erred in law in permitting the respondents to amend and in not striking out the unamended statement of claim. The paragraphs amending the statement of claim allege that the Sawridge Indian Band rejected the respondents' membership applications by misapplying the Band membership rules (paragraph 38), and claim a declaration that the Band rules are discriminatory and exclusionary, and hence invalid (paragraph 39).

3 These paragraphs amount to a claim for declaratory or prerogative relief against the Band, which is a federal board, commission or other tribunal within the definition provided by section 2 of the *Federal Court Act*. By virtue of subsection 18(3) of that Act, declaratory or prerogative relief may only be sought against a federal board, commission or other tribunal on an application for judicial review under section 18.1. The claims contained in paragraphs 38 and 39 cannot therefore be included in a statement of claim.

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

5 It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

6 For these reasons, the appeal will be allowed with costs in this Court and in the Trial Division.

Appeal allowed.

End of Document

Tab 3

2013 FC 509, 2013 CF 509
Federal Court

Stoney v. Sawridge First Nation

2013 CarswellNat 1434, 2013 CarswellNat 2006, 2013 FC 509, 2013 CF 509, 228 A.C.W.S. (3d) 605, 432 F.T.R. 253 (Eng.)

Maurice Felix Stoney, Applicant and Sawridge First Nation, Respondent

Aline Elizabeth (McGillivray) Huzar and June Martha (McGillivray) Kolosky, Applicants and Sawridge First Nation, Respondent

R.L. Barnes J.

Heard: March 05, 2013
Judgment: May 15, 2013
Docket: T-923-12, T-922-12

Counsel: Priscilla Kennedy, for Applicants
Edward H. Molstad, for Respondent

Subject: Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Aboriginal law --- Government of Aboriginal people — Membership

Applicants were descendants of individuals who were at one time members of First Nation group, but who, either voluntarily or by operation of law, lost their band memberships — Applicants were excluded from membership in First Nation by chief and council — Appeal committee upheld chief and council's decision — Applicants brought application for judicial review — Application dismissed — Applicants did not qualify for automatic band membership — Applicants' only option was to apply for membership in accordance with membership rules promulgated by First Nation — Further, applicants were named as plaintiffs in previous action seeking mandatory relief requiring that their names be added to First Nation's membership list, and that action was struck out — Attempt by applicants to reargue question of their automatic right of membership in First Nation was barred by principle of issue estoppel — There was no evidence to make finding of institutional bias — There was no evidence to support finding of breach of s. 15 of Canadian Charter of Rights and Freedoms.

Table of Authorities

Cases considered by *R.L. Barnes J.*:

Danyluk v. Ainsworth Technologies Inc. (2001), 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 2001 C.L.L.C. 210-033, 272 N.R. 1, 149 O.A.C. 1, 7 C.P.C. (5th) 199, 34 Admin. L.R. (3d) 163, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) — referred to

Huzar v. Canada (2000), 2000 CarswellNat 5603, 258 N.R. 246, 2000 CarswellNat 1132 (Fed. C.A.) — referred to

Lavallee v. Louison (1999), 1999 CarswellNat 1771, 1999 CarswellNat 5553 (Fed. T.D.) — referred to

Sawridge Band v. R. (2003), 2003 FCT 347, 2003 CarswellNat 1212, 2003 CFPI 347, 2003 CarswellNat 2857, [2003] 3 C.N.L.R. 344, *(*sub nom. *Sawridge Indian Band v. Canada)* 232 F.T.R. 54, *(*sub nom. *Sawridge Band v. Canada)* [2003] 4 F.C. 748 (Fed. T.D.) — considered

Sawridge Band v. R. (2004), 2004 FCA 16, 2004 CarswellNat 130, *(*sub nom. *Sawridge Indian Band v. Canada)* 316 N.R. 332, 2004 CAF 16, 2004 CarswellNat 966, *(*sub nom. *Sawridge Indian Band v. Canada)* 247 F.T.R. 160 (note), [2004] 2 C.N.L.R. 316, *(*sub nom. *Sawridge Indian Band v. Canada)* [2004] 3 F.C.R. 274 (F.C.A.) — considered

Sweetgrass First Nation v. Favel (2007), 63 Admin. L.R. (4th) 207, 2007 CarswellNat 5180, 2007 CF 271, 2007 FC 271, 2007 CarswellNat 567 (F.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 15 — referred to

Federal Courts Act, R.S.C. 1985, c. F-7
s. 18.1 [en. 1990, c. 8, s. 5] — pursuant to

Gender Equity in Indian Registration Act, S.C. 2010, c. 18
Generally — referred to

Indian Act, R.S.C. 1927, c. 98
Generally — referred to

s. 6 — considered

s. 10(7) — considered

s. 114 — referred to

Indian Act, Act to amend the, S.C. 1985, c. 27
Generally — referred to

APPLICATION for judicial review of appeal committee's decision upholding chief and council's decision to exclude

applicants from membership in First Nation.

***R.L. Barnes J.*:**

1 This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7. The Applicants are all descendants of individuals who were at one time members of the Sawridge First Nation, but who, either voluntarily or by operation of the law at the time, lost their band memberships. As a result the Applicants were excluded from membership in the Sawridge First Nation. They now ask this Court to review the Sawridge First Nation Appeal Committee's decision to uphold the Sawridge Chief and Council's decision which denied their applications for membership.

2 The father of the Applicant Maurice Stoney was William J. Stoney. William Stoney was a member of the Sawridge First Nation but in April 1944 he applied to the Superintendent General of Indian Affairs to be enfranchised under section 114 of the *Indian Act*, c 98, RSC 1927. In consideration of payments totalling $871.35, William Stoney surrendered his Indian status and his membership in the Sawridge First Nation. By operation of the legislation, William Stoney's wife, Margaret Stoney, and their two children, Alvin Stoney and Maurice Stoney, were similarly enfranchised thereby losing their Indian status and their membership in the Sawridge First Nation.

3 The Applicants Aline Huzar and June Kolosky are sisters and, like Mr. Stoney, they are the grandchildren of Johnny Stoney. The mother of Ms. Huzar and Ms. Kolosky was Johnny Stoney's daughter, Mary Stoney. Mary Stoney married Simon McGillivray in 1921. Because of her marriage Mary Stoney lost both her Indian status and her membership in Sawridge by operation of law. When Ms. Huzar and Ms. Kolosky were born in 1941 and 1937 respectively Mary Stoney was not a member of the Sawridge Band First Nation and she did not reacquire membership before her death in 1979.

4 In 1985, with the passing of Bill C-31, *An Act to amend the Indian Act*, 33 - 34 Eliz II c 27, and pursuant to section 10 of the *Indian Act*, the Sawridge First Nation delivered its membership rules, supporting documentation and bylaws to the Deputy Minister of Indian and Northern Affairs, who accepted them on behalf of the Minister. The Minister subsequently informed Sawridge that notice would be given pursuant to subsection 10(7) of the *Indian Act* that the Sawridge First Nation had control of its membership. From that point on, membership in the Sawridge First Nation was determined based on the Sawridge Membership Rules.

5 Ms. Kolosky submitted her application for membership with the Sawridge First Nation on February 26, 2010. Ms. Huzar submitted her application on June 21, 2010. Mr. Stoney submitted his application on August 30, 2011. In letters dated December 7, 2011, the Applicants were informed that their membership applications had been reviewed by the First Nation Council, and it had been determined that they did not have any specific "right" to have their names entered in the Sawridge Membership List. The Council further stated that it was not compelled to exercise its discretion to add the Applicants' names to the Membership list, as it did not feel that their admission would be in the best interests and welfare of Sawridge.

6 After this determination, "Membership Processing Forms" were prepared that set out a "Summary of First Nation Councils Judgement". These forms were provided to the Applicants and outlined their connection and commitment to Sawridge, their knowledge of the First Nation, their character and lifestyle, and other considerations. In particular, the forms noted that the Applicants had not had any family in the Sawridge First Nation for generations and did not have any current

relationship with the Band. Reference was also made to their involvement in a legal action commenced against the Sawridge First Nation in 1995 in which they sought damages for lost benefits, economic losses, and the "arrogant and high-handed manner in which Walter Patrick Twinn and the Sawridge Band of Indians has deliberately, and without cause, denied the Plaintiffs reinstatement as Band Members...". The 1995 action was ultimately unsuccessful. Although the Applicants were ordered to pay costs to the First Nation, those costs remained unpaid.

7 In accordance with section 12 of the Sawridge Membership Rules, the Applicants appealed the Council's decision arguing that they had an automatic right to membership as a result of the enactment of Bill C-31. On April 21, 2012 their appeals were heard before 21 Electors of the Sawridge First Nation, who made up the Appeal Committee. Following written and oral submissions by the Applicants and questions and comments from members of the Appeal Committee, it was unanimously decided that there were no grounds to set aside the decision of the Chief and Council. It is from the Appeal Committee's decision that this application for judicial review stems.

8 The Applicants maintain that they each have an automatic right of membership in the Sawridge First Nation. Mr. Stoney states at para 8 of his affidavit of May 22, 2012 that this right arises from the provisions of Bill C-31. Ms. Huzar and Ms. Kolosky also argue that they "were persons with the right to have their names entered in the [Sawridge] Band List" by virtue of section 6 of the *Indian Act*.

9 I accept that, if the Applicants had such an acquired right of membership by virtue of their ancestry, Sawridge had no right to refuse their membership applications: see *Sawridge Band v. R.*, 2004 FCA 16 (F.C.A.) at para 26, [2004] F.C.J. No. 77 (F.C.A.).

10 Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge Band v. R.*, 2003 FCT 347, [2003] 4 F.C. 748 (Fed. T.D.), and *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.) in support of their claims to automatic Sawridge membership. Those decisions, however, apply to women who had lost their Indian status and their band membership by virtue of marriages to non-Indian men and whose rights to reinstatement were clearly expressed in the amendments to the *Indian Act*, including Bill C-31. The question that remains is whether the descendants of Indian women who were also deprived of their right to band membership because of the inter-marriage of their mothers were intended to be protected by those same legislative amendments.

11 A plain reading of sections 6 and 7 of Bill C-31 indicates that Parliament intended only that persons who had their Indian status and band memberships directly removed by operation of law ought to have those memberships unconditionally restored. The only means by which the descendants of such persons could gain band membership (as distinct from regaining their Indian status) was to apply for it in accordance with a First Nation's approved membership rules. This distinction was, in fact, recognized by Justice James Hugessen in *Sawridge Band v. R.*, 2003 FCT 347 (Fed. T.D.) at paras 27 to 30, [2003] 4 F.C. 748 (Fed. T.D.):

> 27 Although it deals specifically with Band Lists maintained in the Department, section 11 clearly distinguishes between automatic, or unconditional, entitlement to membership and conditional entitlement to membership. Subsection 11(1) provides for automatic entitlement to certain individuals as of the date the amendments came into force. Subsection 11(2), on the other hand, potentially leaves to the band's discretion the admission of the descendants of women who "married out."
>
> 28 The debate in the House of Commons, prior to the enactment of the amendments, reveals Parliament's intention to create an automatic entitlement to women who had lost their status because they married non-Indian men. Minister

Crombie stated as follows (*House of Commons Debates*, Vol. II, March 1, 1985, page 2644):

> ... today, I am asking Hon. Members to consider legislation which will eliminate two historic wrongs in Canada's legislation regarding Indian people. These wrongs are discriminatory treatment based on sex and the control by Government of membership in Indian communities.

29 A little further, he spoke about the careful balancing between these rights in the Act. In this section, Minister Crombie referred to the difference between status and membership. He stated that, while those persons who lost their status and membership should have both restored, the descendants of those persons are only automatically entitled to status (*House of Commons Debates*, idem, at page 2645):

> This legislation achieves balance and rests comfortably and fairly on the principle that those persons who lost status and membership should have their status and membership restored. [page766] While there are some who would draw the line there, in my view fairness also demands that the first generation descendants of those who were wronged by discriminatory legislation should have status under the Indian Act so that they will be eligible for individual benefits provided by the federal Government. However, their relationship with respect to membership and residency should be determined by the relationship with the Indian communities to which they belong.

30 Still further on, the Minister stated the fundamental purposes of amendments, and explained that, while those purposes may conflict, the fairest balance had been achieved (*House of Commons Debates*, idem, at page 2646):

> ... I have to reassert what is unshakeable for this Government with respect to the Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions; and third, it must ensure that the Indian First Nations who wish to do so can control their own membership. Those are the three principles which allow us to find balance and fairness and to proceed confidently in the face of any disappointment which may be expressed by persons or groups who were not able to accomplish 100 per cent of their own particular goals...

[Emphasis added]

This decision was upheld on appeal in *Sawridge Band v. R.*, 2004 FCA 16, [2004] F.C.J. No. 77 (F.C.A.).

12 The legislative balance referred to by Justice Hugessen is also reflected in the 2010 Legislative Summary of Bill C-3 titled the *Gender Equity in Indian Registration Act*, SC 2010, c 18. There the intent of Bill C-31 is described as follows:

> Bill C-31 severed status and band membership for the first time and authorized bands to control their own membership and enact their own membership codes (section 10). For those not exercising that option, the Department of Indian Affairs would maintain "Band Lists" (section 11). Under the legislation's complex scheme some registrants were granted automatic band membership, while others obtained only conditional membership. The former group included women who had lost status by marrying out and were reinstated under paragraph 6(1)(c). The latter group included their children, who acquired status under subsection 6(2).
>
> [Emphasis added]

13 While Mary Stoney would have an acquired right to Sawridge membership had she been alive when Bill C-31 was enacted, the same right did not accrue to her children. Simply put neither Ms. Huzar or Ms. Kolosky qualified under section 11 of Bill C-31 for automatic band membership. Their only option was to apply for membership in accordance with the membership rules promulgated by Sawridge.

14 This second generation cut-off rule has continued to attract criticism as is reflected in the Legislative Summary at p 13, para 34:

> 34. The divisiveness has been exacerbated by the Act's provisions related to band membership, under which not all new or reinstated registrants have been entitled to automatic membership. As previously mentioned, under provisions in Bill C-31, women who had "married out" and were reinstated did automatically become band members, but their children registered under subsection 6(2) have been eligible for conditional membership only. In light of the high volume of new or returning "Bill C-31 Indians" and the scarcity of reserve land, automatic membership did not necessarily translate into a right to reside on-reserve, creating another source of internal conflict.

Notwithstanding the above-noted criticism, the legislation is clear in its intent and does not support a claim by Ms. Huzar and Ms. Kolosky to automatic band membership.

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

16 Even if I am wrong in my interpretation of these legislative provisions, this application cannot be sustained at least in terms of the Applicants' claims to automatic band membership. All of the Applicants in this proceeding, among others, were named as Plaintiffs in an action filed in this Court on May 6, 1998 seeking mandatory relief requiring that their names be added to the Sawridge membership list. That action was struck out by the Federal Court of Appeal in a decision issued on June 13, 2000 for the following reasons:

> [4] It was conceded by counsel for the respondents that, without the proposed amending paragraphs, the unamended statement of claim discloses no reasonable cause of action in so far as it asserts or assumes that the respondents are entitled to Band membership without the consent of the Band.
>
> [5] It is clear that, until the Band's membership rules are found to be invalid, they govern membership of the Band and that the respondents have, at best, a right to apply to the Band for membership. Accordingly, the statement of claim against the appellants, Walter Patrick Twinn, as Chief of the Sawridge Indian Band, and the Sawridge Indian Band, will be struck as disclosing no reasonable cause of action.

See *Huzar v. Canada*, [2000] F.C.J. No. 873, 258 N.R. 246 (Fed. C.A.).

17 It is not open to a party to relitigate the same issue that was conclusively determined in an earlier proceeding. The attempt by these Applicants to reargue the question of their automatic right of membership in Sawridge is barred by the principle of issue estoppel: see *Danyluk v Ainsworth Technologies Inc.* 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.) .

18 The Applicants are, nevertheless, fully entitled to challenge the lawfulness of the appeal decision rejecting their membership applications.

19 The Applicants did not challenge the reasonableness of the appeal decision but only the fairness of the process that was followed. Their argument is one of institutional bias and it is set out with considerable brevity at para 35 of the Huzar and Kolosky Memorandum of Fact and Law:

> 35. It is submitted that the total membership of Sawridge First Nation is small being in the range of 50 members. Only three applicants have been admitted to membership since 1985 and these three are (were) the sisters of deceased Chief, Walter Twinn. The Appeal Committee consisted of 21 of the members of Sawridge and three of these 21 were the Chief, Roland Twinn and Councillors, Justin Twinn and Winona Twin, who made the original decision appealed from.

20 In the absence of any other relevant evidence, no inference can be drawn from the limited number of new memberships that have been granted by Sawridge since 1985. While the apparent involvement of the Chief and two members of the Band Council in the work of the Appeal Committee might give rise to an appearance of bias, there is no evidence in the record that would permit the Court to make a finding one way or the other or to ascertain whether this issue was waived by the Applicants' failure to raise a concern at the time.

21 Indeed, it is surprising that this issue was not fully briefed by the Applicants in their affidavits or in their written and oral arguments. It is of equal concern that no cross-examinations were carried out to provide an evidentiary foundation for this allegation of institutional bias. The issue of institutional bias in the context of small First Nations with numerous family connections is nuanced and the issue cannot be resolved on the record before me: see *Sweetgrass First Nation v. Favel*, 2007 FC 271 (F.C.) at para 19, [2007] F.C.J. No. 347 (F.C.), and *Lavallee v. Louison*, [1999] F.C.J. No. 1350 (Fed. T.D.) at paras 34-35, (1999), 91 A.C.W.S. (3d) 337 (Fed. T.D.).

22 The same concern arises in connection with the allegation of a section 15 Charter breach. There is nothing in the evidence to support such a finding and it was not advanced in any serious way in the written or oral submissions. The record is completely inadequate to support such a claim to relief. There is also nothing in the record to establish that the Crown was provided with any notice of what constitutes a constitutional challenge to the *Indian Act*. Accordingly, this claim to relief cannot be sustained.

23 For the foregoing reasons these applications are dismissed with costs payable to the Respondent.

Judgment

THIS COURT'S JUDGMENT is that these applications are dismissed with costs payable to the Respondent.

Application dismissed.

End of Document

Tab 4

Canadian human rights commission | Commission cane di enne des droits de la personne

Record of Decision under Sections 4041 PROTECTED

Complaint Information

File Number(s):	20140008
Date of Complaint(s):	January 31, 2014
Complainant(s):	Maurice Stoney
Respondent(s):	Sawridge First Nation

Decision touter section 41

The Commission decided, for the reasons identified below, not to deal with the complaint, under paragraph 41(1)(d) of the *Canadian Human Rights Act.*

The Commission further decided that a decision under paragraph 41(1)(e) of the *Canadian Human Rights Act* is therefore unnecessary.

Material considered when decision made

The following documents were reviewed:

> Complaint form dated January 31, 2014
> Section 40/41 report dated January 21, 2015
D Complainant's submission dated February 6, 2015
D Respondent's submission dated March 23, 2015

Reasons for decision

The Commission adopts the following conclusion set out in the Section 40/41 Report:

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 the 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 respondent's denial of the complainant's membership in the band, was central to both proceedings. The complainant clearly raised discrimination in his application for judicial review when he alleged that the decision violated the Charter; however, he did not provide adequate evidence for the Federal Court to overturn the decision of the respondent. The Supreme Court in Figliola held that human rights commissions must respect the finality of decisions made by other administrative decision-makers with concurrent jurisdiction to apply human rights legislation when the issues raised in both processes are the same. In this instance, the other decision-makers are judges of the Federal Court and the Federal Court of Appeal and could have clearly considered the human rights allegations raised. Therefore, it would not be unfair for the Commission to decide not to deal with this complaint.

Signature

April 15, 2015

Deputy Chief Comm' ner *Dale*

Tab 5

2015 ABCA 206
Alberta Court of Appeal

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.

2015 CarswellAlta 1090, 2015 ABCA 206, [2015] A.W.L.D. 2816, 255 A.C.W.S. (3d) 256, 602 A.R. 135, 647 W.A.C. 135

Attila Dogan Construction and Installation Co. Inc., Applicant and AMEC Americas Limited, formerly AMEC E&C Services Limited and Agra Monenco Inc., Respondents

Frans Slatter J.A.

Heard: June 11, 2015
Judgment: June 18, 2015
Docket: Calgary Appeal 1501-0068-AC

Counsel: C. Amsterdam, for Applicant
D. Tupper, for Respondent

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Practice on appeal — Time to appeal — Extension of time — Grounds for extension

Out of province counsel filed notice of appeal two days late, under mistaken assumption that "month" in Alberta Rules meant "30 days" — Applicant brought application for extension of time to appeal — Application granted — Time to appeal was extended by two days — In many cases of short delay of day or two, weighing various components of Cairns v — Cairns test would result in court exercising its discretion to grant extension — Human error in legal system was inevitable and Cairns test did not categorically reject it as adequate explanation — Respondents were aware that appeal was being launched, and did not do anything in reliance on judgment which resulted in prejudice as result of delay itself — Appeal did not operate as stay of judgment, and any incremental prejudice to respondents by extending time to appeal was not decisive.

Table of Authorities

Cases considered by *Frans Slatter J.A.*:

Adderley v. 1400467 Alberta Ltd. (2014), 2014 ABCA 291, 2014 CarswellAlta 1558, 580 A.R. 319, 620 W.A.C. 319 (Alta. C.A.) — referred to

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABQB 120, 2015 CarswellAlta 287, 40 C.L.R. (4th) 187 (Alta. Q.B.) — referred to

C. (L.) v. Alberta (2009), 2009 CarswellAlta 268, 2009 ABCA 77, 448 A.R. 293, 447 W.A.C. 293, 69 C.P.C. (6th) 315 (Alta. C.A.) — referred to

Cairns v. Cairns (1931), [1931] 3 W.W.R. 335, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.) — followed

Gauthier Manufacturing Ltd. v. Pont Viau (City) (1978), 1978 CarswellQue 128, *(*sub nom. *Cité de Pont Viau v. Gauthier Mfg. Ltd.)* [1978] 2 S.C.R. 516, 21 N.R. 192, 1978 CarswellQue 128F (S.C.C.) — referred to

Hudson v. Bower (1968), 67 W.W.R. 564, *(*sub nom. *Shewschuk, Re)* 1 D.L.R. (3d) 288, 1968 CarswellAlta 77 (Alta. C.A.) — referred to

Jackson v. Canadian National Railway (2015), 2015 CarswellAlta 306, 2015 ABCA 89 (Alta. C.A.) — referred to

RIC New Brunswick Inc. v. Telecommunications Research Laboratories (2010), 2010 ABCA 75, 2010 CarswellAlta 412 (Alta. C.A.) — referred to

Royal Bank v. Morin (1977), 4 C.P.C. 1, 1977 CarswellAlta 108, 4 Alta. L.R. (2d) 127, 6 A.R. 341 (Alta. C.A.) — referred to

Schulte v. Alberta (Appeals Commission for Workers' Compensation Board) (2015), 2015 ABCA 148, 2015 CarswellAlta 727 (Alta. C.A.) — referred to

Stoddard v. Montague (2006), 2006 CarswellAlta 1826, 2006 ABCA 109, 404 W.A.C. 88, 412 A.R. 88 (Alta. C.A.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 13.4(1) — referred to

R. 14.5(1)(b) — referred to

R. 14.8(1)(b) — referred to

R. 14.8(2)(a)(iii) — referred to

R. 14.16(3) — referred to

APPLICATION for extension of time to appeal.

***Frans Slatter J.A.*:**

1 The applicant seeks an extension of time to appeal the decision reported as *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABQB 120 (Alta. Q.B.). That decision a) denied an application for an adjournment, b) granted summary judgment dismissing the claim, and c) granted summary judgment on the counterclaim.

2 This decision was released on February 18, 2015, and under R. 14.8(1)(b) and (2)(a)(iii) the time to appeal it expired one month later on March 18, 2015. Under R. 13.4(1) a month is measured from the numerical date in one month to the equivalent numerical date in the next month, so that the expiry of the appeal period is consistent regardless of how long a particular calendar month may be.

3 In this case out of province counsel filed the Notice of Appeal two days late, on March 20, 2015, apparently as a result of the mistaken assumption that a "month" in the Alberta Rules means "30 days".

4 Applications to extended time to appeal are governed by the principles in *Cairns v. Cairns*, [1931] 4 D.L.R. 819 (Alta. C.A.), at pp. 826-7). It is often said that *Cairns* sets out a "four part test", but that decision does not actually set out any "test", and it mentions more than four factors:

> (a) a *bona fide* intention to appeal held while the right to appeal existed;
>
> (b) an explanation for the failure to appeal in time that serves to excuse or justify the lateness;
>
> (c) an absence of serious prejudice such that it would not be unjust to disturb the judgment;
>
> (d) the applicant must not have taken the benefits of the judgment under appeal; and
>
> (e) a reasonable chance of success on the appeal, which might better be described as a reasonably arguable appeal.

These factors guide the Court in exercising its discretion to extend the time to appeal, but they do not set rigid requirements, and they do not override the Court's general discretion to extend time in appropriate cases. As noted in *Cairns* at p. 829 "... this Court considers that it has a free and unfettered discretion to do what justice requires to be done between the parties having regard to the circumstances of each particular case".

5 Since there is an overriding discretion in the Court to extend the time to appeal, it is not necessary for an applicant to satisfy all components of the *Cairns* test: *Stoddard v. Montague*, 2006 ABCA 109 (Alta. C.A.) at para. 8, (2006), 412 A.R. 88 (Alta. C.A.). It is more accurate to say that if the applicant *does* satisfy all the components of the *Cairns* test, it is highly likely that an extension will be granted. Nevertheless, the appropriate approach is to address the *Cairns* factors first: *Royal Bank v. Morin* (1977), 6 A.R. 341 (Alta. C.A.) at para. 8, (1977), 4 Alta. L.R. (2d) 127 (Alta. C.A.). However, in the end the *Cairns* factors and the surrounding circumstances must be considered and weighed collectively in deciding whether an extension of time is warranted.

6 While the appellant immediately expressed an intention to appeal, the respondents argue that it was not *bona fide*. The respondents argue that the appeal is just another attempt by the appellant to delay these proceedings, given that the appellant indicated it would appeal regardless of the reasons why summary judgment was granted. This complex litigation has been underway for many years, and it has been in the Court of Appeal several times. The amounts involved are very large: the judgment on the counterclaim was in excess of $11.6 million. It is not necessarily bad faith for a litigant to express an intention to appeal an adverse result in any event, if the consequences of the judgment are very serious for that litigant. In the circumstances, it is not possible to say that the appellant is not appealing *bona fide*.

7 The reason offered for the lateness of the appeal is that counsel miscalculated the time. The respondents argue that errors by counsel do not qualify as an acceptable explanation, citing *Adderley v. 1400467 Alberta Ltd.*, 2014 ABCA 291 (Alta. C.A.) at para. 12 and *Schulte v. Alberta (Appeals Commission for Workers' Compensation Board)*, 2015 ABCA 148 (Alta. C.A.) at para. 14. There is no rigid rule that an error by counsel is not a sufficient explanation: *Royal Bank v. Morin* at para. 17; *Hudson v. Bower* (1968), 67 W.W.R. 564 (Alta. C.A.), at pp. 564 -5, (1968), 1 D.L.R. (3d) 288 (Alta. C.A.)); *C. (L.) v. Alberta*, 2009 ABCA 77 (Alta. C.A.) at para. 8, (2009), 448 A.R. 293 (Alta. C.A.); *Jackson v. Canadian National Railway*, 2015 ABCA 89 (Alta. C.A.) at para. 7; *Gauthier Manufacturing Ltd. v. Pont Viau (City)*, [1978] 2 S.C.R. 516 (S.C.C.) at p. 527. Calculating "one month" may not be obscure or debatable, but human error in the legal system is inevitable, and the *Cairns* test does not categorically reject it as an adequate explanation.

8 It is true that *Cairns* contemplates "some very special circumstance which serves to excuse or justify" the late appeal. *Cairns*, however, was a custody dispute engaging the interests of a child: finality was of prime importance, and the procedural history was unsatisfactory. While some acceptable explanation for the lateness is required, the reason, considered in isolation, need not be "very special". The source of the error must be weighed with all of the other factors, such as the length of the delay, prejudice from granting or denying the application, and all the other relevant considerations.

9 In many cases of a short delay of a day or two, weighing the various components of the *Cairns* test will result in the Court exercising its discretion to grant an extension: *RIC New Brunswick Inc. v. Telecommunications Research Laboratories*, 2010 ABCA 75 (Alta. C.A.) at para. 1.

10 The respondents argue that *Cairns* emphasizes that the successful party at trial has a vested interest in its judgment which should not easily be displaced. There is undoubtedly some disadvantage or "prejudice" to the respondents by reason of the appeal. Much of that prejudice is, however, by reason of the appeal itself, and not by reason of the two days of delay that are at issue here. The respondents were aware that an appeal was being launched, and did not do anything in reliance on the judgment which resulted in prejudice as a result of the delay itself. The appeal does not operate as a stay of a judgment, and any incremental prejudice to the respondents by extending the time to appeal is not decisive.

11 The appellant argues that there is a prospect for success on the appeal, and proposes to raise several grounds of appeal. The respondents argue the appeal is without merit and that the time for appeal should not be extended. The issues in the lawsuit are complex, as indicated by the 152 paragraph reasons of the case management judge. Whether the appeal is without merit is for a panel of this Court to decide. It is sufficient for the present purposes to conclude that the appeal is arguable.

12 The respondents argue that the appellant is not entitled to appeal the denial of the adjournment unless permission to

appeal is obtained under R. 14.5(1)(b). The appellant has now indicated that it does not propose to pursue any grounds of appeal arising from the denial of the adjournment.

13 In conclusion, the time to appeal is extended two days, to March 20, 2015. Since the appellant has now applied for and received an indulgence from the Court, it is incumbent on the appellant to prosecute the appeal with special diligence. In that respect:

> (a) Rule 14.16(3) directs that the Appeal Record and Transcripts be prepared promptly and filed and served forthwith. Some of the required transcripts appear to have been certified by Transcript Management in September, 2014, and the last of them was certified on April 10, 2015, but they were not filed with the Registrar until June 10, 2015. Just because the respondents have challenged some aspect of the appeal is no justification for disregarding all the other provisions in the Rules. Since counsel who appeared on the application was not retained to file the Appeal Record, Ontario counsel who has conduct of this file is to write to the Registrar by June 30, 2015 explaining the delay in filing the Appeal Record and Transcripts.
>
> (b) The Appeal Record is to be completed, filed and served by June 30, 2015.
>
> (c) The appellant's factum is to be filed and served by July 31, 2015.
>
> (d) This appeal should be scheduled for oral argument now. Before June 30, 2015, counsel must select and book an appropriate date for oral argument, in consultation with the Registrar, or contact the Court for further directions.

14 Normally, the successful applicant would be entitled to costs. However, since the need for this application arose as a result of an error of the appellant, there will be no costs to either party.

Application granted.

End of Document

Tab 6

Most Negative Treatment: Not followed
Most Recent Not followed: R. v. Hammerling | 1979 CarswellMan 131, 1 Man. R. (2d) 246, [1980] 1 W.W.R. 572, 4 W.C.B. 59 | (Man. C.A., Oct 22, 1979)

1931 CarswellAlta 52
Alberta Supreme Court [Appellate Division]

Cairns v. Cairns

1931 CarswellAlta 52, [1931] 3 W.W.R. 335, [1931] 4 D.L.R. 819, [1931] A.J. No. 76, 26 Alta. L.R. 69

Cairns v. Cairns

Harvey, C.J.A., Clarke, Mitchell, Lunney and McGillivray, JJ.A.

Judgment: October 23, 1931

Counsel: *A. Lannan*, for application.
J. McKinley Cameron, K.C., contra.

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Barristers and Solicitors --- Relationship with client — Counsel as witness

Practice — Appeals — Extending Time For — Jurisdiction of Appellate Division — Burden on Applicant.

Barristers and Solicitors — Counsel — Functions of Must Not be Combined With Those of Witness.

An application for an extension of time within which to appeal to the Appellate Division of the Supreme Court may properly be made direct to that Division; and, moreover, it is better practice to do so than to apply first to the trial Judge and, if he refuses leave, to appeal from him to the Appellate Division.

Where a person has recovered a judgment and the time for giving notice of appeal therefrom has expired he has a vested interest in the judgment and in the benefits which may flow from it that will not lightly be interfered with by the Courts.

Therefore an extension of time within which to give notice of appeal will not be granted as a matter of course, but a heavy burden rests on the applicant of showing cause why the indulgence of the Court should be extended to him. It is

incumbent upon him:

(1) To show that a *bona-fide* intention to appeal was entertained while the right to appeal existed and that the failure to appeal was by reason of some special circumstances which served to excuse or justify such failure;

(2) To account for the delay and to show that the other side was not so seriously prejudiced thereby as to make it unjust, having regard to the position of both parties, to disturb the judgment;

(3) To show that he has not taken the benefits of the judgment from which he is seeking to appeal;

(4) To show that he would have a reasonable chance of success if allowed to prosecute the appeal.

While in the present case the Court refused to extend the time within which to give notice of appeal from an order as to the custody of a child whose parents had both been found guilty of adultery, yet in view of the fact that the future welfare of the infant was involved, and it was advisable in its interests that its custody be settled finally, subject to new conditions and future change of circumstances, leave was granted to make a new application for leave to appeal, the application to be made at the time of bringing on his appeal (which it was stated was intended) from an order of the trial Judge refusing to vary the original order for custody.

A counsel in any Court does not occupy in any way the dual position of advocate and witness.

Counsel before a Court of Appeal are entitled to stand upon the record and are not required to be prepared to rebut any statements of fact *extra* the record then made by opposing counsel.

An application for an extension of time within which to appeal from an order by Simmons, C.J.T.D. The application was made to Lunney, J.A., sitting as Judge of the Appellate Division in Chambers, who referred the application to the Court at its next sittings. Application disposed of as stated in the headnote *supra*.

The application was heard by HARVEY, C.J.A., CLARKE, MITCHELL, LUNNEY and MCGILLIVRAY, JJ.A.

***Harvey, C.J.A., Clarke*, and *Mitchell, JJ.A.* concur with McGillivray, J.A.:**

***Lunney, J.A.*:**

2 I concur in the result.

***McGillivray, J.A.*:**

3 This is an application to extend the time within which to give notice of appeal. Counsel opposing the application has taken the preliminary objection that this Court not being a Court of original jurisdiction should not entertain a motion to extend the time for giving notice of appeal except it be brought by way of appeal from the decision of the trial Judge who should first deal with an application of this character. Mr. Cameron concedes that this Court has the right to hear such an application in the first instance but says that according to the practice of the Court it should not be exercised and in support of

this view he points to the fact that there is no reported decision in which this Court has dealt with such an application other than on appeal from a Judge's refusal to grant leave. As to this, I would say in the first place that it is a common practice for this Court to hear applications of this character made to it direct and the reason for lack of reported decisions is that in nearly all cases the judgment of the Court has been pronounced from the Bench by the presiding Judge. If for this reason the practice of the Court is not well known it may be important to declare, as I now do, that it is good practice to apply to the Appellate Division of the Supreme Court for an extension of time within which to give notice of appeal and I may add that in my opinion it is the better practice for the following reasons: There can be no advantage in applying to any Judge of the Trial Division other than the trial Judge which would not lie in the case of an application to the Appellate Division. It may be said that an advantage does lie in an application to the trial Judge in that he knows the facts of the case, but it is to be remembered that the Appellate Court has or at least should have the notes of evidence or reasons for judgment of the trial Judge. It is also to be borne in mind that the Appellate Court has not dealt with the matter before, whereas the trial Judge to whom such an application is made, has already decided against the proposed appellant and so is faced with the disagreeable and, it seems to me, the most difficult task of determining amongst other things whether or not it is reasonably arguable that he is quite wrong. Furthermore, I am persuaded that the Court before which the appeal is sought to be brought should be the one to decide whether or not it is a proper case in which to grant an indulgence so that the appeal may be heard.

4 In *The Annual Practice*, 1931, at p. 1337, we have the following note under the Rule with respect to the power of the Court or Judge to enlarge or abridge time:

> As a general rule and subject to any specific provision to the contrary, all applications to enlarge the time for doing any act, or taking any proceeding, must be made in the first instance to the court or person who has jurisdiction to deal with the substance of the matter in relation to which the extension of time for a step to be taken is required. Thus application for extension of time to appeal to the Court of Appeal must be made to that court.

5 In the case of *Sellar v. Bright & Co. Ltd.* (1904) 20 T.L.R. 586, 91 L.T. 9, Collins, M.R., with whom Lord Justice Sterling and Lord Justice Matthew agreed, is reported as having stated that he "dissented from the proposition that any Judge had power to impose upon this Court the obligation of hearing an appeal which was out of time."

6 I am of the opinion stated for a further reason: Assuming that a Court of five Judges is generally speaking more apt to be right than a single Judge, then a distinct advantage lies in seeking an extension of time from the Appellate Court in the first instance, because an appeal to this Court from a decision of the trial Judge refusing to extend the time within which to give notice of appeal, must necessarily be limited in character in that it is a discretionary matter and this Court would consider itself bound not to interfere unless it found that the trial Judge acted on a misunderstanding or disregard of principle or clear misapprehension of the facts.

7 In this case the plaintiff Dougall Norman Cairns and the defendant Mary Buchan Cairns (plaintiff by way of counter-claim), husband and wife, each brought action against the other claiming a decree of divorce on the ground of adultery and the custody of the infant child of their marriage. The case was tried before the Chief Justice of the Trial Division. The learned trial Judge found that both parties were guilty of adultery but for reasons stated he gave effect to the defendant's counterclaim and adjudged and decreed that the marriage be dissolved by reason of the adultery of the plaintiff Dougall Norman Cairns, unless sufficient cause were shown to the Court why the decree should not be made absolute within three months from the making thereof.

8 The claim of the plaintiff against the co-respondent was dismissed; a claim by the defendant by way of counterclaim for maintenance was also dismissed and the custody of the infant child was given to the plaintiff husband "until further order."

Following upon this judgment a formal order was entered on June 23, 1931. A notice of application in this action dated June 22, 1931, and filed June 23, 1931, was then given and in pursuance of such notice an application was proceeded with before the learned trial Judge to have the custody of the infant child granted to the defendant wife or to the defendant wife's father and mother in the place and stead of the plaintiff, and to that extent to have the before-mentioned order varied.

9 This application was finally disposed of by the learned Judge on August 31, 1931. He refused to vary his order and dismissed the application with costs.

10 It is stated by counsel that no formal order dismissing this application has been taken out and that an appeal from the order is intended and will be launched so soon as the formal order is entered. No question arises as to this appeal.

11 The next step with which we are concerned is a notice of application for an order extending the time to file a notice of appeal from that part of the judgment of Chief Justice Simmons entered on June 23, 1931, which gave the custody of the infant child to the plaintiff. This notice is dated September 30, 1931, and was filed on October 1, 1931. The notice states that in support of the application will be read the pleadings and judgments and the affidavit of Alphonsus Lannan, the solicitor for the defendant. The application came on to be heard before Lunney, J.A. sitting as a Judge of the Appellate Division in Chambers on October 3 last. Counsel for the plaintiff took the position that since Mr. Lannan's affidavit had been served upon him only that morning, he was not prepared to proceed and the learned Judge then directed that the application be made to this Court at the sittings which commenced the Monday following. The application was heard by this Court on Wednesday, the 14th instant, and, after hearing counsel for the plaintiff and for the defendant, judgment was reserved.

12 In this affidavit there is a recital of the facts with regard to the different steps in the action. A copy of the decree *nisi* and of the minutes of judgment on the last application are exhibited. It is then stated that instructions to appeal from the refusal to vary the original order or judgment have been received and that there is ample time to file notice of appeal from this judgment but that the time for filing notice of appeal from the original judgment has elapsed, and "it is the desire of the wife to have all facts in regard to the custody of the child before the Court of Appeal."

13 There is the further statement in the affidavit that this Division can only properly deal with the question of the custody of the child from the point of view of serving the best interests of the child by having all the evidence adduced on the first trial and the subsequent application before it.

14 The affidavit concludes with an opinion that no one will be prejudiced by the granting of the application as no money or property rights are involved in the question of custody of the child, as to which it is desired to appeal.

15 On the argument, the reading of this affidavit, which it now appears was not filed, was dispensed with, and, at the suggestion of the Court, counsel for the applicant undertook to briefly state the effect of the material upon which he relied in support of the application.

16 In the course of argument I invited counsel for the applicant to inform the Court of the excuse he offered for delay and in reply counsel said in effect that he had been extremely ill and that his motion to vary the original order was a proper one and had he been successful in that application there would have been no necessity for an appeal on his part. Something was

also said about the delay in delivery of judgment on the motion to vary the order as to custody having some bearing on the failure to give notice of appeal.

17 I assumed, as I believe other members of the Court assumed, that these statements adequately enlarged upon were part of the material before the Court. It is now clear that this is not the case. It is proper to add that I am satisfied that counsel for the applicant in making answer had no thought of giving the impression to the Court that his affidavit covered more than it in fact did, but was merely answering a question put to him, which he apparently had not considered of sufficient importance to deal with in his affidavit. I think that hereafter it would be better if the Registrar did not place any case on the motion list until a copy for each member of the Court, of the notice and all material in support, except in the case of lengthy exhibits, has been filed.

18 Counsel opposing the application took the position that on motion to vary the original order, counsel for the applicant had been challenged to appeal, to which his reply was in effect that the motion to vary was sufficient for his purposes. As to Mr. Lannan's illness, I think it cannot be said that counsel opposing the application conceded that this illness was of such length or severity as to prevent him from filing, or instructing some one else to file, notice of appeal had he been disposed so to do nor was there any acquiescence in the suggestion that the delay in delivering judgment on the motion to vary the order should afford the slightest excuse for not filing a notice of appeal within time.

19 Considering for the present only the affidavit and the material of record, notice of the use of which was given to the other side, there is nothing to be found therein which serves or even attempts to explain or justify or excuse the delay in giving the notice of appeal. To say as stated in this affidavit that this Court can only properly deal with the question of the custody of the child when it has all the evidence taken at the trial of this action before it, is merely to presuppose that this Court will, as a matter of course, enlarge the time for appealing and so be concerning itself with the question of the custody of this child, a matter which has already been determined presumably quite correctly by the learned trial Judge.

20 If an experienced counsel such as Mr. Lannan assumes that an extension of time to give notice of appeal will be granted as a matter of course, it is probably high time that this misapprehension be corrected.

21 I cannot too strongly emphasize that a person who has a judgment, as to to which the time for giving notice of appeal has expired, has a vested interest in that judgment and in the benefits that may flow from it, an interest that will not be lightly set aside. In 1877 Lord Justice James in the case *Int. Financial Soc. v. City of Moscow Gas Co.*, 7 Ch. D. 241, 47 L.J. Ch. 258, at 262, said:

> The respondents here say they are within the rule, and they have a right — and I think it is as valuable a right as any which a subject has in this country — to know when they can rely upon the decree or order in their favour. The limitation of the time of appeal is a right given to the person in whose favour a Judge has decided.

22 In the case of *Nicholson v. Piper* (1907) 24 T.L.R. 16, 51 Sol. J. 823, Lord Justice Buckley, with whom Lord Justice Kennedy concurred, stated the rule to be that:

> Where a litigation had been adjudicated upon, the successful litigant had, upon the termination of the time allowed for appealing, a vested interest in his order of which he ought not, in the absence of special circumstances, to be deprived.

23 In 1924 in the case of *Fraser v. Neas; Roddy v. Fraser*, [1925] 2 W.W.R. 614, at 618, 35 B.C.R. 70, Macdonald, C.J.A. [now C.J.B.C.] with whom the majority of the Court were in agreement said:

> I wish to say that, in my opinion, applications to extend the time for appealing are on quite a different footing to applications to extend the time to set down appeals. The one takes away from the judgment creditor the benefit of a statutory limitation, and an extension of time would open to further litigation a judgment which but for the extension would be unassailable. The other has to do with practice and procedure and can whenever an extension should be granted, i.e., where the opposite party is not otherwise prejudiced, be compensated for by costs.

24 The principle enunciated in the above-mentioned cases runs through all of the decisions relating to applications for an extension of time in which to give notice of appeal. There is much conflict in the decisions as to when leave will be granted but it is generally conceded that the holder of a judgment, after the time for giving notice of appeal has expired, has a special right or interest which will not be set aside by the Courts, unless weighty reasons be given for asking the Court to interfere with that right.

25 Illustrations of what I have just said are not lacking. In the case *Int. Financial Soc. v. City of Moscow Gas Co.*, (1877) 7 Ch. D. 241, 47 L.J. Ch. 258, a special application to enlarge the time for giving a notice of appeal was refused on the ground that a mere mistake or misunderstanding of the meaning of the Rules is not such a special circumstance as will induce the Court to give the leave which is required to extend the time.

26 In the case of *In re Coles and Ravenshear*, [1907] 1 K.B. 1, 76 L.J.K.B. 27, owing to a mistake of counsel as to the effect of a Rule, the appeal was not brought until after the expiration of the time allowed for appealing. It was held that there was not sufficient ground for granting special leave to appeal.

27 In the case of *Nicholson v. Piper* (1907) 24 T.L.R. 16, 51 Sol. J. 823, the mistake of a workman's legal advisor as to his right to appeal against an order under *The Workmen's Compensation Act*, 1897, ch. 37, was held by the Court of Appeal to be not a ground for subsequently extending the time for appealing from the order.

28 In *Hill v. Barwis* (1908) 1 Alta L.R. 514, a case where the applicant had gone away into the mountains before the judgment was delivered and did not return and did not know that notice was required to be given within 30 days, with the result that notice was not given for three months, the unanimous decision of the Court *en banc* was that the delay not being trifling and that there being no important principle of law involved and the amount of money involved being comparatively small and there being nothing to show that the appeal was an arguable one, leave to extend the time to give notice of appeal was refused.

29 In the case of *In re Wigfull & Sons Ltd. Trade Mark*, [1919] 1 Ch. 52, 88 L.J. Ch. 30, it was held that it was not a ground for enlarging the time to appeal that in a later case it was held by a higher tribunal that the decision in the first case was wrong.

30 In the case of *Best v. Dussessoye*, [1921] 1 W.W.R. 363, an extension of time in which to give notice of appeal was refused on the ground that the proposed appellant was not shown to have had a *bona-fide* intention to appeal while the right to appeal existed and had not shown that the correctness of the judgment was at least arguable. A further ground for refusing

the application was that the party seeking the extension had acted on the judgment that it was proposed to appeal from.

31 In the case of *Rolston v. Smith* (1923) 33 B.C.R. 235, illness was set up as an excuse for the delay in giving notice of appeal. The extension was refused on the ground that the affidavits did not satisfactorily show that the illness was such that the applicant could not have given notice of appeal within time.

32 In the case *A. H. Selwyn Ltd. v. Baker*, [1924] W.N. 195, it was held that a *bona-fide* mistake as to whether or not the time ran from the date of the pronouncement of the order in Court or from the date of passing and entering it was not a special ground for granting the indulgence asked for.

33 In the case of *In re Produce Marketing Act; Coleman v. Interior Tree, etc. Committee of Direction*, [1930] 2 W.W.R. 784, 42 B.C.R. 499, it was held that an extension of time for giving notice of appeal would not be granted where the party appealing from the judgment in his favour had taken benefits under that judgment.

34 The cases referred to above leave no room for doubt that extensions of time within which to give notice of appeal will not be granted as a matter of course. The burden, and a heavy burden it is, of showing cause why the indulgence of the Court should be granted, is upon the applicant.

35 Turning again to a consideration of the affidavit, I think that it was incumbent upon the applicant to show a *bona-fide* intention to appeal held while the right to appeal existed and that the failure to appeal was by reason of some very special circumstance which serves to excuse or justify such failure: *Smith v. Hunt* (1902) 5 O.L.R. 97; *Ross v. Robertson* (1904) 7 O.L.R. 464; *Hill v. Barwis* (1908) 1 Alta. L.R. 514; *Best v. Dussessoye*, [1921] 1 W.W.R. 363.

36 There is nothing in the affidavit to satisfy this requirement. It is true the affidavit discloses that the defendant moved to vary the order as to custody. This order was made "until further order." Changed circumstances after the time of the granting of the order were alleged. I think she had a perfect right to so move (*In re Holt*, [1881] 16 Ch. D. 115, 29 W.R. 341) but while this shows dissatisfaction with the order sought to be varied, it in no wise shows an intention to appeal and is quite consistent with a decision by the applicant to abide by the result of the motion to vary and to forego the right of appeal.

37 I think that it was incumbent upon the applicant to account for the delay and to show that the other side was not so seriously prejudiced thereby as to make it unjust, having regard to the position of both parties, to disturb the judgment: *Ross v. Robertson, supra; Hill v. Barwis, supra*. This has not been done.

38 I think that it was incumbent upon the applicant to show that he had not taken the benefits of the judgment from which he is seeking to appeal: *Keith v. Keith* (1877) 25 Gr. 110; *Int. Wrecking Company v. Lobb* (1887) 12 P.R. 207; *Videan v. Westover* (1898) 18 C.L.T. 83; *Phillips v. Belleville Corpn.* (1905) 10 O.L.R. 178; *Best v. Dussessoye*, [1921] 1 W.W.R. 363; *In re Produce Marketing Act; Coleman v. Interior Tree, etc. Committee of Direction*, [1930] 2 W.W.R. 784, 42 B.C.R. 499. This has not been done. In fact it is said by opposing counsel that the applicant has issued execution and collected costs. How far this might be answered if an answer were attempted, by saying that no costs were allocated to the issue as to custody, it is not necessary, in the view I take of the case, to decide.

39 I think that it was incumbent upon the applicant to show that he had a reasonable chance of success if allowed to commence and prosecute the appeal: *Ross v. Robertson, supra; Best v. Dussessoye, supra; Hill v. Barwis, supra*.

40 There is nothing in the affidavit to cast doubt upon the correctness of the judgment of the learned trial Judge and we have neither his notes of evidence nor reasons for judgment before us.

41 Turning now to the statements of fact before mentioned made to the Court by counsel for the applicant in the course of argument: It is often said that counsel before the Court as officers of the Court are always under oath and so the Court may rely on their statements of fact. It is of course traditional that members of the Bar will not mislead or deceive the Court and counsel are frequently asked concerning matters that are of passing interest to the Court but Courts do not decide cases upon the hearsay statements of counsel.

42 It is to be borne in mind that the function of counsel in any Court is that of an advocate; he is there to plead his client's cause upon the record before the Court and he does not in any sense occupy the dual position of advocate and witness. Counsel before a Court of Appeal are entitled to stand upon the record and they certainly are not required to stand prepared to rebut any statements of fact then made by opposing counsel. In this case, as I have pointed out, counsel opposing the application has not subscribed to the statements made by counsel in support of the application and so these statements cannot be considered by the Court in coming to a conclusion. It follows from what I have said as to the material properly before the Court that in my opinion the application should be dismissed.

43 A question has arisen however as to whether or not in this particular case the applicant should be allowed to come before the Court again with a new application to extend the time within which to give notice of appeal and with such material in support as may be brought forward to meet the requirements mentioned. I think that in the ordinary case a misapprehension as to the law and practice relating to such applications affords no reason for following such a course but this case involves the future welfare of an infant whose parents have each been found guilty of adultery, and so if in law having regard to the plaintiff's vested interest in his judgment the whole question of custody can be brought under review and, subject to new conditions and circumstances arising in the future, be settled once and for all, it would be well from the point of view of the child that this should be done. As to whether or not the applicant can make out a case for leave if allowed to try I express no opinion — that must be decided upon the material before the Court if and when the application is made. From what counsel has said it appears that it probably would be futile to grant leave to the applicant to make a new application if this Court were disposed to accept the opinion of James, L.J. as to when an extension of time will be granted as expressed in the case of *Int. Financial Soc. v. City of Moscow Gas Co.* (1877) 7 Ch. D. 241, 47 L.J. Ch. 258, which is summarized by Davey, L.J. in the case of *In re Helsby; Ex parte Trustee*, [1894] 1 Q.B. 742, 63 L.J.Q.B. 265, as follows:

> Upon the question whether the time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James, L.J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the rules, 'unless there has been on his part some conduct raising an equity against him,' or in a case of 'inevitable accident.'

44 This view was considered with favour in the cases of *In re Coles and Ravenshear*, [1907] 1 K.B. 1, 76 L.J.K.B. 27, and *A. H. Selwyn Ltd. v. Baker*, [1924] W.N. 195.

45 In the leading case to the contrary of *In re Manchester Economic Bldg. Soc.* (1883) 24 Ch. D. 488, at 497, 53 L.J. Ch.

115, Brett, M.R. said in dealing with an application for an extension of time to bring an appeal:

> I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that that leave should be given. The cases which were brought before the Court were cases in which either justice did require that the leave should be given or justice required that it should not be given.

46 The rule as laid down by Brett, M.R. was approved.

47 In the case of *In re Wigfull & Sons Ltd. Trade Mark*, [1919] 1 Ch. 52, 88 L.J. Ch. 30, Swinfen Eady, M.R. with whom Lord Justice Duke and Mr. Justice Eve concurred, said:

> In *In re Manchester Economic Building Society*, Brett, M.R. stated in general terms what the rules should be and said that the only question was whether it was or was not just to extend the time for appeal.

48 I think that the view of Brett, M.R. is to be preferred to that of James, L.J. but whatever may be said as to the conflicting decisions under the special language of the English Rule I think that it can be laid down that under our Rules this Court considers that it has a free and unfettered discretion to do what justice requires to be done between the parties having regard to the circumstances of each particular case: *Ross v. Robertson* (1904) 7 O.L.R. 464; *Howe v. Kaministiqua Pulp and Paper Co.* (1922) 52 O.L.R. 43; *Splan v. Barrett-Lennard*, [1931] 3 W.W.R. 41.

49 This does not mean that this Court will exercise its discretion loosely: *Cusack v. L. & N.W. Ry. Co.*, [1891] 1 Q.B. 347, 60 L.J.Q.B. 208. In the application of this Rule due regard will be had to the successful litigant's vested interest in his judgment, and so the Court will scrutinize with care the material offered in support of a claim to have that interest set aside to see if it establishes those things that I have indicated it is incumbent upon the applicant to prove, but once satisfied as to this the Court will grant or refuse the extension of time as the interests of justice seem to require.

50 Having regard to all the circumstances to which I have alluded in connection with this application, I would dismiss the application with costs to the plaintiff.

51 I would grant leave to the defendant to make a new application at the time that he brings on his appeal from the judgment of the learned trial Judge refusing to vary the order as to custody. The leave hereby granted is made conditional upon the payment of the plaintiff's costs in respect of this application.

52 I would direct that in the event of this leave being taken advantage of that all of the evidence on the trial be placed before this Court and that service of the notice of such application and of all material to be used in support of the application be made upon the plaintiff at least one week before the time fixed by the notice for the hearing of the application.

Order accordingly.

Solicitors of record:

A. Lannan & Co., solicitors for applicant.
J. McKinley Cameron, K.C., solicitor for respondent.

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Tab 7

2002 ABCA 133
Alberta Court of Appeal

Broda v. Broda

2002 CarswellAlta 1042, 2002 ABCA 133, 113 A.C.W.S. (3d) 990

Lidia Maria Broda, Respondent/Respondent (Plaintiff) and Ihor John Broda, Also Known as, Ihor Iwan Broda, Applicant/Appellant (Defendant) and Ihor I. Broda Professional Corporation, Xata Developments Ltd., Stefania Broda And Alex Broda, Applicant/Appellants (Defendants)

Ritter J.A.

Heard: May 21, 2002
Judgment: May 24, 2002
Docket: Edmonton Appeal 0203-0188-AC

Counsel: Appellant for himself
Louise M. Ares, Q.C., for Respondent

Subject: Family; Property; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Family law --- Family property on marriage breakdown — Practice and procedure — Practice on appeal — Stay pending appeal

Husband and wife were involved in protracted divorce litigation — Prior proceedings included 21 applications and nine case management meetings — Nine appeals from interlocutory orders were still outstanding — Husband still owed over $22,000 for three previous appeals and $14,000 for support arrears — Husband had conducted three cross-examinations on affidavits and one extensive examination for discovery — Case management judge terminated further discovery and directed that financial issues be tried separately from custody issues — Husband brought application for stay pending appeal — Application dismissed — Decision was discretionary — Case management judge was personally involved in examination and had good grasp of circumstances — Husband failed to show how he might have benefited from further discovery — Potential for further financial erosion from additional interlocutory proceedings outweighed benefit of single trial.

Family law --- Family property on marriage breakdown — Practice and procedure — Discovery — General

Husband and wife were involved in protracted divorce litigation — Prior proceedings included 21 applications and nine case management meetings — Nine appeals from interlocutory orders were still outstanding — Husband still owed over $22,000 for three previous appeals and $14,000 for support arrears — Husband had conducted three cross-examinations

on affidavits and one extensive examination for discovery — Case management judge terminated further discovery and directed that financial issues be tried separately from custody issues — Husband brought application for stay pending appeal — Application dismissed — Decision was discretionary — Case management judge was personally involved in examination and had good grasp of circumstances — Husband failed to show how he might have benefited from further discovery — Potential for further financial erosion from additional interlocutory proceedings outweighed benefit of single trial.

Table of Authorities

Cases considered by *Honourable Mr. Justice Ritter*:

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Generally — referred to

Rules considered:

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R. 216.1 [en. Alta. Reg. 277/95] — referred to

R. 216.1(1) [en. Alta. Reg. 277/95] — considered

R. 508(3) — considered

APPLICATION by husband for stay pending appeal of judgment of case management judge terminating discovery and ordering separate trials for financial and custody issues.

***Honourable Mr. Justice Ritter*:**

2002 ABCA 133, 2002 CarswellAlta 1042, 113 A.C.W.S. (3d) 990

Background:

1 The appellants apply for an order staying enforcement of the order of the case management judge granted on April 9, 2002, directing that matrimonial property and support issues be severed from issues relating to custody of and access to children. The order also directs that the trial of the matrimonial property and support issues take place during the last week of June 2002. Finally, the order provides that the discovery process in relation to the entire action is terminated.

2 The right to stay enforcement pending appeal flows from Rule 508(3) which provides:

> If an application under subrule(1) to the judge appealed is granted, refused, made but not heard, or is impractical, a judge of the Court of Appeal may de novo stay enforcement or proceedings of the decision being appealed.

3 The test for granting a stay involves the same tripartite test as is utilized in the granting of an injunction. That is the parties seeking a stay must be in a position to establish 1) that a serious question is involved; 2) that the applicant would suffer irreparable harm if a stay was refused and 3) that the balance of convenience favours the applicants. That is, if the stay is refused, the applicant would suffer greater harm than would the respondent should the stay be granted: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

4 In order to determine whether the appellants have met all three prongs of the tripartite test, a brief review of the facts which gave rise to the order being granted is appropriate.

5 During a case management conference on February 12, 2002, the case management judge asked the parties to write to him by the end of February 2002, and to advise about further applications they would like to bring within the case management context. In response to that direction, the respondent's counsel wrote a letter advising that she wished to bring an application for severance of the *Matrimonial Property Act* issues from the divorce issue. She had previously brought the same application in the fall of 2001 but was unsuccessful as the case management judge indicated that her application was premature.

6 By letter dated March 4, 2002, the case management judge scheduled a case management meeting for the full morning of April 9, 2002. Neither party filed any notice of motion, returnable for April 9, 2002, but respondent's counsel filed a brief outlining the positions she was taking with respect to the severance issue.

7 During the course of the case management meeting, the case management judge granted the severance application and also granted an order terminating the discovery process.

8 Unfortunately, this matter has not proceeded through the trial court in what could be described as a normal or systematic way. The appellant has filed nine appeals from interim orders. Agreements relating to the contents of the nine appeals have not yet been finalized. The appellant has taken no steps to have any of the nine appeals heard.

9 The appellant had also previously filed three other notices of appeals of interim orders in this matter. Those appeals were heard on June 5, 2001. All of the appeals were dismissed. Costs for the appeals were awarded against the appellant in the sum of $5,025. The appellant has failed to pay any of those costs.

10 The appellant currently has court costs awarded against him in a total sum of $22,990.81, none of which has been paid. He is also in arrears with respect to the maintenance orders that he was ordered to pay and those arrears total $14,000.

11 With respect to examination of the respondent wife, the following examinations have taken place.

Description	***Date***	***Pages***	***Undertakings***	***Undertakings complied with***
Examination on Affidavit	January 22, 2001	98	16	All
Examination on Affidavit	April 12, 2001	7	0	All
Examinations on Affidavit	June 6, 2001	171	10	All
Examinations for Discovery	February 4, 5, 6, 2002	602	101	1 outstanding — awaiting information from a 3{ rd} party in California

12 Further, there have been an additional nine case management meetings before the case management judges, as follows:

Date	***Duration of Case Management Conference***
June 7, 2001	2.75 hours
June 26, 2001	5.50 hours
October 11, 2001	4.00 hours
October 23, 2001	7.50 hours
October 25, 2001	2.75 hours
November 19, 2001	7.00 hours
February 12, 2002	2.50 hours
April 9, 2002	2.75 hours
April 17, 2002	3.50 hours

13 Finally, there have been 21 Court applications in addition to the case management meetings, as follows:

Date	***Justice***
March 13, 2000	Justice Veit (ex-parte)
March 17, 2000	Justice Veit
September 8, 2000	Justice Veit
September 13, 2000	Justice Veit
December 15, 2000	Justice Veit
December 20, 2000	Justice Bensler
January 8, 2001	Justice Moen
January 16, 2001	Justice Burrows
February 15, 2001	Justice Clackson
March 19, 2001	Justice Lewis
March 29, 2001	Justice Marceau
April 11, 2001	Justice Costigan
April 20, 2001	Justice Murray
May 14, 2001	Justice Sanderman

May 18, 2001	Justice Côté
May 22, 2001	Justice Clarke
July 19, 2001	Justice Clarke
August 1, 2001	Justice Burrows
August 8, 2001	Justice Murray
January 9, 2002	Justice McClung
January 11, 2002	Justice Watson

Analysis:

14 The source material relating to the case management judge's exercise of discretion are found in Practice Note No. 1 paras. 12 and 14 and in Rule 216.1..

> Practice Note No. 1, paras 12. and 14 provide:
>
> 12) Subject to section 13, the case management judge may, on application of any party to the action, **or on his or her own initiative**, make any order which the case management judge determines will likely promote the efficient resolution of the action. [emphasis added]
>
> 14) Without limiting the generality of section 12, the case management judge may:
>
> a. order steps to be taken by the parties to identify or clarify the issues in the action,
>
> b. establish a case timetable and order the parties conform to it
>
> c. make directions to facilitate any interlocutory application, discovery, or other pre-trial step,
>
> d. make directions to promote the efficient resolution of the action by trial,
>
> e. facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through settlement.

Rule 216.1 is found in the section of the Alberta Rules of Court dealing with examinations for discovery. It provides:

> Rule 216.1(1) The Court may modify or waive any right or power under this Part, on terms or otherwise, or may impose terms on any party, where
>
> (a) any party acts or threatens to act in a manner that is vexatious, evasive, abusive, oppressive, improper or prolix, or
>
> (b) the expense, delay, danger or difficulty in complying fully would be grossly disproportionate to the likely benefit.

15 Turning to the first prong of the tripartite test, an appellate judge must make a preliminary and tentative assessment on the merits of the case; is it a serious question as opposed to a frivolous and vexation one? The appellant argues that the matter is serious as his right to full discovery has been terminated and that this is an unusual step. He suggests that the case

management judge took a unilateral step that has deprived him of rights that should not lightly be removed.

16 At the same time, the appellant was unable to articulate any real or precise issue that requires further exploration at examination for discovery. He did advise me of a series of cheques that the respondent has recently produced, which are clearly documentary evidence that speak for themselves. He says that he wants to ask the respondent why she was unable to find other cheques, but he has already apparently asked this question and has had an answer to it. He simply doesn't like that answer.

17 The other examples of questions that remain outstanding and which the appellant says he would like to ask the respondent about are to similar effect. That is, they have either been asked and/or answered, or are questions about matters which speak for themselves.

18 When asked about the complexity of this matter, the appellant advises that it is very complex but then describes the fairly common place matrimonial contest.

19 I find it particularly noteworthy that during the February 2002 examinations for discovery, the case management judge made himself available to the discovery room in order to provide immediate rulings on questions and objections. Therefore, the case management judge was able to make a direct assessment of the nature and extent of any continued required discovery. It was his determination that such discoveries were not required. A case management judge who has conducted extensive hearings and has "a good deal of familiarity with the facts of [a] lawsuit" should not have his determinations lightly disturbed: *Brost Concrete Inc. v. Stel-Marr Concrete Ltd.*, [1998] A.J. No. 484 (Alta. C.A.)online: QL (AJ) at para. 7.

20 I can find no error in his exercise of discretion. The case management judge was entitled to terminate continued examinations for discovery. Practice Note No. 1 para. 12.

21 With respect to the question of irreparable harm, the appellant submits that both he and the other named appellants will suffer irreparable harm if continued examinations for discovery are not permitted. Further, he submits that he will suffer irreparable harm as issues of credibility arise with respect to both matrimonial property and support issues and custody and access issues.

22 The appellant was unable to provide me with any concrete examples of how irreparable harm would ensue as a result of his inability to ask further questions. In view of the 800 pages of transcripts from examinations for discovery of the respondent, it is unlikely that any stone remains unturned.

23 The final prong of the tripartite test is the determination of balance of convenience. The Court must ask itself whether the applicant will suffer greater harm than the respondent would if the stay were granted.

24 It is the respondent's position that the protracted litigation in this matter is gradually having the effect of eroding any assets that might otherwise go to her as she is required to respond to each one of the appellant's many applications and

appeals. The appellant responds that some of the applications were instituted by the respondent. While this is true, it is clear that the great majority of applications and all of the appeals are at the behest of the appellant. The effect of extreme protracted litigation is extreme expense. The failure of the appellant to pay any costs which have been previously awarded against him, amplifies that effect.

25 It is the appellant's position that the balance of convenience favours one lengthy trial as opposed to two separate trials. Dates are available for a two or three week trial during the month of January, 2003, and the appellant is of the view that one trial dealing with related issues is always better than two.

26 It is my conclusion that the balance of convenience favours the respondent. The appellant has created a circumstance where further delay simply invites further applications, case management and appeals, which will have the effect of impoverishing the respondent whether or not she is ultimately successful. I conclude that concern overrides the benefit that might be achieved by holding a single trial. The intent of the separate trial dealing with monetary issues is clearly to preserve some monetary benefit for whichever of the parties might be successful at that trial. In these circumstances, the sooner that occurs, the better.

27 For all of the foregoing reasons the appellant's application for a stay is denied, with costs payable, forthwith, to the respondent.

Application dismissed.

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Tab 8

2010 ABCA 40
Alberta Court of Appeal

Balogun v. Pandher

2010 CarswellAlta 177, 2010 ABCA 40, [2010] A.W.L.D. 867, [2010] A.W.L.D. 868, 184 A.C.W.S. (3d) 976, 474 A.R. 258, 479 W.A.C. 258

Alexander O. Balogun, Esther Elizabeth Balogun (by her Next Friend, Alexander O. Balogun), Pauline Jessica Balogun (by her Next Friend, Alexander O. Balogun), Daniel Richard Balogun (by his Next Friend, Alexander O. Balogun) and Alexander Otto Balogun Jr. (by his Next Friend, Alexander O. Balogun) (Appellants / Plaintiffs) and Harbhajan Singh Pandher (Respondent / Defendant)

Frans Slatter J.A., Jack Watson J.A., and Patricia Rowbotham J.A.

Heard: February 1, 2010
Judgment: February 5, 2010
Docket: Edmonton Appeal 0903-0144-AC

Counsel: Alexander O. Balogun for himself
B.E. Wallace for Respondent

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Trials — Jury trial — Power of court to determine mode of trial — Discretion

Case management judge issued order denying jury trial in motor vehicle personal injuries action — This was second ruling during case management process by same judge denying jury trial — Case management judge found that basis for earlier ruling had not changed and that there was no reason to decide differently — Plaintiff appealed — Appeal dismissed — There was no discernable basis for intervention either on (a) decision of case management judge to refrain from re-considering his earlier decision (if that is what he did), or (b) decision on merits if he did reconsider matter — As to point (a), case management would not be very effective method for civil proceedings if rulings of case management judges could simply be revisited as of right at instance of unsatisfied party, even if there might have been some adjustment of factual platform on which earlier decision was made — Appellate deference on exercise of discretion is particularly appropriate to case management decisions which decline to re-open procedural adjudication which settled issue for case management purposes — Very essence of case management is judicial supervision of litigation process in order to provide coherence, predictability and stability to that process — As to point (b), there was no error in substantive ruling on jury trial that was within reach of applicable standard of review — Decision was not arbitrary, erroneous in law or fact, or productive of injustice.

Civil practice and procedure --- Pre-trial procedures — Case management and status hearing — Case management — Appeals

Case management judge issued order denying jury trial in motor vehicle personal injuries action — This was second ruling during case management process by same judge denying jury trial — Case management judge found that basis for earlier ruling had not changed and that there was no reason to decide differently — Plaintiff appealed — Appeal dismissed — There was no discernable basis for intervention either on (a) decision of case management judge to refrain from re-considering his earlier decision (if that is what he did), or (b) decision on merits if he did reconsider matter — As to point (a), case management would not be very effective method for civil proceedings if rulings of case management judges could simply be revisited as of right at instance of unsatisfied party, even if there might have been some adjustment of factual platform on which earlier decision was made — Appellate deference on exercise of discretion is particularly appropriate to case management decisions which decline to re-open procedural adjudication which settled issue for case management purposes — Very essence of case management is judicial supervision of litigation process in order to provide coherence, predictability and stability to that process — As to point (b), there was no error in substantive ruling on jury trial that was within reach of applicable standard of review — Decision was not arbitrary, erroneous in law or fact, or productive of injustice.

Table of Authorities

Cases considered:

Balogun v. Pandher (2007), 2007 ABQB 615, 2007 CarswellAlta 1368, 430 A.R. 229 (Alta. Q.B.) — referred to

Balogun v. Pandher (2009), 2009 CarswellAlta 1991, 2009 ABCA 409, 14 Alta. L.R. (5th) 274 (Alta. C.A.) — referred to

Chevron Canada Resources v. Canada (Executive Director of Indian Oil & Gas) (2009), [2009] 7 W.W.R. 631, 6 Alta. L.R. (5th) 5, 2009 CarswellAlta 674, 2009 ABCA 180, *(*sub nom. *Chevron Canada Resources v. Canada)* 457 W.A.C. 132, *(*sub nom. *Chevron Canada Resources v. Canada)* 457 A.R. 132 (Alta. C.A.) — referred to

Holland (Guardian ad litem of) v. Marshall (2009), 2009 CarswellBC 1682, 2009 BCCA 311, *(*sub nom. *Holland v. Marshall)* 463 W.A.C. 48, *(*sub nom. *Holland v. Marshall)* 274 B.C.A.C. 48, 96 B.C.L.R. (4th) 55 (B.C. C.A. [In Chambers]) — referred to

Holland (Guardian ad litem of) v. Marshall (2009), 2009 BCCA 582, 2009 CarswellBC 3456 (B.C. C.A.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — followed

Purba v. Ryan (2006), 61 Alta. L.R. (4th) 112, 397 A.R. 251, 384 W.A.C. 251, 2006 ABCA 229, 2006 CarswellAlta 1006, 30 C.P.C. (6th) 35 (Alta. C.A.) — referred to

Richard v. Lee-Knight (2009), 2009 CarswellAlta 917, 2009 ABCA 224 (Alta. C.A.) — referred to

Richard v. Lee-Knight (2010), 2010 CarswellAlta 40, 2010 CarswellAlta 41 (S.C.C.) — referred to

Salamon v. Alberta (Minister of Education) (1991), 1991 CarswellAlta 199, 1 C.P.C. (3d) 193, 120 A.R. 298, 8 W.A.C. 298, 83 Alta. L.R. (2d) 275 (Alta. C.A.) — referred to

Salamon v. Alberta (Minister of Education) (1993), [1993] 1 S.C.R. ix, 6 Alta. L.R. (3d) xxxvii (S.C.C.) — referred to

Statutes considered:

Jury Act, R.S.A. 2000, c. J-3
s. 17 — considered

s. 17(1)(b) — considered

s. 17(2) — considered

Regulations considered:

Jury Act, R.S.A. 2000, c. J-3
Jury Act Regulation, Alta. Reg. 68/83

s. 4.1 [en. Alta. Reg. 18/2003] — considered

APPEAL by plaintiff from order of case management judge denying jury trial in motor vehicle personal injuries action.

Per curium:

The adult appellant challenges a Court of Queen's Bench case management judge's order denying a jury trial in a motor vehicle personal injuries lawsuit. The adult appellant is a plaintiff in his own right and proceeds without counsel. He purports to represent, as next friend, his four children also as appellants. His representation of two children is problematic as those two children are no longer minors and should be represented by their own solicitor: *Salamon v. Alberta (Minister of Education)*, 120 A.R. 298, [1991] A.J. No. 922 (Alta. C.A.), leave denied (1993), [1991] S.C.C.A. No. 535 (S.C.C.); see also *Holland (Guardian ad litem of) v. Marshall*, 96 B.C.L.R. (4th) 55, [2009] B.C.J. No. 1294, 2009 BCCA 311 (B.C. C.A. [In Chambers]), leave denied, [2008] S.C.C.A. No. 327 (S.C.C.) and affirmed as *Holland (Guardian ad litem of) v. Marshall*, [2009] B.C.J. No. 2535, 2009 BCCA 582 (B.C. C.A.); *Balogun v. Pandher*, [2009] A.J. No. 1339, 2009 ABCA 409 (Alta. C.A.). Under the circumstances of this case, however, we do not need to address this procedural concern.

The case management in the Court of Queen's Bench relates to an incident on May 14, 2003 where the respondent (defendant)'s vehicle collided with the back end of a vehicle containing the appellants. The appellants' claims include general damages, loss of income earning capacity, and cost of future care. The respondent disputes the damage claims. Issues at trial will include causation and quantum of damages.

The ruling under appeal dated April 22, 2009 is the second ruling during the case management process by the same judge denying a jury trial, the earlier ruling being at 430 A.R. 229, [2007] A.J. No. 1134, 2007 ABQB 615 (Alta. Q.B.). The case management judge in the ruling under appeal held that the basis for his 2007 ruling had not changed and that there was no reason to decide differently in 2009.

In his 2007 ruling, the case management judge referred to s. 17(1)(b) of the *Jury Act*, R.S.A. 2000, c. J-3, which allows for jury trials in lawsuits such as this where the amount claimed "exceeds an amount prescribed by regulation". The regulation in this instance provides that the "amount claimed" must exceed $75,000 for actions commenced after March 1, 2003: s. 4.1 of *Jury Act Regulation*, Alta. Reg. 68/83. The Statement of Claim in this instance claims an amount in excess of $75,000 for each plaintiff. By this and the other terms of s. 17 of the Act, the Legislature has set the criteria for eligibility for a civil jury trial in this province. There is no residual discretion of case management judges to order a civil jury trial on a basis not provided for by legislation: *Purba v. Ryan*, 397 A.R. 251, [2006] A.J. No. 963, 2006 ABCA 229 (Alta. C.A.).

A jury trial, however, can be refused where the trial involves matters that cannot "conveniently be made by a jury": s.17(2) of the *Act*. The case management judge looked at the criteria from case law for determining inconvenience under s. 17(2) of the *Act*. Those criteria include "(a) a prolonged examination of documents or accounts, or (b) a scientific or long investigation". To assess these criteria, a case management judge will consider such factors as the number of parties and factual issues, the number of experts, the need for interpretation, the legal issues, the potential for conflicts of expert opinion, questions of causation and other factors including, in our view, what the history of the litigation suggests about the approach the parties can be expected to take. He concluded in his 2007 ruling that "this is not a case that can be conveniently heard by a jury taking into account the number of issues involved with five Plaintiffs, the length of trial time required, the amount and complexity of the expert evidence, the number of medical reports and the history of the litigation": at para. 43. No appeal was taken from that 2007 decision. As to the more recent 2009 ruling, the case management judge referred to his previous decision declining to order a jury trial and concluded that he saw "no reason to change [his] previous decision and order a jury trial."

In sum, the appellants argue that the trial of this action would not be so prolonged or complex that it could not be conveniently heard by a jury. The respondent submits that the case management judge properly considered the applicable criteria in determining that the case was inappropriate for a jury trial. The respondent also submits that the case management judge properly considered whether he should re-visit his earlier ruling.

The decision of the case management judge to decline to reverse his prior ruling, and his decision to find no basis to order a jury trial in this case, were both exercises of discretion. As such, the standard of review for the factual underpinnings of the exercise of discretion is deferential absent palpable and overriding error: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, 2005 SCC 25 (S.C.C.) at paras. 52 to 56. The standard of review for the exercise of discretion by a case management judge is also deferential and appellate intervention is warranted only if the case management judge has clearly misdirected himself on the facts or the law, proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice: see e.g. *Chevron Canada Resources v. Canada (Executive Director of Indian Oil & Gas)*, 457 A.R. 132, [2009] A.J. No. 496, 2009 ABCA 180 (Alta. C.A.) at paras. 4 to 6; *Richard v. Lee-Knight*, [2009] A.J. No. 653, 2009 ABCA 224 (Alta. C.A.), leave denied, (2010), [2009] S.C.C.A. No. 429 (S.C.C.) at para. 9; *Balogun v. Pandher*, [2009] A.J. No. 1339, 2009 ABCA 409 (Alta. C.A.) at paras. 10 and 11.

Here we are unable to discern any basis for intervention either on (a) the decision of the case management judge to refrain from re-considering his earlier decision (if, indeed, that is what he did since he appears to have taken a renewed look at the matter substantively) or (b) the decision of the case management judge on the merits under s. 17 of the *Act* if indeed the case management judge did re-consider the matter.

As to point (a), case management would not be a very effective method for civil proceedings if rulings of case management judges could simply be re-visited as of right at the instance of an unsatisfied party to the action - even if there might have been some adjustment of the factual platform on which the earlier decision was made. Accordingly, appellate deference on the exercise of discretion is particularly appropriate as to case management decisions which decline to re-open a procedural adjudication which settled an issue for case management purposes. That high deference is not merely because of the policy resistance to fragmentation of proceedings and piecemeal appellate review, nor because it may be that a specific case management ruling may be subject to appeal at the end of the trial if its effects can be traced through to that stage, but also because the very essence of case management is judicial supervision of the litigation process in order to provide coherence, predictability and stability to that process. We detect no error in the case management judge's decision not to re-open his

earlier ruling.

As to point (b), we find no error in the substantive ruling on a jury trial that is within reach of the applicable standard of review. The decision was not arbitrary, erroneous in law or fact, nor productive of injustice.

The appeal is dismissed.

Appeal dismissed.

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Tab 9

2005 ABCA 83
Alberta Court of Appeal

Armstrong v. Shapiro

2005 CarswellAlta 209, 2005 ABCA 83, [2005] A.W.L.D. 1278, [2005] A.W.L.D. 1279, [2005] A.J. No. 172, 137 A.C.W.S. (3d) 267

Robert L. Armstrong, James B. Archee-Shee, H. Stewart Ash, Jonathan A. Baker, Frederick N. Banwell, Jeffery A. Barnes, Gregory C. Boehmer, H. Donald Borthwick, J. Douglas Bradley, Cameron Capital Corporation, Peter J. Cavanagh, I.C.B. Currie, Irene J. David, James W. Davie, George S. Dembroski, Michael A. Denega, Robert E. Dickson, John S. Elder, David Fuller, Joseph F. Gill, Timothy A. Godfrey, Gloria Gratias, Paul Gratias, G. Kerry Gray, Luann Gray, K. Gordon Green, Susan J. Guttman, John G. Hagg, Peter W. Hand, Nancy Harley, Ewout Heersink, Robb C. Heintzman, Randal T. Hughes, Michael N. Kaplan, Howard J. Kellough, Thomas R. Kennedy, Rick H. Kesler, Frances Kordyback, Michael R. Kordyback, Donald L. Lenz, David A. Leslie, W. Reay Mackay, Ronald Matheson, William J. McDermott, John L. McDougall, Anthony R. Melman, A. Warren Moysey, Peter E. Murphy, Ronald J. Murphy, David M. Newman, Robert I. Niven, D. Kristian Nowers, William K. Orr, Susan E. Paul, Michael J. Penman, John D. Pennal, Eric W. Pertsch, Charles A. Pielsticker, Susan I. Pielsticker, L. Quattro, James B. Rathbun, Heather Reisman, Carole Robb as Executrix of the Estate of Clayton Robb, Steven Rose, Gerald W. Schwartz, Peter A. Shiroky, Sheldon S. Shore, Gerald J. Shortall, R. Paul Singleton, Derrick Strizic, Kenneth Teslia, Graham Turner, Robert D. Turner, Charles Webster, John H. Whiteside, Whitshed Limited, J.A. Warner Woodley, Fraser Wray, Terrance H. Young, David A. Yule, Hugh A. Zimmerman (Respondents / Plaintiffs) and Leonard Shapiro, WCP Petro Research Corp., Four Star International Corp., Shapco Resources Ltd., Amigo Resources, Technical Data Holdings Ltd. (Appellants / Defendants)

Fruman J.A., Park J.A., and Russell J.A.

Heard: February 11, 2005
Judgment: February 11, 2005
Docket: Calgary Appeal 0401-0155-AC

Counsel: V. May, Q.C., G. Price for Appellants
B. Code for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Civil practice and procedure --- Discovery — Introductory — General principles

Case management judge granted order postponing further discoveries, and order adjourning defendants' application to compel plaintiffs to answer interrogatories prepared in relation to litigation — Defendants contended that, while orders were limited to postponement of discoveries, practical effect was to impose indefinite stay on defendants' right to discover plaintiffs or, essentially, to move forward with their defence — Defendants contended that R. 223 of Alberta Rules of Court was not applicable to present circumstances, where issues to be determined related to two entirely separate cases with different parties before different court — Defendants contended that even if R. 223 applied, order should not have been granted because it violated fundamental principle of fairness — Defendants appealed — Appeal dismissed — R. 223 was not expressly relied on by case management judge as giving him jurisdiction to make order under appeal — Nonetheless, judge was entitled to make order he did by virtue of his inherent powers as case management judge, as well as other sources of authority, including Judicature Act and Rules of Court — Orders granted were reasonable — Defendants bore onus of demonstrating that case management judge did not give sufficient weight to relevant factors, proceeded arbitrarily or on erroneous view of facts, or that order would result in failure of justice — Case management judge noted that this case was about deductibility of tax shelters issue, which was before Tax Court — While decision of Tax Court was not formally binding on Alberta courts, conclusion with respect to viability of tax shelters would have significant impact on conduct of present action — Defendants advanced no evidence of prejudice as result of postponement — Postponing discoveries pending outcome of tax appeal was reasonable course of action — No error was committed by case management judge.

Civil practice and procedure --- Discovery — Examination for discovery by interrogatories — Practice and procedure — General principles

Case management judge granted order postponing further discoveries, and order adjourning defendants' application to compel plaintiffs to answer interrogatories prepared in relation to litigation — Defendants contended that, while orders were limited to postponement of discoveries, practical effect was to impose indefinite stay on defendants' right to discover plaintiffs or, essentially, to move forward with their defence — Defendants contended that R. 223 of Alberta Rules of Court was not applicable to present circumstances, where issues to be determined related to two entirely separate cases with different parties before different court — Defendants contended that even if R. 223 applied, order should not have been granted because it violated fundamental principle of fairness — Defendants appealed — Appeal dismissed — R. 223 was not expressly relied on by case management judge as giving him jurisdiction to make order under appeal — Nonetheless, judge was entitled to make order he did by virtue of his inherent powers as case management judge, as well as other sources of authority, including Judicature Act and Rules of Court — Orders granted were reasonable — Defendants bore onus of demonstrating that case management judge did not give sufficient weight to relevant factors, proceeded arbitrarily or on erroneous view of facts, or that order would result in failure of justice — Case management judge noted that this case was about deductibility of tax shelters, issue which was before Tax Court — While decision of Tax Court was not formally binding on Alberta courts, conclusion with respect to viability of tax shelters would have significant impact on conduct of present action — Defendants advanced no evidence of prejudice as result of postponement — Postponing discoveries pending outcome of tax appeal was reasonable course of action — No error was committed by case management judge.

Table of Authorities

Statutes considered:

Judicature Act, R.S.A. 2000, c. J-2
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

R. 223 — referred to

APPEAL by defendants from order postponing further discoveries, and from order adjourning defendants' application to compel plaintiffs to answer interrogatories prepared in relation to litigation.

***Park J.A.*:**

1 This is an appeal from two orders granted by a case management judge on March 25th, 2004: one postponing further discoveries in the respondents' action against the appellants; and the other, adjourning the appellants' application to compel the respondents to answer interrogatories prepared in relation to that litigation.

2 The appellants suggest that, while the orders under appeal were limited to a postponement of discoveries, the practical effect of the orders was to impose an indefinite stay on the appellants' right to discover the respondents or, essentially, to move forward with their defence in this action. This, it is submitted, was an unreasonable exercise of judicial discretion and amounts to a reversible error.

3 In support of this submission, the appellants rely on the *Rules of Court* and an appeal to fairness and common sense. They submit that Rule 223, which permits the Court to order a discovery or inspection of any kind in respect of one or more issues until the determination of other issues, is not applicable to the present circumstances, where the issues to be determined relate to two entirely separate cases with different parties before a different court. They further submit that even if the Rule applied to the relief the respondents were seeking before the case management judge, the order should not have been granted because it violates a fundamental principle of fairness.

4 Rule 223 was not expressly relied on by the case management judge as giving him jurisdiction to make the order under appeal. We are nonetheless satisfied that he was entitled to make the order that he did by virtue of his inherent powers as case management judge, as well as other sources of authority, including the *Judicature Act*, and the Alberta *Rules of Court*.

5 It remains to be determined, however, whether the orders granted were reasonable in the circumstances. We are of the view that they were.

6 The appellants take issue with the decision to postpone examinations for discovery. They argue the decision is

tantamount to a stay of proceedings and is detrimental to the substantive rights of the appellants. The standard of review for a decision made by a case management judge is high. The appellant bears the onus of demonstrating the case management judge, who is uniquely situated to assess interlocutory motions and applications, did not give sufficient weight to relevant factors, proceeded arbitrarily or on an erroneous view of the facts, or that the order would result in a failure of justice. Moreover, this Court ought not to interfere simply because it would have arrived at a different conclusion.

7 The case management judge noted that, at the end of the day, this case is about the deductibility of tax shelters. That issue is before the Tax Court. While the decision of the Tax Court is not formally binding on Alberta courts, the conclusion with respect to the viability of the tax shelters will have a significant impact on the conduct of the present action.

8 The appellants have advanced no evidence of prejudice as a result of the postponement. Accordingly, postponing discoveries pending the outcome of the tax appeal was a reasonable course of action and we are of the view no error was committed by the case management judge.

9 We note, however, under the terms of the order, neither party is precluded from returning to the case management judge should circumstances change. It may be timely for the parties to ask the case management judge to revisit his order. Indeed, an order of this nature should be revisited periodically in the face of the possibility of indefinite delay.

10 The appeal is dismissed.

Appeal dismissed.

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