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FILED
JUN 04 2018
Court of Appeal of Alberta

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER	1803 0076AC
COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c T-8, AS AMENDED, and
	IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	MAURICE FELIX STONEY AND HIS BROTHERS AND SISTERS
STATUS ON APPEAL:	Interested Party
RESPONDENTS (ORIGINAL APPLICANTS):	ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust (the "Sawridge Trustees")
STATUS ON APPEAL:	Respondents
RESPONDENT	PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Not a Party to the Appeal
INTERVENOR:	SAWRIDGE FIRST NATION
STATUS ON APPEAL:	Respondent
INTERESTED PARTY:	PRISCILLA KENNEDY, Counsel for Maurice Felix Stoney and His Brothers and Sisters
STATUS ON APPEAL:	Appellant
DOCUMENT:	**BOOK OF AUTHORITIES, OF THE RESPONDENT, SAWRIDGE TRUSTEES**

Fast Track

Appeal from the Case Management Order of
The Honourable Mr. Justice D.R.G. Thomas
Dated March 20, 2018, Filed the 2nd day of May, 2018

BOOK OF AUTHORITIES
OF THE RESPONDENT, SAWRIDGE TRUSTEES

SCANNED

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TABLE OF AUTHORITIES

TAB **DESCRIPTION**

Tab 1

Court of Queen's Bench of Alberta

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

Date:
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

Public Trustee of Alberta ("OPTG")

Respondent

- and –

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

Intervenor

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

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I. Introduction

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

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

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

II. Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Maurice Stoney

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

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

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

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

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

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

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

B. Sawridge Band

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

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

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

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

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

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

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

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

C. 1985 Sawridge Trustees

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

VI. Analysis

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. Vexatious Litigant Status

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIII. Costs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Submissions in writing from:

Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

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

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

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

Tab 2

Court of Queen's Bench of Alberta

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

Date: 20170831
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and -

Public Trustee of Alberta ("OPTG")

Respondent

- and -

The Sawridge Band

Intervenor

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

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I Introduction

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

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

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

1. Maurice Stoney is estopped from making this argument via his concession in ***Huzar v Canada***, [2000] FCJ 873 (QL), 258 NR 246 (FCA) that this argument has no legal basis.
2. Maurice Stoney made this same argument in ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253, where it was rejected. Since Mr. Stoney did not choose to challenge that decision, that finding of fact and law has 'crystallized'.
3. In ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2015 ABQB 799 at para 35, time extension denied 2016 ABCA 51, 616 AR 176, I concluded the question of Band membership should be reviewed in the Federal Court, and not in the Advice and Direction Application by the 1985 Sawridge Trustees.
4. In any case I accept and adopt the reasoning of ***Stoney v Sawridge First Nation***, as correct, though I was not obligated to do so.

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

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

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

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

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

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

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

II Background

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

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

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

III Evidence and Submissions at the July 28 Hearing

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

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

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

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

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

A. Priscilla Kennedy

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

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

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

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

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

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

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

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

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

B. Sawridge Band

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

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

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

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

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

C. Sawridge Trustees

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

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

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

IV. Court Costs Awards vs Lawyers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Principle 2 on page 5:
>
> > Self-represented persons should not be denied relief on the basis of a minor or easily rectified deficiency in their case.
>
> Principle 3 on page 8:
>
> > Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.

I note these and other instructions to trial judges in the "*Statement of Principles*" are not permissive, but mandatory. See for example: ***Gray v Gray***, 2017 CanLII 55190 (Ont Sup Ct J); ***Young v Noble***, 2017 NLCA 48; ***Moore v Apollo Health & Beauty Care***, 2017 ONCA 383; ***R v Tossounian***, 2017 ONCA 618.

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

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

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

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

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

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

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

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

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

B. Costs Awards Against Lawyers

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

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

> ... flows the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice ... [Citations omitted.]
>
> (***Jodoin*** at para 18.)

[52] ***Jodoin*** at paras 21, 24 discusses two separate court-mediated lawyer discipline mechanisms, contempt of court vs awards of costs. While "the criteria ... are comparable", these two processes are distinguished in a functional sense by the degree of proof, the possibility of detention, and the implications of a sanction on a lawyer's career:

> ... Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt ...
>
> ...
>
> In most cases ... the implications for a lawyer of being ordered personally to pay costs are less serious than [a finding of contempt or law society discipline]. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. ...

[53] Of course, lawyers are also potentially subject to professional discipline by their supervising Law Society. Gascon J in ***Jodoin*** at paras 20, 22, citing ***R v Cunningham***, 2010 SCC 10 at para 35, [2010] 1 SCR 331, is careful to distinguish how professional discipline and court sanction for lawyer misconduct are distinct processes with separate purposes:

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

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

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

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

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

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

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

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

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

2. The Nuremberg Defence - I Was Just Following Orders

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. No Constitutional Right to Abusive Litigation

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

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

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

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

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

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

[75] Restating this point:

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

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

4. An Exceptional Step

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

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

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

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

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

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

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

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

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

5. Abuse of the Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6. Knowledge and Persistence

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

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

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

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

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

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

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

7. Examples of Lawyer Misconduct that Usually Warrant Costs

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

a. Futile Actions and Applications

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

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

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

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

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

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

b. Breaches of Duty

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

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

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

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

c. Special Forms of Litigation Abuse

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

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

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

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

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

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

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

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

d. Delay

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

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

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

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

C. Conclusion

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

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

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

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

V. Priscilla Kennedy's Litigation Misconduct

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

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

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

A. Futile Litigation

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

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

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

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

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

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

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

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

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

B. Representing Non-Clients

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Conclusion

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

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

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

E. Quantum of the Costs Award

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

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

VI. Conclusion

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

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

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

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

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

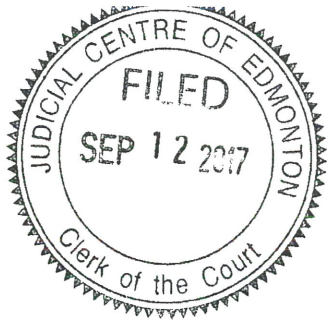
Submissions in writing from:

Donald Wilson
DLA Piper
for Priscilla Kennedy

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

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

Tab 3



Court of Queen's Bench of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2017 ABQB 548

Date: 20170912
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Applicants

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

Respondents (Original Applicants)

- and –

The Sawridge Band

Intervenor

Case Management Decision re Vexatious Litigant Status of Maurice Stoney (Sawridge #8) of the Honourable Mr. Justice D.R.G. Thomas

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I Introduction

[1] The Action to which this decision ultimately relates was commenced on June 12, 2011 by the 1985 Sawridge Trustees and is sometimes referred to as the "Advice and Direction Application". The 1985 Sawridge Trust applied to this Court for directions on how to distribute the Trust property to its beneficiaries. Members of the Sawridge Band are the beneficiaries of that Trust. The initial application has led to many court case management hearings, applications, decisions, and appeals: ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2012 ABQB 365, 543 AR 90 ("***Sawridge #1***"), aff'd 2013 ABCA 226, 543 AR 90 ("***Sawridge #2***"); ***1985 Sawridge***

Trust v Alberta (Public Trustee), 2015 ABQB 799 ("***Sawridge #3***"), time extension denied 2016 ABCA 51, 616 AR 176; ***1985 Sawridge Trust (Trustee for) v Sawridge First Nation***, 2017 ABQB 299 ("***Sawridge #4***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 377 ("***Sawridge #5***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 ("***Sawridge #6***"); ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530 ("***Sawridge #7***").

[2] On July 12, 2017 I rejected an August 12, 2016 application by Maurice Felix Stoney that he and "his brothers and sisters" should be added as beneficiaries to the 1985 Sawridge Trust: ***Sawridge #6***. In that decision I concluded that Stoney's application was a collateral attack on previously decided issues, hopeless, without merit, and an abuse of court: paras 34-52. I also concluded that there was no evidence to support that Maurice Stoney's "10 living brothers or sisters" were, in fact, voluntary participants in this application: paras 8-12.

[3] I therefore:

1. limited the scope of the August 12, 2016 application to Maurice Stoney;
2. struck out the August 12, 2016 application;
3. ordered solicitor and own client indemnity costs against Maurice Stoney;
4. ordered that Stoney's lawyer, Priscilla Kennedy, appear on July 28, 2017 to make submissions as to whether she should be personally liable for that litigation costs award;
5. concluded that Maurice Stoney's August 12, 2016 application exhibits indicia of abusive litigation, and, therefore, on my own motion and pursuant to the Court's inherent jurisdiction:

   a) put in place an interim court order to restrict Maurice Stoney's initiating or continuing litigation in Alberta Courts, and

   b) instructed that Maurice Stoney, the Sawridge 1985 Trustees, and the intervener Sawridge Band may file written submissions as to whether Maurice Stoney should have his court access restricted via what is commonly called a "vexatious litigant" order.

[4] Written submissions were received from the Trustees on July 26, 2017, the Sawridge Band on July 27, 2017, and Maurice Stoney on August 3, 2017.

[5] On August 31, 2017 I issued ***Sawridge #7***, where I concluded that Priscilla Kennedy and Maurice Stoney were jointly and severally liable for the costs award ordered in ***Sawridge #6***.

[6] This judgment evaluates whether Maurice Stoney should be the subject of restrictions on his future litigation activity in Alberta courts.

II. Abusive Litigation and Court Access Restrictions

[7] The principles and procedure that govern court-ordered restrictions to access Alberta courts are developed in a number of recent decisions of this Court. This Court's inherent jurisdiction to control abuse of its processes includes that the Alberta Court of Queen's Bench may order that a person requires leave to initiate or continue an action or application: ***Hok v Alberta***, 2016 ABQB 651 at paras 14-25, 273 ACWS (3d) 533, leave denied 2017 ABCA 63, leave to the SCC requested, 37624 (12 April 2017); ***Thompson v International Union of***

Operating Engineers Local No. 955, 2017 ABQB 210 at para 56, affirmed 2017 ABCA 193; ***Ewanchuk v Canada (Attorney General)***, 2017 ABQB 137 at paras 92-96; ***McCargar v Canada***, 2017 ABQB 416 at para 110.

[8] An intervention of this kind is potentially warranted when a litigant exhibits one or more "indicia" of abusive litigation: ***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, 590 AR 288, aff'd 2014 ABCA 444; ***Re Boisjoli***, 2015 ABQB 629 at paras 98-103, 29 Alta LR (6th) 334; ***McCargar v Canada***, 2017 ABQB 416 at para 112. Where a judge concludes these "indicia" are present and control of abusive litigation may be appropriate then the Court usually follows a two-step process prior to imposing court access restrictions, if appropriate: ***Hok v Alberta***, 2016 ABQB 651 at paras 10-11; ***Ewanchuk v Canada (Attorney General)***, at para 97.

[9] ***Sawridge #6***, at para 55 identified three types of litigation abuse behaviour by Maurice Stoney that potentially warranted court access restrictions:

1. Collateral attack that attempts to reopen an issue that has already been determined by a court of competent jurisdiction, to circumvent the effect of a court or tribunal decision, using previously raised grounds and issues.

2. Bringing hopeless proceedings that cannot succeed, here in both the present application and the ***Sawridge #3*** appeal where Maurice Stoney was an uninvolved third party.

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

[10] I therefore on an interim basis and pursuant to ***Hok v Alberta***, 2016 ABQB 335 at para 105 restricted Maurice Stoney's litigation activities (***Sawridge #6***, at para 65-66), and invited submissions on whether Maurice Stoney's litigation activities should be restricted, and if so, in what manner (***Sawridge #6***, at paras 63-64).

[11] Subsequently Associate Chief Justice Rooke on July 20, 2017 granted an exception to this interim order in relation to ***Nussbaum v Stoney***, Alberta Court of Queen's Bench docket 1603 03761 (the "Rooke Order").

[12] The current decision completes the second step of the two-part ***Hok v Alberta*** process.

[13] Relevant evidence for this analysis includes activities both inside and outside of court: ***Bishop v Bishop***, 2011 ONCA 211 at para 9, 200 ACWS (3d) 1021, leave to SCC refused, 34271 (20 November 2011); ***Henry v El***, 2010 ABCA 312 at paras 2-3, 5, 193 ACWS (3d) 1099, leave to SCC refused, 34172 (14 July 2011). A litigant's entire court history is relevant, including litigation in other jurisdictions: ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 83-127, 543 AR 132; ***Curle v Curle***, 2014 ONSC 1077 at para 24; ***Fearn v Canada Customs***, 2014 ABQB 114 at paras 102-105, 586 AR 23. That includes non-judicial proceedings, as those may establish a larger pattern of behaviour: ***Bishop v Bishop*** at para 9; ***Canada Post Corp. v Varma***, 2000 CanLII 15754 at para 23, 192 FTR 278 (FC); ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547 at para 39. A court may take judicial notice of public records when it evaluates the degree and kind of misconduct caused by a candidate abusive litigant: ***Wong v Giannacopoulos***, 2011 ABCA 277 at para 6, 515 AR 58.

[14] A court may order court access restrictions where future litigation abuse is *anticipated*. As Verville J observed in ***Hok v Alberta***, 2016 ABQB 651 at para 37:

> ... when a court makes a vexatious litigant order it should do so to respond to anticipated abuse of court processes. This is a prospective case management step, rather than punitive. [emphasis in original]

[15] When a court considers limits to future court access by a person with a history of litigation misconduct the key questions for a court are:

1. Can the court determine the identity or type of persons who are likely to be the target of future abusive litigation?
2. What litigation subject or subjects are likely involved in that abuse of court processes?
3. In what forums will that abuse occur?

(***Hok v Alberta***, 2016 ABQB 651 at para 36).

[16] Court access restriction orders should be measured versus and responsive to the anticipated potential for future abuse of court processes. Court access restrictions are designed in a functional manner and not restricted to formulaic approaches, but instead respond in a creative, but proportionate, manner to anticipated potential abuse: ***Bhamjee v Forsdick & Ors (No 2)***, [2003] EWCA Civ 1113 (UK CA).

[17] A vexatious litigant order that simply requires the abusive person obtain permission, "leave", from the court before filing documents to initiate or continue an action is a limited impediment to a person's ability to access court remedies: ***Hok v Alberta***, 2016 ABQB 651 at paras 32-33. Though this step is sometimes called "extraordinary", that dramatic language exaggerates the true and minimal effect of a leave application requirement: ***Wong v Giannacopoulos***, at para 8; ***Hok v Alberta***, 2016 ABQB 651 at paras 32-33.

[18] Other more restrictive alternatives are possible, where appropriate, provided that more strict intervention is warranted by the litigant's anticipated future misconduct: ***Hok v Alberta***, 2016 ABQB 651 at para 34; ***Ewanchuk v Canada (Attorney General)***, at paras 167-68.

III. Submissions and Evidence Concerning Appropriate Litigation Control Steps

A. The Sawridge Band

[19] The Sawridge Band submits that this Court should exercise its inherent jurisdiction and *Judicature Act*, RSA 2000, c J-2 ss 23-23.1 to restrict Maurice Stoney's access to Alberta courts. The Sawridge Band relied on evidence concerning Maurice Stoney's activities that was submitted to the Court in relation to ***Sawridge #6***.

[20] The August 12, 2016 application was futile because Maurice Stoney had continued to repeat the same, already discounted argument. Maurice Stoney had not been granted automatic membership in the Sawridge Band by Bill C-31, and that fact had been either admitted or adjudicated in the ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 decisions.

[21] Maurice Stoney was allowed to apply to become a member of the Sawridge Band, but that application was denied, as was the subsequent appeal. The lawfulness of those processes was confirmed in ***Stoney v Sawridge First Nation***.

[22] A subsequent 2014 Canadian Human Rights Commission complaint concerning the membership application process again alleged the same previously rejected arguments. The same occurred before the Alberta Court of Appeal in ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51

[23] Maurice Stoney's persistent attempts to re-litigate the same issue represent collateral attacks and are hopeless proceedings. Stoney has failed to pay outstanding costs orders. His attempts to shift litigation costs to the 1985 Sawridge Trust are an aggravating factor. These factors imply that Maurice Stoney had brought these actions for an improper purpose. The August 12, 2016 application was a "busybody" attempt to enforce (alleged) rights of uninvolved third parties.

[24] Combined, these indicia of abusive litigation mean Maurice Stoney should be the subject of a vexatious litigant order that globally restricts his access to Alberta courts. In the alternative, a vexatious litigant order with a smaller scope should, at a minimum, restrict Maurice Stoney's potential litigation activities in relation to the Sawridge Band, its Chief and Council, the Sawridge 1985 and 1986 Trusts, and the Trustees of those trusts.

[25] Given Stoney's history of not paying cost awards he should be required to pay outstanding costs orders prior to any application for leave to initiate or continue actions, as in ***R v Grabowski***, 2015 ABCA 391 at para 15, 609 AR 217.

B. The Sawridge 1985 Trust Trustees

[26] The Sawridge 1985 Trust Trustees adopted the arguments of the Sawridge Band, but also emphasized the importance of Maurice Stoney's answers and conduct during cross-examination on his May 16, 2016 affidavit. The Trustees stress this record shows that Maurice Stoney is uncooperative and refused to acknowledge the prior litigation results.

C. Maurice Stoney

[27] Maurice Stoney's written submissions were signed by and filed by lawyer Priscilla Kennedy, identified as "Counsel for Maurice Stoney". The contents of the written submissions are, frankly, unexpected. Paragraphs 6 through 13 advance legal arguments concerning Maurice Stoney's status as a member of the Sawridge Band:

1. the ***Huzar v Canada*** decision cannot be relied on as "evidence in this matter";
2. ***Stoney v Sawridge First Nation*** is not a "thorough analysis" of Maurice Stoney's arguments;
3. Maurice Stoney has not attempted to re-litigate the membership issue but rather to set out the legal arguments that address the definition of a beneficiary of the 1985 Sawridge Trust; and
4. "... there have been a number of recent decisions on these constitutional issues that have and are in the process of completely altering the law related to these issues of the membership/citizenship of Indians, in order to have them comply with the *Constitution*." [Italics in original].

[28] Paragraph 14 of the written brief, which follows these statements, reads:

> It is acknowledged that this court has dismissed these arguments and they are not referred to here, other than as the facts to set the context for the matters to be dealt

with as directed on the issue of whether or not the application of Maurice Stoney was vexatious litigation.

[29] I reject that a bald statement that these are "the facts" proves anything, or establishes these statements are, in fact, true or correct.

[30] The brief then continues at paras 16-17, 24, 28 to state:

> As shown by the litigation in the Sawridge Band cases above, the on-going case in [Descheneaux c Canada (Procureur Général), 2015 QCCS 3555] and the decision of the Supreme Court of Canada in [Daniels v Canada (Indian Affairs and Northern Development), 2016 SCC 12, [2016] 1 SCR 99], and the review of the Federal Court of Appeal decision in Huzar and the judicial review in Stoney, it is submitted that this is not a proceeding where the issue has been determined by a court of competent jurisdiction. Nor is this a matter where proceedings have been brought that cannot succeed or have no reasonable expectation of providing relief.
>
> It is submitted that litigation seeking to determine whether or not you qualify as a beneficiary under a trust established on April 15, 1985 is a matter where the issue of membership/citizenship has not been settled by the courts, and this application was not brought for an improper purpose ...
>
> Contrary to the argument of Sawridge First Nation these matters have not been determined in the past Federal Court proceedings. Issues of citizenship and the constitutionality of these proceedings remains a legal question today as shown by the on-going litigation throughout Canada. Plainly, this Court has determined that these arguments are dismissed in this matter and that is acknowledged.
>
> ... No conclusion was made in the 1995 Federal Court proceedings which were struck as showing no reasonable cause of action and the judicial review was concerned with the issue of the Sawridge First Nation Appeal Committee decision based on membership rules post September, 1985.

[31] These are reasons why the August 12, 2016 application was not a collateral attack:

> No disrespect for the court process or intention to bring proceedings for an improper purpose, was intended to be raised by these arguments respecting this time period and the definitions of a beneficiary of this trust.
>
> (Written brief, para 23).

[32] Prior to going any further I will at this point explain that I put no *legal* weight on these statements. If Maurice Stoney wishes to appeal ***Sawridge #6*** and my conclusions therein he may do so. In fact he did file an appeal of ***Sawridge #6*** as a self-represented litigant on August 11, 2017. If Maurice Stoney or his counsel wish to revisit ***Sawridge #6*** then they could have made an application under *Rule* 9.13 of the *Alberta Rules of Court*, Alta Reg 124/2010 [the "*Rules*", or individually a "*Rule*"], however they did not elect to do so. I conclude these statements, no matter how they were allegedly framed in paragraphs 14 and 23 of Stoney's written arguments, are nothing more than an attempt to re-argue ***Sawridge #6***. Again, I put no *legal* weight on these arguments, but conclude these statements are highly relevant as to whether Maurice Stoney is likely to in the future re-argue issues that have been determined conclusively by Canadian courts.

[33] Other submissions by Maurice Stoney are more directly relevant to his potentially being the subject of court-ordered restrictions. He acknowledges that there are unpaid costs to the Sawridge First Nation, but says these will be paid "... as soon as it is possible ...". Stoney indicates he has been unable to pay these costs amounts because of a foreclosure action.

[34] Affidavit evidence allegedly has established that Maurice Stoney was authorized to represent his brothers and sisters, and that Maurice Stoney was directed to act on their behalf. Counsel for Stoney unexpectedly cites *Federal Courts Rules*, SOR/98-106, s 114 as the authority for the process that Maurice Stoney followed when filing his August 12, 2016 application in the Alberta Court of Queen's Bench:

> ... The Federal Court Rules, provide for Representative proceedings where the representative asserts common issues of law and fact, the representative is authorized to act on behalf of the represented persons, the representative can fairly and adequately represent the interests of the represented persons and the use of a representative proceeding is the just, more efficient and least costly manner of proceeding. This method of proceeding is frequently used for aboriginals and particularly for families who are aboriginal. It is submitted that this was the most efficient and least costly manner of proceeding in the circumstances where the claim of all of the living children possess the same precise issues respecting their citizenship.
>
> (Written Brief, para 24.)

Maurice Stoney therefore denies this was a "busybody" proceeding where he without authority attempted to represent third parties.

[35] The written argument concludes that Maurice Stoney should not be the subject of court access restrictions, but if the Court concludes that step is necessary then that restriction should only apply to litigation vs the Sawridge Band and 1985 Sawridge Trust.

D. Evidence

[36] The Trustees and the Sawridge Band entered as evidence a transcript of Maurice Stoney's cross-examination on his May 16, 2016 affidavit. This transcript illustrates a number of relevant points.

1. Maurice Stoney claims to be acting on behalf of himself and his brothers and sisters, and that he has their consent to do that: pp 9-10.
2. Maurice Stoney believes his father was forced out of Indian status by the federal government: p 12.
2. Maurice Stoney and his counsel Priscilla Kennedy do not accept that Maurice Stoney was refused automatic membership in the Sawridge Band by the ***Huzar v Canada***, [2000] FCJ 873, 258 NR 246 (FCA) and ***Stoney v Sawridge First Nation***, 2013 FC 509, 432 FTR 253 decisions: pp 23-27, 30-33.
3. Maurice Stoney claims he made an application for membership in the Sawridge Band in 1985 but that this application was "ignored": pp 37-39. Stoney however did not have a copy of that application: pp 39-40.
4. Maurice Stoney refused to answer a number of questions, including:

- whether he had read the ***Stoney v Sawridge First Nation*** decision (pp 32-33),
- whether he had made a Canadian Human Rights Commission complaint against the Sawridge Band (p 54),
- whether he had ever read the Sawridge Trust's documentation (pp 60-61),
- the identity of other persons whose Sawridge Band applications were allegedly ignored (pp 63-64), and
- the health status of the siblings for whom Maurice Stoney was allegedly a representative (p 66).

5. Maurice Stoney claims that the Sawridge Band membership application process is biased: pp 41-42.

[37] Maurice Stoney introduced three affidavits which he says indicate the August 12, 2016 application was not a "busybody" proceeding and instead Maurice Stoney was authorized to represent his other siblings in the Sawridge Advice and Direction Application:

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

[38] In ***Sawridge #7*** at paras 133-37 I conclude these affidavits should receive little weight:

> The three affidavits presented by Kennedy do not establish that Maurice Stoney was authorized to represent his siblings. Even at the most generous, these affidavits only indicate that Bill and Gail Stoney gave some kind of oral sanction for Maurice Stoney to act on their behalf. I put no weight on the affidavit of Shelley Stoney. It is hearsay, and presumptively inadmissible.
>
> I note that none of these affidavits were supported by any form of documentation, either evidence or records of communications between Maurice Stoney and his siblings, or between Kennedy and her purported clients.
>
> I make an adverse inference from the absence of any documentary evidence of the latter. The fact that no documentation to support that Kennedy and the Stoney siblings communicated in any manner, let alone gave Kennedy authority to act on their behalf, means none exists.
>
> There is no documentation to establish that Maurice Stoney applied to become a litigation representative or was appointed a litigation representative, per *Rules* 2.11-2.21. This is not a class action scenario where Maurice Stoney is a

> representative applicant. While Kennedy has argued that Maurice Stoney's siblings are elderly and unable to conduct litigation, then that is not simply a basis to arbitrarily add their names to court filing. Instead, a person who lacks the capacity to represent themselves (*Rule* 2.11(c-d)) may have a self-appointed litigation representative (*Rule* 2.14), but only after filing appropriate documentation (*Rule* 2.14(4)). That did not occur.

[39] I come to the same conclusion here and also find as a fact that in this proceeding Maurice Stoney was not authorized to file the August 12, 2016 application on behalf of his siblings.

IV. Analysis

[40] What remains are two steps:

1. to evaluate the form and seriousness of Maurice Stoney's litigation misconduct, and
2. determine whether court access restrictions are appropriate, and, if so, what those restrictions should be.

[41] However, prior to that I believe it is helpful to briefly explore the inherent jurisdiction of this Court to limit litigant activities, vs the authority provided in *Judicature Act*, ss 23-23.1, since these two mechanisms were broached in the submissions of the parties.

A. Control of Abusive Litigation via Inherent Jurisdiction vs the *Judicature Act*

[42] An argument can be made that that Alberta Court of Queen's Bench may only restrict prospective litigation via the procedure in *Judicature Act*, ss 23-23.1. I disagree with that position, though at present this question has not been explicitly and conclusively decided by the Alberta Court of Appeal, or the Supreme Court of Canada.

[43] The most detailed investigation of this issue is found in ***Hok v Alberta***, 2016 ABQB 651, where Verville J at paras 14-25 concluded that one element of this Court's inherent jurisdiction is an authority to restrict prospective and hypothetical litigation activities, both applications and entirely new actions.

[44] In coming to that conclusion Justice Verville rejected a principle found in I H Jacobs often-cited paper, "The Inherent Jurisdiction of the Court" ((1970) 23:1 Current Legal Problems 23 at 43), that UK tradition courts do not have an inherent jurisdiction to block commencement of potentially abusive proceedings:

> The court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious. It is possibly by virtue of this principle that many a litigant in person, perhaps confusing some substratum of grievance with an infringement of legal right, is lured into using the machinery of the court as a remedy for his ills only to find his proceedings summarily dismissed as being frivolous and vexatious and an abuse of the process of the court. The inherent jurisdiction of the court has, however, been supplemented by statutory power to restrain a vexatious litigant from instituting or continuing any legal proceedings without leave of the court.

[45] Jacobs elsewhere in his paper explains that the inherent jurisdiction of the court flows from its historic operation, and stresses this is an adaptive tool that applies as necessary to address issues that would otherwise interfere with the administration of justice and the court's operations:

> ... inherent jurisdiction of the court may be defined as the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. ...
>
> (Jacobs at 51)

[46] However, Jacob's conclusion that courts have no inherent jurisdiction to limit future litigation was based on a historical error, as explained in ***Hok v Alberta***, 2016 ABQB 651, at para 17:

> Two UK Court of Appeal decisions, Ebert v Birch & Anor, (also cited as Ebert v Venvil), [1999] EWCA Civ 3043 (UK CA) and Bhamjee v Forsdick & Ors (No 2), [2003] EWCA Civ 1113 (UK CA), set out the common law authority of UK courts to restrict litigant court access. Some Commonwealth authorities had concluded that UK and Commonwealth courts had no inherent jurisdiction to restrict a person from initiating new court proceedings, and instead that authority was first obtained when Parliament passed the Vexatious Actions Act, 1896. Ebert concludes that is false, as historical research determined that in the UK courts had exercised common law authority to restrict persons initiating new litigation prior to passage of the Vexatious Actions Act, 1896. That legislation and its successors do not codify the court's authority, but instead legislative and common-law inherent jurisdiction control processes co-exist.

[47] Furthermore, the Alberta Court of Appeal has itself issued vexatious litigant orders which do not conform to *Judicature Act* processes. For example, in ***Dykun v Odishaw***, 2001 ABCA 204, 286 AR 392, that Court issued an "injunction" that restricted court access without either an originating notice or the consent of the Minister of Justice and Attorney General of Alberta (then required by *Judicature Act*, s 23.1). Justice Verville concludes (***Hok v Alberta***, 2016 ABQB 651, at paras 19-20, 25), and I agree, that this means Alberta courts have an inherent jurisdiction to take steps of this kind. If the Court of Appeal had the inherent jurisdiction to make the order it issued in ***Dykun v Odishaw***, then so does the Alberta Court of Queen's Bench.

[48] Beyond that, the efficient administration of justice simply requires that there must be an effective mechanism by which the courts may control abusive litigation and litigants. This must, of course, meet the constitutional requirement that any obstacle or expense requirement placed in front of a potential court participant does not "... effectively [deny] people the right to take their cases to court ..." or cause "undue hardship": ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at paras 40, 45-48, [2014] 3 SCR 31. As I have previously observed, an obligation to make a document-based application for leave to file is a comparatively minor imposition and obviously does not cause "undue hardship".

[49] The question, then, is whether the *Judicature Act*, ss 23-23.1 procedure is an adequate one, or does the Court need to draw on its "reserve" of "residual powers" to design an effective

mechanism to control abusive litigants and litigation. I conclude that it must. A critical defect in this legislation is that section 23(2) defines proceedings that are conducted in a "vexatious manner" as requiring "persistent" misconduct, for example "persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction" [emphasis added]: *Judicature Act*, s 23(2)(a).

[50] The Alberta Court of Appeal in certain decisions that apply *Judicature Act*, ss 23-23.1 appears to apply this rule in a strict manner, for example, in ***RO v DF***, 2016 ABCA 170, 36 Alta LR (6th) 282 at para 38 the Court stresses this requirement. Further, the ***RO v DF*** decision restricts the scope of a *Judicature Act*, ss 23-23.1 order on the basis that the vexatious litigant had no "... history of "persistently" ..." engaging in misconduct that involves outside parties. In other words, according to ***RO v DF*** the *Judicature Act*, ss 23-23.1 process operates retrospectively. *Judicature Act*, ss 23-23.1 authorize court access restrictions only after "persistent" misconduct has occurred.

[51] That said, it is clear that the Alberta Court of Appeal does not actually apply that requirement in other instances where it has made an order authorized per the *Judicature Act*. For example, in ***Henry v El*** Slatter JA ordered a broad, multi-court ban on the plaintiff's court activities, though only one dispute is mentioned. There is no or little record of 'persistent history'. ***Henry v El*** does not identify repeated or persistent litigation steps, nor are multiple actions noted. The misconduct that warranted the litigation restraint was bad arguments, and out-of-court misconduct: a need for the target of the misconduct to obtain police assistance, the plaintiff had foisted allegedly binding legal documents on the defendant, the abusive plaintiff was the target of a court ordered peace bond, and the abusive plaintiff posted a bounty for the defendant on the Internet.

[52] In ***Hok v Alberta***, 2016 ABQB 651 at paras 36-37, Justice Verville concluded that an effective mechanism to limit court access should operate in a *prospective* manner - based on evidence that leads to a prediction of future abusive litigation activities. This is also the approach recommended in the UK Court of Appeal ***Ebert v Birch & Anor***, [1999] EWCA Civ 3043 (UK CA) and ***Bhamjee v Forsdick & Ors (No 2)*** decisions.

[53] However, the strict "persistence"-driven approach in the *Judicature Act* and ***RO v DF*** only targets misconduct that has already occurred. It limits the court to play 'catch up' with historic patterns of abuse, only fully reining in worst-case problematic litigants after their litigation misconduct has metastasized into a cascade of abusive actions and applications.

[54] That outcome can sometimes be avoided.

1. Statements of Intent

[55] First, abusive litigants are sometimes quite open about their intentions. For example, in ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625 at para 44, 543 AR 11, a vexatious litigant said exactly what he planned to do in the future:

> I can write, I can write the judicature counsel, I can write the upper law society of Canada. I got Charter violations. I got administrative law violations. I've got civil contempt. I've got abuse of process. I've got abuse of qualified privilege. I can keep going, I haven't even got, I haven't even spent two days on this so far. And if you want to find out how good I am, then let's go at it. But you know, at the

> end of the day, I'm not walking away. And it's not going to get any better for them.

[56] It seems strange that a court is prohibited from taking that kind of statement of intent into account when designing the scope of court access restrictions. This kind of stated intention obviously favours broad control of future litigation activities.

[57] A modern twist on a statement of intentions is that some abusive litigants document their activities and intentions on Internet websites. For example, ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547 at paras 31, 40 describes how an abusive court litigant had, rather conveniently, documented and recorded online his various activities and his perceptions of a corrupt court apparatus.

[58] However, there is no reason why the opposite scenario would not be relevant. Where an abusive litigant chooses to take steps to indicate good faith conduct, then that action predicts future conduct, for example by taking tangible positive steps to demonstrate they are a 'fair dealer' by:

1. voluntarily terminating or limiting abusive litigation,
2. abandoning claims, restricting the scope of litigation, consenting to issues or facts previously in dispute,
3 retaining counsel, and
4. paying outstanding cost awards.

[59] These kinds of actions may warrant a problematic litigant receiving limited court access restrictions, or no court access restrictions at all. Rewarding positive self-regulation is consistent with the administration of justice, and a modern, functional approach to civil litigation.

2. Demeanor and Conduct

[60] Similarly, a trial court judge may rely on his or her perception of an abusive court participant's character, demeanor, and conduct. Obviously, there is a broad range of conduct that may be relevant, but it is helpful to look at one example. Maurice Prefontaine, a persistent and abusive litigant who has often appeared in Alberta and other Canadian courts, presents a predictable in-court pattern of conduct, which is reviewed in ***R v Prefontaine***, 2002 ABQB 980, 12 Alta LR (4th) 50, appeal dismissed for want of prosecution 2004 ABCA 100, 61 WCB (2d) 306.

[61] Mr. Prefontaine presented himself in a generally ordered, polite manner in court. He was at one point a lawyer. He has for years pursued a dispute with the Canada Revenue Agency, and has appeared on many occasions in relation to that matter. Mr. Prefontaine's behaviour changed in a marked but predictable manner when his submissions were rejected. He explodes, making obscene insults and threats directed to the hearing judge and opposing parties. When a person responds to the court in this manner, that conduct is a significant basis to conclude that future problematic litigation is impending from that abusive court participant. Sure enough, that has been the case with Mr. Prefontaine.

[62] Also perhaps unsurprising is that Mr. Prefontaine's conduct is probably linked to his being diagnosed with a persecutory delusional disorder, or a paranoid personality disorder: ***R v Prefontaine***, at paras 8-17, 82, 94-98.

3. Abuse Caused by Mental Health Issues

[63] There are many other examples of how litigation abuse has a mental health basis. For example, the plaintiff in ***Koerner v Capital Health Authority***, 2011 ABQB 191, 506 AR 113, affirmed 2011 ABCA 289, 515 AR 392, leave to SCC refused, 34573 (26 April 2012) engaged in vexatious litigation because her perceptions were distorted by somatoform disorder, a psychiatric condition where a person reports spurious physical disorders (***Koerner v Capital Health Authority***, 2010 ABQB 590 at paras 4-5, 498 AR 109). Similarly, in ***Re FJR (Dependent Adult)***, 2015 ABQB 112, court access restrictions were appropriate because the applicant was suffering from dementia that led to spurious, self-injuring litigation. In these cases future abuse of the courts can be predicted from a person's medical history.

[64] Another and very troubling class of abusive litigants are persons who are affected by querulous paranoia, a form of persecutory delusional disorder that leads to an ever-expanding cascade of litigation and dispute processes, which only ends after the affected person has been exhausted and alienated by this self-destructive process. Querulous paranoiacs attack everyone who becomes connected or involved with a dispute via a diverse range of processes including lawsuits, appeals, and professional complaints. Anyone who is not an ally is the enemy. This condition is reviewed in Gary M Caplan & Hy Bloom, "Litigants Behaving Badly: Querulousness in Law and Medicine" 2015 44:4 Advocates' Quarterly 411 and Paul E Mullen & Grant Lester, "Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour" (2006) 24 Behav Sci Law 333.

[65] Persons afflicted by querulous paranoia exhibit a unique 'fingerprint' in the way they frame and conduct their litigation as a crusade for retribution against a perceived broad-based injustice, and via a highly unusual and distinctive document style. The vexatious litigants documented in ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456, 543 AR 132, ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625, 543 AR 11, ***Chutskoff v Bonora***, 2014 ABQB 389, 590 AR 288, ***Hok v Alberta***, 2016 ABQB 335, and ***Hok v Alberta***, 2016 ABQB 651 all exhibit the characteristic querulous paranoiac litigation and document fingerprint criteria.

[66] Mullen and Grant observe these persons cannot be managed or treated: pp 347-48. Early intervention is the only possible way to interrupt the otherwise grimly predictable progression of this condition: Caplan & Bloom, pp 450-52; Mullen & Lester, pp 346-47. Disturbingly, these authors suggest that the formal and emotionally opaque character of litigation processes may, by its nature, transform generally normal people into this type of abusive litigant: Caplan & Bloom, pp 426-27, 438.

[67] A "persistent misconduct" requirement means persons afflicted by querulous paranoia cannot be managed. They will always outrun any court restriction, until it is too late and the worst outcome has occurred.

4. Litigation Abuse Motivated by Ideology

[68] Other abusive litigants are motivated by ideology. A particularly obnoxious example of this class are the Organized Pseudolegal Commercial Argument ["OPCA"] litigants described in ***Meads v Meads***, 2012 ABQB 571, 543 AR 215. Many OPCA litigants are hostile to and reject conventional state authority, including court authority. They engage in group and organized actions that have a variety of motives, including greed, and extremist political objectives: ***Meads***

v Meads, at paras 168-198. Justice Morissette ("Querulous or Vexatious Litigants, A Disorder of a Modern Legal System?" (Paper delivered at the Canadian Association of Counsel to Employers, Banff AB (26-28 September 2013)) at pp 11) has observed for this population that abuse of court processes is a political action, "... the vector of an ideology for a class of actors in the legal system."

[69] Some OPCA litigants use pseudolegal concepts to launch baseless attacks on government actors, institutions, lawyers, and others. For example:

- ***ANB v Alberta (Minister of Human Services)***, 2013 ABQB 97, 557 AR 364 - after his children were seized by child services the Freeman-on-the-Land father sued child services personnel, lawyers, RCMP officers, and provincial court judges, demanding return of his property (the children) and $20 million in gold and silver bullion, all on the basis of OPCA paperwork.
- ***Ali v Ford***, 2014 ONSC 6665 - the plaintiff sued Toronto mayor Rob Ford and the City of Toronto for $60 million in retaliation for a police attendance on his residence. The plaintiff claimed he was a member of the Moorish National Republic, and as a consequence immune from Canadian law.
- ***Bursey v Canada***, 2015 FC 1126, aff'd 2015 FC 1307, aff'd ***Dove v Canada***, 2016 FCA 231, leave to the SCC refused, 37487 (1 June 2017) - the plaintiffs claimed international treaties and the *Charter* are a basis to demand access to a secret personal bank account worth around $1 billion that is associated with the plaintiffs' birth certificates; this is allegedly a source for payments owed to the plaintiffs so they can adopt the lifestyle they choose and not have to work.
- ***Claeys v Her Majesty***, 2013 MBQB 313, 300 Man R (2d) 257 - the plaintiff sued for half a million dollars and refund of all taxes collected from her, arguing she had waived her rights to be a person before the law, pursuant to the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Canada had no authority because Queen Elizabeth II was "... Crowned on a fraudulent Stone and ... violated her Coronation Oath by giving Royal Assent to laws that violate God's Law ...".
- ***Doell v British Columbia (Ministry of Public Safety and Solicitor General)***, 2016 BCSC 1181 - an individual who received a traffic ticket for riding without a helmet sued British Columbia, demanding $150,000.00 in punitive damages, because he is a human being and not a person, and the RCMP had interfered with his right "to celebrate divine service".
- ***Fiander v Mills***, 2015 NLCA 31, 368 Nfld & PEIR 80 - a person accused of fisheries offenses sued the Crown prosecutor, fisheries officer, and provincial court judge, arguing he was wrongfully prosecuted because he had opted out of "having" a "person" via the *Universal Declaration of Human Rights*.
- ***Isis Nation Estates v Canada***, 2013 FC 590, the plaintiff, "Maitreya Isis Maryjane Blackshear, the Divine Holy Mother of all/in/of creation", sued Alberta and Canada for $108 quadrillion and that they "cease and desist all blasphemy" against the plaintiff.

[70] There is little need to explore why these claims are anything other than ridiculous.

[71] OPCA litigants have been formally declared vexatious, for example: ***Boisjoli (Re)***, 2015 ABQB 629, 29 Alta LR (6th) 334; ***Boisjoil (Re)***, 2015 ABQB 690; ***Cormier v Nova Scotia***, 2015 NSSC 352, 367 NSR (2d) 295; ***Curle v Curle***, 2014 ONSC; ***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348; ***Holmes v Canada***, 2016 FC 918; ***R v Fearn***, 2014 ABQB 233, 586 AR 182; ***Yankson v Canada (Attorney General)***, 2013 BCSC 2332.

[72] Judicial and legal academic authorities uniformly identify OPCA narratives and their associated pseudolegal concepts as resting on and building from a foundation of paranoid and conspiratorial anti-government and anti-institutional political and social belief. These individuals are sometimes called 'litigation terrorists' for this reason. They may act for personal benefit, but they also do so with the belief they are justified and act lawfully when they injure others and disrupt court processes. Persons who advance OPCA litigation to harm others have no place in Canada's courts. The court's inherent jurisdiction must be able to shield the innocent potential victims of these malcontents. Their next target can be anyone who crosses their path - government officials or organizations, peace officers, lawyers, judges, business employees - and who then offends the OPCA litigant's skewed perspectives.

[73] These individuals believe they have a right to attack others via the courts, they like the idea of doing that, and they view their litigation targets as bad actors who deserve punishment. Waiting for these individuals to establish "persistent misconduct" simply means they just have more opportunities to cause harm.

[74] The plaintiff in ***Henry v El*** was obviously an OPCA litigant engaged in a vendetta. Slatter JA in that matter did not wait for the plaintiff to establish a pattern of "persistently" misusing the courts to attack others. I agree that is the correct approach. If a person uses pseudolaw to attack others as a 'litigation terrorist' then that should be a basis for immediate court intervention to prevent that from recurring. If the *Judicature Act* cannot provide an authority to do that, then this Court's inherent jurisdiction should provide the basis for that step.

5. Persistent Abusive Conduct is Only One Predictor of Future Misconduct

[75] All this is not to say that "persistence" is irrelevant. In fact, it is extremely important. A history of persistent abuse of court processes implies the likelihood of other, future misconduct. Persistence is relevant, but must not be *the only prerequisite* which potentially triggers court intervention. Persistence is a clear and effective basis for a court to predict actions when it cannot ascertain motivation or pathology, and from that derive what is likely and predictable. However, that should not be the only evidence which is an appropriate basis on which to restrict court access.

[76] The reason that I and other Alberta Court of Queen's Bench judges have concluded that this Court has an inherent jurisdiction to limit court access to persons outside the *Judicature Act*, ss 23-23.1 scheme is not simply because the UK appeal courts have concluded that this jurisdiction exists, *but also because that authority is necessary*. ***Sawridge #7*** at paras 38-49 reviews how the Supreme Court has instructed that trial courts conduct a "culture shift" in their operation towards processes that are fair and proportionate, without being trapped in artificial and formulaic rules and procedures. This is *an obligation* on the courts. The current *Judicature Act*, ss 23-23.1 process is an inadequate response to the growing issue of problematic and abusive litigation.

[77] Even though the *Judicature Act* is not the sole basis for this Court's jurisdiction to control abusive litigation, that legislation could be amended to make it more effective. One helpful step would be to remove the requirement that "vexatious" litigation involves misconduct that occurs "persistently". Another would be to re-focus the basis for when intervention should occur. Currently, section 23.1(1) permits intervention when "... a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner ...". This again is backwards-looking, punitive language. In my opinion a superior alternative is "... when a Court is satisfied that a person may abuse court processes ...".

[78] The Legislature should also explicitly acknowledge that the *Judicature Act* procedure does not limit how courts of inherent jurisdiction may on their own motion and inherent authority restrict a person's right to initiate or continue litigation.

[79] As Veit J observed in ***Sikora Estate (Re)***, 2015 ABQB 467 at paras 16-19, where a person seeks to have the court make an order that restricts court access then the appropriate procedure is *Judicature Act*, ss 23-23.1. That is a distinct process and authority from that possessed by judges of this Court. Given that the Masters of the Alberta Court of Queen's Bench derive their authority from legislation, another helpful step would be for the Legislature to extend *Judicature Act*, ss 23-23.1 to authorize Masters, on their own motion, to apply the *Judicature Act* procedure to control abusive litigants who appear in Chambers. This is not an uncommon phenomenon; the Masters are in many senses the 'front line' of the Court, and frequently encounter litigation abuse in that role.

B. Maurice Stoney's Abusive Activities

[80] In reviewing Maurice Stoney's litigation activities I conclude on several independent bases that his future access to Alberta courts should be restricted. His misconduct matches a number ***Chutskoff v Bonora*** "indicia" categories and exhibits varying degrees of severity.

1. Collateral Attacks

[81] First, Maurice Stoney has clearly attempted to re-litigate decided issues by conducting the ***Stoney v Sawridge First Nation*** judicial review, the 2016 Canadian Human Rights Commission application, and his attempts to interfere in the Advice and Direction Application litigation via the ***Stoney v 1985 Sawridge Trust***, 2016 ABCA 51 appeal and his August 12, 2016 application. In each case he attempted to argue that he has automatically been made a member of the Sawridge Band by the passage of Bill C-31. He has also repeatedly attacked the processes of the Sawridge Band in administering its membership. My reasons for that conclusion are found in ***Sawridge #6*** at paras 41-52.

[82] This is the first independent basis on which I conclude Maurice Stoney's litigation activity should be controlled. He has a history of repeated collateral attacks in relation to this subject and the related parties. This has squandered important court resources and incurred unnecessary litigation and dispute-related costs on other parties.

2. Hopeless Proceedings

[83] Maurice Stoney's attempts to re-litigate the same issues also represent hopeless litigation. The principle of *res judicata* prohibits a different result. This is a second independent basis on which I conclude Maurice Stoney's litigation conduct needs to be controlled, though it largely overlaps with the issue of collateral attacks.

3. Busybody Litigation

[84] Maurice Stoney appears to have alleged two bases for why I should conclude his purportedly acting in court as a representative of his "living brothers and sisters" is not "busybody" litigation:

1. he has provided affidavit evidence to establish he was an authorized representative, and
2. representation in this manner is authorized by the *Federal Court Rules*, s 114.

[85] As I have previously indicated I reject that the affidavit evidence of Shelley, Bill, and Gail Stoney established on a balance of probabilities that Maurice Stoney was authorized to represent his siblings. As for the *Federal Court Rules*, that legislation has no legal relevance or application to a proceeding conducted in the Alberta Court of Queen's Bench.

[86] "Busybody" litigation is a very serious form of litigation abuse, particularly since it runs the risk of injuring otherwise uninvolved persons. I am very concerned about how the weak affidavit evidence presented by Maurice Stoney represents an after-the-fact attempt to draw Maurice Stoney's relatives not only into this litigation, but potentially with the result these individuals face court sanction, including awards of solicitor and own client indemnity costs. While I have rejected that possibility (***Sawridge #7*** at paras 8, 139), the fact that risk emerged is a deeply aggravating element to what is already a very serious form of litigation abuse. This is a third independent basis on which I conclude Maurice Stoney's court access should be restricted.

4. Failure to Follow Court Orders - Unpaid Costs Awards

[87] Maurice Stoney admitted he has outstanding unpaid cost awards. Maurice Stoney says he is unable to pay the outstanding costs orders because he does not have the money for that. No evidence was tendered to substantiate that claim.

[88] A costs order is a court order. A litigant who does not pay costs is disobeying a court order.

[89] Outstanding costs orders on their own may not be a basis to conclude that a person's litigation activities require control. What amplifies the seriousness of these outstanding awards is that Maurice Stoney has attempted to shift all his litigation costs to a third party, the 1985 Sawridge Trust: ***Sawridge #6*** at para 78. Worse, the effect of that would be to deplete a trust that holds the communal property of an aboriginal community: ***Sawridge #7*** at paras 145-46, 148.

[90] A court may presume that a person intends the natural consequences of their actions: ***Starr v Houlden***, [1990] 1 SCR 1366, 68 DLR (4th) 641. Maurice Stoney appears to intend to cause harm to those he litigates against. He conducts hopeless litigation and then attempts to shift those costs to innocent third parties. If unsuccessful, he says he is unable to pay those costs. In this context Maurice Stoney's failure to pay outstanding costs orders to the Sawridge Band is in itself a basis to take steps to restrict his court access.

5. Escalating Proceedings - Forum Shopping

[91] In ***Sawridge #6*** and ***Sawridge #7*** I noted that Maurice Stoney's dispute with the Sawridge Band has been spread over a range of venues. He acted in Federal Court, and when unsuccessful there he shifted to the Canadian Human Rights Commission. Again unsuccessful, he now

renewed his abusive litigation, this time in the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

[92] I conclude this is a special kind of escalating proceedings, "forum shopping", where a litigant moves between courts, tribunals, and jurisdictions in an attempt to prolong or renew abusive dispute activities. Forum shopping is a particular issue in relation to vexatious litigants because court-ordered restrictions on litigation have a limited scope. For example, I have no authority to order steps that would affect a litigant's access to a court in a different province, or the federal courts.

[93] Abusive litigants can exploit this gap in Canadian court jurisdictions to repeatedly harm other litigants and, in the process, multiple courts. The litigation activities of a British Columbia resident, Roger Callow, are a dramatic example of forum shopping: reviewed in ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547; ***Callow v Board of School Trustees, School District No. 45***, 2008 BCSC 778, 168 ACWS (3d) 906.

[94] Callow's dispute began in 1985 as a labour arbitration proceeding in response to Callow's employment being terminated. That led to litigation and appeals in that jurisdiction. The Supreme Court refused leave. More British Columbia lawsuits followed, and by 2003 Callow was declared a "vexatious litigant" in British Columbia. Callow then persisted with multiple appeals and leave applications. That led to a further 2010 order to control his court access. Callow now shifted to the Federal Court, where his actions were struck out as an abuse of process: ***Callow v B.C. Court of Appeal Chief Justice Threfal*** (9 November 2011), Vancouver T-1386-11 (FC), aff'd (2 December 2011), Vancouver T-138611 (FC); ***Callow v Board of School Trustees (#45 West Vancouver)*** (2 February 2015), Vancouver T-2360-14 (FC). In 2012 Callow then sued in Ontario, which led to him being subjected to broad court access restrictions in that jurisdiction as well: ***West Vancouver School District No. 45 v Callow***, 2014 ONSC 2547.

[95] The saga then continued, with Callow next having filings struck out in Quebec (***Callow v Board of School Trustees (S.D. #45 West Vancouver)***, 2015 QCCS 5002, affirmed 2016 QCCA 60, leave to the SCC refused, 36883 (9 June 2016) and Saskatchewan (***Callow v West Vancouver School District No. 45***, 2015 SKQB 308, affirmed 2016 SKCA 25, leave to the SCC refused, 36993 (6 October 2016). I would be unsurprised if Alberta is not at some point added to this list.

[96] Clearly, at least some persistent abusive court participants are willing to 'shop around', and Roger Callow's litigation is an extreme example of the waste that can result. Given the manner in which Canadian court and tribunal jurisdictions are structured there seems little way at present to escape scenarios like this. Academic commentary on the control of abusive litigation has recommended a national "vexatious litigant" registry: Caplan & Bloom at 457-58, Morissette at 22. I agree that would be a useful addition.

[97] Forum shopping by its very nature implies an intent to evade legitimate litigation control processes and legal principles, including *res judicata*. In the case of Maurice Stoney his forum shopping largely overlaps his abusive collateral attack and futile litigation activities, and is a highly aggravating factor to that misconduct.

6. Unproven Allegations of Fraud and Corruption

[98] The May 16, 2016 cross-examination transcript reveals that Maurice Stoney believes he and his relatives are the subjects of fraud and conspiracy that is intended to deny them their

birthright. For example, he says Sawridge Band membership applications have been ignored, though he has no proof of that.

[99] These allegations are not in themselves a basis to restrict Maurice Stoney's court access, however they provide some insight into his litigation objectives and how he views his now longstanding conflict with the Sawridge Band and its administration.

7. Improper Litigation Purposes

[100] The Sawridge Band argues Maurice Stoney's August 12, 2016 application has an improper purpose, or no legitimate purpose. Maurice Stoney's exact objective is not obvious. It may be he intends to pursue his perceived objective no matter the consequences or justification, to disrupt the membership process of the Sawridge Band, to obtain monies from the 1985 Sawridge Trust, or a combination of those motives. However, as I have previously indicated, the combination of futile litigation, unpaid costs awards, costs shifting, forum shopping, and a claim that the abusive litigant lacks the means to pay costs leads to a logical inference. The August 12, 2016 application had no legitimate purpose. Its only effect was to waste court and litigant resources.

[101] This is another independent basis on which I conclude court intervention is warranted to control Maurice Stoney's access to Alberta Courts.

C. Anticipated Litigation Abuse

[102] This decision identifies five independent bases on which this Court should take steps to control future litigation abuse by Maurice Stoney in Alberta Courts. Collectively, that strongly favours court intervention. His litigation history predicts future litigation abuse.

[103] But that is secondary to another fact - that the submissions received in the second stage of the procedure found in ***Hok v Alberta*** shows that Maurice Stoney and his counsel still do not accept that prior decisions mean Maurice Stoney has no right to continue his interference with the Sawridge Band and its membership processes. Instead, Maurice Stoney and his counsel say his arguments are viable, if not correct. Those are "the facts". This is a very strong predictor of future abusive litigation activities. Maurice Stoney's objectives and beliefs remain unchanged.

[104] What remains is to determine the scope of that court access restriction order. The combination of trial, appeal, judicial review, and tribunal activities strongly predicts that Maurice Stoney will not restrict his abusive litigation activities to a particular forum. Instead, his history of forum shopping suggests the opposite.

[105] While I have agreed with many of the Sawridge Band and 1985 Sawridge Trust's arguments, I do not accept that Maurice Stoney's litigation history and apparent intentions means that his plausible future abusive litigation activities cannot be restricted to a particular target group or dispute. Instead, Maurice Stoney's complaint-related activities have a clear focus: his long-standing dispute with the Sawridge Band concerning band membership. I did not receive any evidence or statements that suggest that Stoney's abusive activities will expand outside that target set. I therefore only require Stoney obtain leave to initiate or continue litigation in Alberta courts where the litigation involves:

1. the Sawridge Band,
2. the 1985 Sawridge Trust,

3 the 1986 Sawridge Trust,

4 the current, former, and future Chief and Council of the Sawridge Band,

5. the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

6. the Public Trustee of Alberta,

7. legal representatives of categories 1-6,

8. members of the Sawridge Band,

9. corporate and individual employees of the Sawridge Band, and

10. the Canadian federal government.

[106] I have defined this plausible target group broadly because Maurice Stoney's allegations of conspiracy against himself and his siblings raises a concern that Maurice Stoney may shift his focus from the Sawridge Band and the Trusts to the individuals who are involved in the prior litigation and Sawridge Band membership-related processes and decisions.

[107] Maurice Stoney's litigation misconduct extends to appeals. Normally that would mean that I would restrict his access to all three levels of Alberta Courts, however in light of the inconsistent Alberta Court of Appeal jurisprudence on control of abusive and vexatious litigation in that forum I do not extend my order to that Court: ***Hok v Alberta***, 2016 ABQB 335; ***Ewanchuk v Canada (Attorney General)***.

[108] I agree that Maurice Stoney's future litigation activities should be made dependent on him first paying outstanding cost awards.

[109] Maurice Stoney's "busybody" activities, and his attempts to justify his purportedly authorized representation activities in this hearing raise the troubling possibility that Stoney will again attempt to draw others into his disputes. Persons have no constitutional right to represent others (***Gauthier v Starr***, 2016 ABQB 213, 86 CPC (7th) 348), and appearing before a court is a privilege solely subject to the court's discretion (***R v Dick***, 2002 BCCA 27, 163 BCAC 62). Maurice Stoney has badly abused that privilege and his arguments concerning his "busybody" activities are highly problematic. He has demonstrated he is an unfit litigation representative. I therefore order that Maurice Stoney is prohibited from representing any person in all Alberta Courts.

D. Court Access Control Order

[110] I therefore order:

1. Maurice Felix Stoney is prohibited, under the inherent jurisdiction of the Alberta Court of Queen's Bench, from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, without an order of the Chief Justice or Associate Chief Justice, or Chief Judge, of the Court in which the proceeding is conducted, or his or her designate, where that litigation involves any one or more of:

   (i) the Sawridge Band,

   (ii) the 1985 Sawridge Trust,

(iii) the 1986 Sawridge Trust,

(iv) the current, former, and future Chief and Council of the Sawridge Band,

(v) the current, former, and future Trustees of the 1985 Sawridge Trust and 1986 Sawridge Trust,

(vi) the Public Trustee of Alberta,

(vii) legal representatives of categories 1-6,

(viii) members of the Sawridge Band,

(ix) corporate and individual employees of the Sawridge Band, and

(x) the Canadian federal government.

2. Maurice Felix Stoney is prohibited from commencing, or attempting to commence, or continuing any appeal, action, application, or proceeding in the Court of Queen's Bench or the Provincial Court of Alberta, on his own behalf or on behalf of any other person or estate, until Maurice Felix Stoney pays in full all outstanding costs ordered by any Canadian court.

3. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may, at any time, direct that notice of an application to commence or continue an appeal, action, application, or proceeding be given to any other person.

4. Maurice Felix Stoney must describe himself, in the application or document to which this Order applies as "Maurice Felix Stoney", and not by using initials, an alternative name structure, or a pseudonym.

5. Any application to commence or continue any appeal, action, application, or proceeding must be accompanied by an affidavit:

(i) attaching a copy of the Order issued herein, restricting Maurice Felix Stoney's access to the Alberta Court of Queen's Bench and Provincial Court of Alberta;

(ii) attaching a copy of the appeal, pleading, application, or process that Maurice Felix Stoney proposes to issue or file or continue;

(iii) deposing fully and completely to the facts and circumstances surrounding the proposed claim or proceeding, so as to demonstrate that the proceeding is not an abuse of process, and that there are reasonable grounds for it;

(iv) indicating whether Maurice Felix Stoney has ever sued some or all of the defendants or respondents previously in any jurisdiction or Court, and if so providing full particulars;

(v) undertaking that, if leave is granted, the authorized appeal, pleading, application or process, the Order granting leave to proceed, and the affidavit in support of the Order will promptly be served on the defendants or respondents;

(vi) undertaking to diligently prosecute the proceeding; and

(vii) providing evidence of payment in full of all outstanding costs ordered by any Canadian court.

6. Any application referenced herein shall be made in writing.

7. The Chief Justice or Associate Chief Justice, or Chief Judge, or his or her designate, may:

   (i) give notice of the proposed claim or proceeding and the opportunity to make submissions on the proposed claim or proceeding, if they so choose, to:

      a) the involved potential parties;

      b) other relevant persons identified by the Court; and

      c) the Attorney Generals of Alberta and Canada.

   (ii) respond to the leave application in writing; and

   (iii) hold the application in open Court where it shall be recorded.

8. Leave to commence or continue proceedings may be given on conditions, including the posting of security for costs.

9. An application that is dismissed may not be made again.

10. An application to vary or set aside this Order must be made on notice to any person as directed by the Court.

[111] This order will be prepared by the Court and filed at the same time, as this Case Management Decision and takes effect immediately. The exception granted in the Rooke Order shall apply to this court access control order.

[112] The interim order made per ***Sawridge #6*** at para 65-66 is vacated.

V. Representation by Priscilla Kennedy in this Matter

[113] I have deep concerns about the manner in which Maurice Stoney's lawyer, Priscilla Kennedy, has conducted herself in this matter. Certain of those issues are reviewed in ***Sawridge #7***, a judgment where I determined that Kennedy should be personally responsible for her client's costs award because of her misconduct. She represented a client who made a hopeless application that was a serious abuse of the Court and other litigants, and involved other third parties without their authorization.

[114] In ***Sawridge #7*** Ms. Kennedy was represented by Mr. Donald Wilson, a partner of the law firm DLA Piper, which is the law firm that employs Ms. Kennedy. I reproduce verbatim certain of Mr. Wilson's submissions to the Court in ***Sawridge #7***:

> ... in these circumstances, I will say that Ms. Kennedy has prosecuted this action on [Maurice Stoney's] behalf further than I would've, further than I think she should've. ...
>
> ... the reason I go through this, Sir, is I think quite candidly I've conceded that Ms. Kennedy prosecuted this action further than I would've, further than I think she ought to have ...
>
> Now, if I'm [counsel for the Sawridge Band], I can tell you that the Band is the person that gets to determine their membership and that is entirely appropriate. And in Mr. Stoney's case they've done that. Appeals were made on two different

levels. An additional attempt was made at the Human Rights tribunal. And Mr. Stoney has been told, and I know he's been told this because I told him this, he is at the end of his rope with respect to the Sawridge Band and the Court system.

And the reason for that is background and history. It's one of Montgomery's campaigns in World War II, it's a bridge too far. He would've been fine if he'd stopped at bridges, by going for a third bridge the campaign itself stopped. In this instance, had -- if I'd been engaged or consulted, if I read Sawridge 5 ... the fact that the Court is not, unlikely earlier trust litigation where often the trust ends up paying for part of the litigant's costs, the Court could not have been clearer that is not going forward. And the Court indicated interlope. That is, someone does not have a claim on the trust, presumably would make the trial more complicated, more time consuming, higher costs for everyone. ...

Now, I can tell you that in the course of the last week ... I had occasion to speak in depth with Ms. Kennedy. And Ms. Kennedy tried to convince me as to the merits of Mr. Stoney's case. And at a certain point in time, I had to tell her that he has exhausted his remedies in the legal realm with respect to the Sawridges and it's time to move on.

...

My submission would be the application that resulted in Sawridge 6 should not have been made. It was ill-advised. But was not done with bad motives, an attempt to abuse the process. It had that effect, I have to say in front of my friends it absolutely had that effect ...

... what the Court is trying to do, as you properly cite in your decision with respect to sanctions, is to change behaviour. It's the same rationale behind torts which is you're giving a tort award so that some other idiot isn't going to follow and do the same thing. And, with respect, I would submit to you that the seriousness of what Sawridge 6 is has been driven home to Ms. Kennedy. And, with respect, it's been driven home as much as an order of contempt or a referral to the Law Society. The decision is out there, we have a courtroom full of reporters here to report on the matter.

And I'm reminded of someone once asked Warren Buffett when he was testifying at the congress as to what was reasonable, and it was on the context of a company he owned and insider trading. And Mr. Buffett to the U.S. congress testified it meets a very easy standard. And the standard is, if they printed the story in your home town and your mother and your father had an opportunity to read it, would you be embarrassed? And, with respect, Ms. Kennedy and the Sawridge 6 decision has brought home the falling of continuing to prosecute the remedy she's seeking for Mr. Stoney. Which, after meeting Mr. Stoney, I understand. But there's a certain point in time the legal remedies have been exhausted. ...

[Emphasis added.]

[115] I believe I am fair when I indicate these submissions say that at the ***Sawridge #7*** hearing Mr. Wilson, on behalf of Ms. Kennedy, had acknowledged that there was no merit to the August 12, 2016 application, and that the legal issues involved in that application had been decided,

conclusively, in a series of earlier court proceedings. Yet, here in her written submissions, Ms. Kennedy on behalf of Maurice Stoney, re-argues the very same points. Her submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that the effect of the August 12, 2016 application was to abuse of the court's process: "... it absolutely had that effect ..." [emphasis added].

[116] Mr. Wilson told me in open court that Ms. Kennedy had learned her lesson. When I read the written brief Kennedy prepared and submitted on behalf of Maurice Stoney, I questioned whether that was true.

[117] In ***Sawridge #7*** at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.

[118] I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

[119] In ***Sawridge #7*** at paras 51-58 I reviewed case law concerning the inherent jurisdiction of a Canadian court to control lawyers and their activities. At para 56 I cited ***MacDonald Estate v Martin***, [1990] 3 SCR 1235 at 1245, 77 DLR (4th) 249 for the rule that courts as part of their supervisory function may remove lawyers from litigation, where appropriate. In that decision representation by lawyers was challenged on the basis of an alleged conflict of interest. However, the inherent jurisdiction of the court is not expressly restricted to simply that:

> ... The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. ... [Emphasis added.]

[120] In my opinion Ms. Kennedy's conduct raises the question of whether she is a suitable representative for Maurice Stoney, and whether the proper administration of justice requires that Ms. Kennedy should be removed from this litigation.

[121] This judgment represents what I believe should be Ms. Kennedy's final opportunity to participate in the Advice and Direction Application in the Alberta Court of Queen's Bench as a representative of Maurice Stoney. If that were not the case then I would have proceeded to invite submissions from Ms. Kennedy why she and her law firm, DLA Piper, should not be removed as representatives of Maurice Stoney, and prohibited from any future representation of Maurice Stoney in the Advice and Direction Application.

[122] Instead I will send a copy of this judgment to the Law Society of Alberta for review.

VI. Conclusion

[123] I conclude that Maurice Felix Stoney has engaged in abusive litigation activities resulting in him being required to seek leave prior to initiating or continuing litigation in the Alberta Court of Queen's Bench and Alberta Provincial Court that relates to persons and organizations involved with the Sawridge Band and Maurice Stoney's disputes concerning membership in that Band. Maurice Stoney may only seek leave after he has paid all outstanding costs awards.

[124] Maurice Stoney is also prohibited from representing others in any litigation before the Alberta Provincial Court, Alberta Court of Queen's Bench, and Alberta Court of Appeal.

[125] I confirm that I will send a copy of this judgment to the Law Society of Alberta for review in respect to Ms. Kennedy.

Appearances made by written submissions.
Dated at the City of Edmonton, Alberta this 12th day of September, 2017.

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

Submissions in writing from:

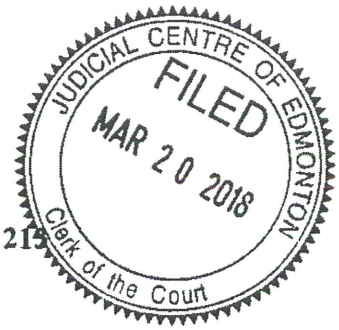
Priscilla Kennedy
DLA Piper
for Maurice Felix Stoney (Applicant)

Edward H. Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band

D.C. Bonora
Dentons LLP
for 1985 Sawridge Trustees

Tab 4

Court of Queen's Bench of Alberta



Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2018 ABQB 215

Date:
Docket: 1103 14112
Registry: Edmonton

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

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

Between:

Maurice Stoney and His Brothers and Sisters

Applicants

- and -

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

Respondents (Original Applicants)

- and -

The Sawridge Band

Respondent (Intervenor)

Memorandum of Decision on Costs (Sawridge #9)
of the
Honourable Mr. Justice D.R.G. Thomas

Table of Contents

I. Introduction

[1] This is my ruling on costs arising from ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 530 ("***Sawridge #7***") and ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 548 ("***Sawridge #8***").

II. Background

[2] The history of this matter to date is summarized at paras 1-6 of ***Sawridge #8***.

[3] On July 12, 2017 I issued ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 436 ("***Sawridge #6***"), wherein I denied an application by Maurice Felix Stoney "and his 10 living brothers and sisters" to be added as interveners or parties to a proceeding intended to settle and distribute the assets of the 1985 Sawridge Trust. I ordered solicitor and own client indemnity costs against Maurice Stoney and ordered that he make written submissions on whether he should be subject to court access restrictions (at paras 53-68). At paras 71-81 of that decision I concluded that the activities of Maurice Stoney's Lawyer, Ms. Priscilla Kennedy, required review. I ordered that Ms. Kennedy appear before me on July 28, 2017 to speak to the costs question.

[4] ***Sawridge #6*** was appealed by Maurice Stoney et al and the Sawridge Band and the Sawridge Trustees (the "Sawridge Participants") applied for security for costs. On December 19, 2017 the Court of Appeal granted that application and stayed the appeal pending the posting of security by February 28, 2017 (***Stoney v Trustees for the 1985 Sawridge Trust,*** 2017 ABCA 437). Mr. Stoney applied to extend the time to post security and that application was dismissed (***Stoney v Twinn,*** 2018 ABCA 81). The appeal in ***Sawridge #6*** is deemed abandoned.

[5] At the July 28, 2017 hearing the Sawridge Participants were permitted to enter evidence that was potentially relevant to whether Ms. Kennedy should be personally responsible for some or all of a costs award against her client, Maurice Stoney. Counsel for the Sawridge Participants argued that an award of costs was appropriate either against Ms. Kennedy personally, or against

Ms. Kennedy and Mr. Stoney on a joint and several basis. Submissions were also received from the Sawridge Participants as to whether Mr. Stoney should have his court access restricted via a "vexatious litigant" order.

[6] Following that July 28, 2017 hearing, I issued ***Sawridge #7*** wherein I concluded that Ms. Kennedy was personally liable, along with her client Maurice Stoney, for the solicitor and own client indemnity costs that I had ordered in ***Sawridge #6*** (***Sawridge #7*** at para 154). In ***Sawridge #8*** I found Mr. Stoney to be a vexatious litigant and that he should be subject to litigation restraints (***Sawridge #8*** at para 110).

[7] The issue of costs arising from ***Sawridge #7*** and ***#8*** had not been addressed by any of the Participants or by the Court. Given the dispute in respect to the scope of my costs award in ***Sawridge #6*** in relation to ***Sawridge #7*** and ***#8***, the Sawridge Participants and Ms. Kennedy were directed in my letter of January 2, 2018, to provide written briefs on the subject. Mr. Stoney was copied with that letter by mail.

III. Positions Taken

[8] The Sawridge Participants provided separate written submissions but given the similarities in their arguments, I summarize them as one. They argue that the costs against the unsuccessful parties in ***Sawridge #7*** and ***#8*** should be awarded on the same basis as in ***Sawridge #6***. They say that the findings of misconduct in ***#7*** and ***#8*** are consistent with the same findings of misconduct in ***Sawridge #6*** which were held to warrant full indemnity costs. ***Sawridge #7*** and ***#8*** are extensions and arise from the application dealt with in ***Sawridge #6***. Accordingly, the Sawridge Participants seek costs on a solicitor and own client full indemnity basis. They seek these costs as against Ms. Kennedy and Mr. Stoney on a joint and several basis for ***Sawridge #8***, and as against Ms. Kennedy only for ***Sawridge #7***. Alternatively, they seek enhanced or party and party costs.

[9] Ms. Kennedy's Reply Submissions take the position that the Court drew a clear line between the application in ***Sawridge #6***, which attracted an enhanced costs award, and the subsequent proceedings to determine whether she should be personally liable for such costs and whether Mr. Stoney should be declared a vexatious litigant. Any costs relating to ***Sawridge #7*** and ***#8*** must be evaluated on their own merits and enhanced costs are not carried over to subsequent proceedings where misconduct is evaluated. Furthermore, she argues that the role of the Sawridge Participants in ***Sawridge #7*** was limited and in ***Sawridge #8*** was optional, and that the suggestion that they were "successful" parties misapprehends the nature of those proceedings and their role. Those were hearings that resulted from the Court acting on its own motion. Thus, Ms. Kennedy asks that the costs award in ***Sawridge #6*** not be extended to proceedings in ***#7*** and ***#8***, and that the enhanced costs applications of the Sawridge Participants be dismissed. Finally, she asks that the Court direct any issues relating to the quantum of any costs awarded be resolved by an Assessment Officer in accordance with the Court's prior direction.

IV. Jurisdiction on Costs

[10] R 1.2 of the *Alberta Rules of Court,* Alta Reg 124/2010 sets out that the "purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way." The provisions that deal with costs uphold the

function of r 1.2(2)(e), providing "an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments."

[11] The issue of costs was not directly addressed by the parties or the Court in ***Sawridge #7*** or ***#8***. Nevertheless, the Court retains the jurisdiction to provide the parties with direction in respect of the costs of *#7* and *#8* (r 10.30(1)(c); ***Saskatchewan Power Corporation v Alberta (Utilities Commission)***, 2015 ABCA 281 at paras 8-10; ***Firemaster Oilfield Services Ltd v Safety Boss (Canada) (1993) Ltd***, 2002 ABCA 96 at para 2).

[12] R 10.30(1)(c) sets out:

> Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made
>
> ...
>
> (c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

[13] Cost awards are discretionary (r 10.29(1), 10.31; *Court of Queen's Bench Act*, RSA 2000, c C-31, s 21). R 10.33(1) sets out some of the considerations in making a costs award:

> (a) the result of the action and the degree of success of each party;
>
> (b) the amount claimed and the amount recovered;
>
> (c) the importance of the issues;
>
> (d) the complexity of the action;
>
> (e) the apportionment of liability;
>
> (f) the conduct of a party that tended to shorten the action;
>
> (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[14] In deciding whether to impose an amount through a costs award the Court may consider, among other things, whether a party has engaged in misconduct (r 10.33(2)(g)).

[15] As explained by Topolniski J in ***EAD Property Holdings (103) Corp v Greyhound Canada Transportation ULC***, 2015 ABQB 425 at para 19 the r 10.33 considerations "dovetail with Rule 1.2(4), which requires a proportionate remedy when the Court is called upon to exercise its discretion."

[16] Finally, a costs award in this case is appropriate and would not be inconsistent with the formal judgments given that neither ***Sawridge #7*** or ***#8*** directly spoke to costs (***Pivotal Capital Advisory Group Ltd v NorAmera BioEnergy Corp***, 2009 ABQB 230 at para 17).

V. Entitlement to Costs

[17] The general rule is that the successful party to an application is entitled to a costs award against the unsuccessful party (r 10.29(1)). R 10.28 sets out that a "party" for the purposes of the rules pertaining to the recoverable costs of litigation "includes a person filing or participating in an application or proceeding who is or may be entitled to or subject to a cost award." This is an expanded definition of "party" which allows a costs award against anyone participating in a

proceeding that is not an action (Stevenson & Côté, *Alberta Civil Procedure Handbook 2017* (Edmonton: Juriliber, 2017) at 10-32).

[18] Although the proceedings in ***Sawridge #7*** and ***#8*** were initiated by this Court, exercising its inherent jurisdiction, the Sawridge Participants were directed to appear and invited to make submissions. The Sawridge Participants participated in those proceedings and argued in support of a costs award personally against Ms. Kennedy and a vexatious litigant designation against Mr. Stoney. Both orders were made by this Court. Thus, the Sawridge Participants fall within the definition of "party" as described in r 10.28 and are entitled to costs.

[19] Commonly, enhanced costs are awarded for litigation misconduct, being confined to the portion of the proceeding in which the misconduct was found to have occurred and are not carried over to the subsequent proceeding in which the conduct is evaluated (see ***Lynch v Checker Cabs Ltd***, 1999 ABQB 514). However, even if that is the common practice, it is not a complete bar to a costs award here given the misconduct which occurred in ***Sawridge #6*** by both Ms. Kennedy and Mr. Stoney and continued by them in ***Sawridge #8***.

VI. Analysis

[20] This Court has broad jurisdiction to order costs (r 10.31, 10.33). However, an increased costs award ought not to be made where there is an absence of notice of the possibility of such an order, no submissions are made on the issue, and no party to the proceedings sought those costs (***Twinn v Twinn***, 2017 ABCA 419 at para 27, rev'g in part ***1985 Sawridge Trust v Alberta (Public Trustee)***, 2017 ABQB 377 ("***Sawridge #5***")). The Court of Appeal in ***Twinn*** also reiterated that awards of costs on a solicitor and client basis are "rare and exceptional" while awards of solicitor and own client costs are "virtually unheard of except where provided by contract" (at para 25).

[21] The ***Twinn*** decision should not be interpreted as restricting a judge's discretion to award enhanced costs in response to litigation misconduct that emerges during a proceeding (see, for example, ***Stagg v Condominium Plan No 882-2999***, 2013 ABQB 684 at para 32 citing ***Jackson v Trimac Industries Ltd*** **(1993)**, 138 AR 161 at para 28, 8 Alta LR (3d) 403 (QB), aff'd on costs 1994 ABCA 199; ***Brown v Silvera***, 2010 ABQB 224 at paras 29-35, aff'd 2011 ABCA 109).

[22] As long as there is a sufficient basis for the award of extraordinary costs such an award may be appropriate (***Twinn*** at paras 25, 28).

[23] Costs need to be evaluated on their own merits since the appropriateness of an enhanced costs award is on a case by case basis (***Twinn*** at para 27). As such, the scale of costs from ***Sawridge #6*** should not automatically be extended to ***Sawridge #7*** and ***#8***.

[24] Here, Ms. Kennedy and Mr. Stoney were provided notice that the Sawridge Participants were seeking solicitor and own client full indemnity costs in relation to the applications in ***Sawridge #6*** and should have been aware of the possibility of such an order in the related proceedings if their litigation misconduct continued (see ***Sawridge #6*** at para 67). There is direct connection between ***Sawridge #6***, ***#7*** and ***#8***, the participants are the same, and the issues are related to and flow from ***Sawridge #6***.

[25] Ms. Kennedy and Mr. Stoney were also aware that the Sawridge Participants sought enhanced costs when they were presented with the draft bills of costs seeking solicitor and own client full indemnity costs in relation to ***Sawridge #7*** and ***#8***. An additional form of notification

occurred by way of the Sawridge Participants' letter of November 15, 2017 addressed to the Court and copied to Mr. Faulds and Mr. Stoney. Finally, all participants were offered the opportunity to make written submissions as to costs.

***Sawridge #7* Costs Award**

[26] I do not find it necessary, or even appropriate, to order enhanced costs against Ms. Kennedy for ***Sawridge #7*** and instead order the presumptive party and party costs (r 10.29). That hearing, where Ms. Kennedy was represented by Mr. Wilson, a senior lawyer at her firm, dealt with whether Ms. Kennedy ought to be responsible for all or some of the costs awarded against Mr. Stoney in ***Sawridge #6***. She was responding to my direction that she appear and explain her position on an award of costs.

[27] Although Mr. Stoney was present at the hearing, he did not make submissions or actively participate in any way and should not bear the costs for a hearing involving the liability of his lawyer for her actions.

[28] No litigation misconduct occurred in the course of ***Sawridge #7*** which would provide a sufficient basis for an award of enhanced costs. Instead, similar to ***Lynch v Checker Cabs Ltd***, 1999 ABQB 514, where enhanced costs were not awarded for the subsequent proceeding evaluating the lawyer's conduct, Column 3 of Schedule "C" costs as against Ms. Kennedy are awarded. Costs are set at Column 3 given the court's discretion, wide entitlement to fix the appropriate scale of costs, and in consideration of r 10.33 (***United Food and Commercial Workers, Local 401 v Alberta (Attorney General)***, 2012 ABCA 244 at para 3; ***Saskatchewan Power Corporation*** at para 18).

***Sawridge #8* Costs Award**

[29] In ***Sawridge #8***, Ms. Kennedy, acting as "Counsel for Maurice Stoney," continued to advance futile arguments concerning Mr. Stoney's status as a member of Sawridge Band (***Sawridge #8*** at paras 27-32, 113-122). I rejected these arguments in ***Sawridge #6***, finding that the Stoney Application was inappropriate, devoid of merit, and abusive in a manner exhibiting the hallmark characteristics of vexatious litigation and that it amounted to serious litigation misconduct (***Sawridge #6*** at para 67). Ms. Kennedy's submissions in ***Sawridge #8*** were a collateral attack on the result in ***Sawridge #6***, constituting a notorious and serious form of litigation abuse (***Chutskoff v Bonora***, 2014 ABQB 389 at para 92, aff'd 2014 ABCA 444).

[30] Mr. Wilson, the lawyer that made representations on behalf of Ms. Kennedy in ***Sawridge #7***, admitted that these earlier arguments "absolutely" had the effect of being an abuse of the court's process (see submissions as reproduced in ***Sawridge #8*** at para 114). However, the written submissions of Ms. Kennedy in ***Sawridge #8*** re-argued those same meritless points (at paras 32, 115). I outlined my concerns with Ms. Kennedy's conduct in ***Sawridge #8*** (at paras 115-118):

> [Ms. Kennedy's] submissions are the law is unsettled, issues remain arguable, despite her counsel's admission on July 28, 2017 that the effect of the August 12, 2016 application was to abuse of the court's process: "... it absolutely had that effect ..." [emphasis added].
>
> Mr. Wilson told me in open court that Ms. Kennedy had learned her lesson. When I read the written brief Kennedy prepared and submitted on behalf of Maurice Stoney, I questioned whether that was true.

In ***Sawridge #7*** at paras 98-99 I explained my conclusion why a lawyer who re-litigates or repeatedly raises settled issues has engaged in serious misconduct that is contrary to the standards expected of persons who hold the title "lawyer". I also observed on how advancing abusive litigation is a breach not merely of a lawyer's professional and court officer duties. It is a betrayal of the solicitor-client relationship, and 'digs a grave for two': para 74.

I am also troubled by Ms. Kennedy relying on a procedure found in the *Federal Court Rules* to explain why Maurice Stoney's August 12, 2016 application was not a "busybody" proceeding. Stating what should be obvious, civil proceedings in front of this Court are governed by the *Alberta Rules of Court*, not the *Federal Court Rules*. I question the competence of a lawyer who does not understand what court rules apply in a specific jurisdiction.

[31] It is critical that this Court continue to disapprove of abusive litigation, changing positions, and re-arguing settled issues (***Stagg*** at para 32; ***Chutskoff*** at para 92; ***Sawridge #7*** at para 82-91). Consequently, Ms. Kennedy and Mr. Stoney, by virtue of their own actions, have opened themselves up to enhanced costs being awarded against them in relation to the proceedings that gave rise to ***Sawridge #8***. In accordance with the reasoning for awarding costs against a lawyer personally in ***Sawridge #7***, there is a sufficient basis to award solicitor-client costs against Ms. Kennedy and Mr. Stoney on a joint and several basis in ***Sawridge #8***.

VII. Conclusion:

[32] Costs are awarded on a party and party basis against Ms. Kennedy only for ***Sawridge #7*** (Column 3 of Schedule "C") and on a solicitor-client basis against Ms. Kennedy and Mr. Stoney on a joint and several basis for ***Sawridge #8***.

[33] There will be no costs associated with this ruling as success has been mixed.

[34] Any issues relating to quantum of costs for ***Sawridge #6***, ***#7***, and/or ***#8*** are to be resolved by an Assessment Officer.

Heard and decided on the basis of written materials directed and described in paras. [7] to [9] inclusive.
Dated at the City of Edmonton, Alberta this 20th day of March, 2018.

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

Appearances:

P. Jon Faulds, Q.C.
Field Law
for Priscilla Kennedy

Edward H. Molstad, Q.C.
Parlee McLaws LLP
for the Sawridge Band

Doris Bonora
Dentons LLP
for the 1985 Sawridge Trustees

Tab 5

In the Court of Appeal of Alberta

Citation: Twinn v Twinn, 2017 ABCA 419

2017 ABCA 419 (CanLII)

Date: 20171212
Docket: 1703-0193-AC
Registry: Edmonton

Between:

Patrick Twinn, on his behalf, Shelby Twinn and Deborah A. Serafinchon

Appellants
(Applicants)

- and -

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

Respondents
(Respondents)

- and -

Public Trustee of Alberta ("OPTG")

Respondent
(Respondent)

- and -

Catherine Twinn

Respondent
(Respondent)

- and -

**Patrick Twinn, on behalf of his infant daughter,
Aspen Saya Twinn, and his wife Melissa Megley**

Not Parties to the Appeal
(Respondents)

2017 ABCA 419 (CanLII)

The Court:

**The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Sheilah Martin**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 5th day of July, 2017
Filed on the 19th day of July, 2017
(2017 ABQB 377; Docket: 1103 14112)

Trust and the assets held in it, and expand the issues beyond those identified during case management.

[9] With respect to the applications of Shelby and Patrick Twinn, the case management judge held that their participation in the advice and direction application would be redundant as their interests are already represented. He noted that both Shelby and Patrick are currently Beneficiaries under the Trust and opined that this status would not be eliminated by the outcome of the Trust litigation, a conclusion that is challenged by the appellants. He further held that the ongoing involvement of current Beneficiaries would be better served by transparent communications with the Trustees and their legal representatives, in order to ensure that their status as Beneficiaries is respected.

[10] With respect to the application of Deborah Sarafinchon, the case management judge noted that she has not applied for membership in the SFN and apparently has no intention to do so. He also noted that the Trust litigation is not intended to address membership issues, and that the purpose of case management has been to narrow the issues in the litigation rather than expand them. He held that Ms. Sarafinchon can monitor the progress of the Trust litigation, review proposals made by the Trustees as to the definition of Beneficiaries under the Trust, and provide comments to the Trustees and the court.

[11] The case management judge then went on to consider costs. He concluded that Patrick and Shelby Twinn "offer nothing and instead propose to fritter away the Trust's resources to no benefit". He concluded that they had no basis to participate in the Trust litigation, and that their proposed litigation would end up harming the pool of beneficiaries as a whole. They appeared late in the proceeding, and they did not promise to take steps to ameliorate the cost impact of their proposed participation, instead proposing to have the Trust pay for that participation. Based on the Supreme Court's decision in *Hryniak v Mauldin*, 2014 SCC 7 at para 2, [2014] 1 SCR 87, he noted a "culture shift" toward more efficient litigation procedure and concluded that one aspect of that culture shift is to use costs awards to deter dissipation of trust property by meritless litigation activities. He therefore ordered Patrick and Shelby Twinn to pay solicitor and own client indemnity costs of the Trustees in respect of the application. He awarded party and party costs against Deborah Serafinchon in favour of the Trustees.

[12] All three applicants appeal the denial of their applications to be added as parties to the Trust litigation. Patrick and Shelby Twinn also appeal the award of solicitor and own client costs made against them.

Standard of review

[13] Case management decisions are entitled to considerable deference on appeal. Absent a legal error, this Court will not interfere with a case management judge's exercise of discretion unless the result is unreasonable. This is particularly the case where a decision is made by a case management judge as part of a series of decisions in an ongoing matter: *Ashraf v SNC Lavalin ATP*

2017 ABCA 419 (CanLII)

Inc, 2017 ABCA 95 at para 3, [2017] AJ No 276; *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 at para 8, 606 AR 291; *Lameman v Alberta,* 2013 ABCA 148 at para 13, 553 AR 44.

[14] Cost awards are also discretionary, and are entitled to deference on appeal. The standard of review for discretionary decisions of a lower court was succinctly stated by the Supreme Court in *Penner v (Niagara Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125:

> A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations [*citations omitted*].

[15] This Court has noted that when reviewing discretionary decisions, appellate intervention is required where a) a case management judge failed to give sufficient weight to relevant considerations; b) a case management judge proceeded arbitrarily, on wrong principles or on an erroneous view of the facts; or c) there is likely to be a failure of justice if the impugned decision is upheld: *Bröeker v Bennett Jones*, 2010 ABCA 67 at para 13, 487 AR 111.

Did the case management judge err in declining to add the appellants as parties to the Sawridge Trust litigation?

[16] The Alberta *Rules of Court* provide a discretionary procedure for the addition of parties to litigation. Rule 3.75 applies to litigation commenced by way of originating application. It requires that the court be satisfied that the order adding a respondent *should* be made, and that the addition of the party will not result in prejudice that cannot be remedied through costs, an adjournment, or the imposition of terms.

[17] Two main questions have been identified when considering whether a party should be added to litigation under the Rules: (1) Does the proposed party have a legal interest (not only a commercial interest) that will be directly affected by the order sought? (2) Can the question raised be effectually and completely resolved without the addition of the party as a party? (*Amoco Canada Petroleum Co v Alberta & Southern Gas Co* (1993), 10 Alta LR (3d) 325 (QB) at paras 23-25). In a narrow sense, the only reason that it is necessary to make a person a party to an action is to ensure they are bound by the result: see *Amoco* at paras 13-15, citing *Amon v Raphael Tuck & Sons Ltd*, [1956] 1 QB 357 at 380. That the person may have relevant evidence or arguments does not make it necessary that they be added as a party. In the appropriate circumstances, such a person may be added as an intervenor, or may be a necessary witness.

[18] In this case, it is unclear what interest the individual appellants have that is not represented by the parties already before the court, or what position they would bring to the litigation, necessary to permit the issues to be completely and effectually resolved, that will not be presented

2017 ABCA 419 (CanLII)

Tab 6

In the Court of Appeal of Alberta

Citation: Bröeker v. Bennett Jones, 2010 ABCA 67

Date: 20100226
Docket: 0901-0059-AC
Registry: Calgary

2010 ABCA 67 (CanLII)

Between:

Cathyrene Bröeker

Appellant (Applicant)

- and -

Bennett Jones Law Firm and The Sheldon Mervin Chumir Estate

Respondents (Respondents)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Keith Ritter

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice C.L. Kenny
Dated the 27th day of January, 2009
Filed on the 28th day of January, 2009
(Docket: ES01-078514; 0701-05969)

of accounts and her claim as unpaid claimant, and prohibited her from filing further documents in the estate action.

[10] The appellant appeals that order to this Court and also brought a number of applications, several of which are first instance applications regarding the conduct of the litigation at Queen's Bench. The appellant did not raise any of the latter applications in her oral argument and we will deal with them by considering the written materials only.

[11] At the commencement of the appeal hearing, we dismissed the appellant's application to have an in-camera appeal, with reasons to follow. Those reasons are found at para. 25. The appellant also brought a fresh evidence application, which the panel asked the appellant to argue along with her argument on the main appeal.

Issues and Standard of Review

[12] The appellant argues that the case management judge erred by:

1. Overreaching her jurisdiction in granting final relief for an uncontested estate and in splitting the claims, which were otherwise consolidated;

2. Misconstruing the fraud or undue influence evidenced in the surrogate file; and

3. Failing to uphold the appropriate standard by surprise arbitrary rulings and cancellations of scheduled summary judgment hearings that were to address both surrogate claims, pursuant to an existing order.

[13] If a chambers judge or a case management judge fails to give sufficient weight to relevant considerations, proceeds arbitrarily, on wrong principles or on an erroneous view of the facts, or if there is likely to be a failure of justice, appellate interference is warranted: ***Metropolitan Life Insurance Co. v. Hover***, 1999 ABCA 123, 237 A.R. 30 at para. 10, citing ***Russell Food Equipment (Calgary) Limited v. Valleyfield Investment Ltd.*** (1962), 40 W.W.R. (n.s.) 292, 1962 CarswellAlta 57 at para. 9 (S.C.). Questions of law engage the correctness standard: ***Northland Bank v. Wettstein*** (1997), 200 A.R. 150 at para. 9 (C.A.); ***Decock v. Alberta***, 2000 ABCA 122, 255 A.R. 234. However, exercises of discretion will be reviewed on a reasonableness standard: ***Decock*** at para. 13; ***Indian Residential Schools, Re*** (sub nom. ***Doe v. Canada***), 2001 ABCA 216, 286 A.R. 307 at para. 23.

[14] The striking of a claim under Rule 129 of the *Alberta Rules of Court* is discretionary and therefore subject to the reasonableness standard absent an error of law: *Tottrup v. Lund*, 2000

2010 ABCA 67 (CanLII)

ABCA 121, 255 A.R. 204 at para. 3; ***First Mortgage Alberta Fund (V) Inc. v. Boychuk***, 2002 ABCA 194, 312 A.R. 1 at para. 9, citing ***Kvaerner Enviropower v. Tanar Industries*** (1998), 223 A.R. 348 at 352 (C.A.) and ***Decock***.

2010 ABCA 67 (CanLII)

Analysis

[15] The appellant argues that the case management judge erred in making her disposition in the absence of a notice of motion from the respondent and cites Rule 384 . Rule 384 provides:

> (1) An application in an action or proceeding shall be made by motion and, unless the court otherwise orders, notice of the motion shall be given to all parties affected.
>
> (2) A Notice of Motion must
>
> > (a) state the relief sought,
> >
> > (b) state briefly the grounds and material or evidence intended to be relied on, including any reference to any statutory provision or Rule sought to be invoked, and
> >
> > (c) specify any irregularities complained of or objection relied on.

[16] Notice of the respondent's intention to bring a motion to have the appellant's applications in the surrogate action dismissed was provided in its case management agenda proposals of September 17, 2008 and January 23, 2009. Moreover, when the appellant raised the issue of the notice requirement with the case management judge, the case management judge indicated that she was bringing the motion of her own accord. Paragraph 12 of the Court of Queen's Bench Civil Practice Note No. 1 gives her the authority to do so. It provides:

> 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.

[17] The purpose of notice is to alert parties to what they will be facing when applications are brought by opposing parties. That process is less formal once case management is in place, as case management contemplates that there will be regular meetings before the same judge at which both process and substantive issues will be dealt with. Often the parties will ask that certain issues be placed on the agenda for a particular meeting without formally filing a written notice of motion. That is what was done in this case and, in fact, the appellant enjoyed a "dry run" when the issues dealt with in this appeal were addressed during the October 16, 2008 case management meeting. Counsel for the respondent asked, in writing, that the same issues be dealt with in January 2009 so the

Tab 7

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 15, 2017

Office Consolidation

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(2) In the case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action has had notice

(a) that the assignment is disputed by the assignor or anyone claiming under the assignor, or

(b) of any other opposing or conflicting claims to the debt or chose in action,

the debtor, trustee or other person is entitled, if the debtor, trustee or other person thinks fit, to call on the several persons making claim to the debt or chose in action to interplead concerning it.

RSA 1980 cJ-1 s21

Time of essence

21 Stipulations in contracts, as to time or otherwise, that would not heretofore have been deemed to be or have become of the essence of the contracts in a court of equity shall receive the same construction and effect as they would receive in equity.

RSA 1980 cJ-1 s22

Validity of orders

22 No order of the Court under any statutory or other jurisdiction may, as against a purchaser, and whether with or without notice, be invalidated on the ground

(a) of want of jurisdiction, or

(b) of want of concurrence, consent, notice or service.

RSA 1980 cJ-1 s23

Part 2.1
Vexatious Proceedings

Definitions

23(1) In this Part,

(a) "clerk of the Court" means

(i) in the case of the Court of Appeal, the Registrar or Deputy Registrar of the Court,

(ii) in the case of the Court of Queen's Bench, a clerk, deputy clerk or acting clerk of the court of the judicial centre in which the proceeding is being instituted, and

(iii) in the case of the Provincial Court, a clerk or deputy clerk of the Court;

(b) "Court" means

(i) the Court of Appeal,

(ii) the Court of Queen's Bench, or

(iii) the Provincial Court.

(2) For the purposes of this Part, instituting vexatious proceedings or conducting a proceeding in a vexatious manner includes, without limitation, any one or more of the following:

(a) persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;

(b) persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;

(c) persistently bringing proceedings for improper purposes;

(d) persistently using previously raised grounds and issues in subsequent proceedings inappropriately;

(e) persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;

(f) persistently taking unsuccessful appeals from judicial decisions;

(g) persistently engaging in inappropriate courtroom behaviour.

2007 c21 s2

Application

23.1(1) Where on application or on its own motion, with notice to the Minister of Justice and Solicitor General, a Court is satisfied that a person is instituting vexatious proceedings in the Court or is conducting a proceeding in a vexatious manner, the Court may order that

(a) the person shall not institute a further proceeding or institute proceedings on behalf of any other person, or

(b) a proceeding instituted by the person may not be continued,

without the permission of the Court.

(2) An application under subsection (1) may be made by a party against whom vexatious proceedings are being instituted or

Tab 8

Federal Court  Cour fédérale

Date: 20130515

Docket: T-923-12
Docket: T-922-12

Citation: 2013 FC 509

2013 FC 509 (CanLII)

Ottawa, Ontario, May 15, 2013

PRESENT: The Honourable Mr. Justice Barnes

Docket: T-923-12

BETWEEN:

MAURICE FELIX STONEY

Applicant

and

SAWRIDGE FIRST NATION

Respondent

Docket: T-922-12

BETWEEN:

ALINE ELIZABETH (MCGILLIVRAY) HUZAR AND JUNE MARTHA (MCGILLIVRAY) KOLOSKY

Applicants

and

SAWRIDGE FIRST NATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[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.

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[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.

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[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.

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[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 v Canada*, 2004 FCA 16 at para 26, [2004] FCJ no 77.

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[10] Ms. Huzar and Ms. Kolosky rely on the decisions in *Sawridge v Canada*, 2003 FCT 347, [2003] 4 FC 748, and *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77 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 v Canada*, 2003 FCT 347 at paras 27 to 30, 4 FC 748, [2003] 4 FC 748:

> 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):

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> ... 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]

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This decision was upheld on appeal in *Sawridge v Canada*, 2004 FCA 16, [2004] FCJ no 77.

[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.

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[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] FCJ no 873, 258 NR 246.

[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 SCR 460.

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

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[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.

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[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 at para 19, [2007] FCJ no 347, and *Lavalee v Louison*, [1999] FCJ no 1350 at paras 34-35, 91 ACWS (3d) 337.

[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.

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JUDGMENT

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

"R.L. Barnes"
Judge

2013 FC 509 (CanLII)

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-923-12 T-922-12
STYLE OF CAUSE:	STONEY v SAWRIDGE FIRST NATION and HUZAR ET AL v SAWRIDGE FIRST NATION
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	March 5, 2013
REASONS FOR JUDGMENT:	BARNES J.
DATED:	May 15, 2013

2013 FC 509 (CanLII)

APPEARANCES:

Priscilla Kennedy	FOR THE APPLICANTS
Edward H. Molstad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davis LLP Edmonton, Alberta	FOR THE APPLICANTS
Parlee McLaws LLP Edmonton, Alberta	FOR THE RESPONDENT

Tab 9

PURPOSE AND INTENTION OF THESE RULES

1.2 (1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

Tab 10

Court of Queen's Bench of Alberta

Citation: Chutskoff v Bonora, 2014 ABQB 389

2014 ABQB 389 (CanLII)

Date: 20140624
Docket: 0803 06510
Registry: Edmonton

Between:

Dr. Brian Chutskoff, Executor and Trustee Under the Last Will and Testament of Charles Chutskoff, Deceased

Plaintiff

- and -

Doris Celestina Esther Bonora, Reynolds Mirth Richards & Farmer LLP, and John Doe

Defendants

Memorandum of Decision
of the
Honourable Mr. Justice Peter Michalyshyn

I. Introduction

[1] On May 9, 2008, Dr. Brian Chutskoff ["Dr. Chutskoff"] sued a named lawyer, Doris Bonora, a second unidentified lawyer, and the law firm of Reynolds Mirth Richards & Farmer [collectively, the "Defendants"]. In this action [the "RMRF Action"] Dr. Chutskoff claims:

1. that the Defendants had agreed to represent Dr. Chutskoff in a challenge to the registration of a Saskatchewan judgment, but

2. several days later the Defendants then refused to represent him, and

leave denied [2001] SCCA No 442; ***Del Bianco v 935074 Alberta Ltd.***, 2007 ABQB 150 at para 39, 156 ACWS (3d) 786.

[89] A litigant's entire court history is relevant (***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456, 543 AR 132; ***Curle v Curle***, 2014 ONSC 1077 at para 24), which may include litigation in other jurisdictions (***Fearn v Canada Customs***, 2014 ABQB 114).

[90] Since a person is presumed to intend the natural consequences of their acts (***Starr v Houlden***, [1990] 1 SCR 1366, 68 DLR (4th) 641)) repeated misconduct is a presumptive indication that a litigant does not intend to follow court rules and procedure (***McMeekin v Alberta (Attorney General)***, at para 119).

2014 ABQB 389 (CanLII)

A. Indicia of Vexatious Litigation

[91] The preceding review identified the general characteristics of litigation that is vexatious and an abuse of process. Specific indicia of vexatious litigation have also been identified, including:

1. features of vexatious litigation identified in *Judicature Act*, RSA 2000, c J-2, ss 23-23.1; and
2. an often applied set of seven criteria from ***Dykun v Odinshaw***, at para 42, 1267 AR 318.

Those lists are non-exhaustive and simply provide examples of stereotypic features of vexatious litigation: ***Dahlseide v Dahlseide***, 2009 ABCA 375 at para 37, 73 RFL (6th) 57).

[92] This is a useful occasion then to collect and update the catalogue of established stereotypic features of vexatious litigation:

1. collateral attack:
   a) bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction: *Judicature Act*, s 23(2)(a); ***Dykun v Odinshaw*** at para 42;
   b) using previously raised grounds and issues improperly in subsequent proceedings: *Judicature Act*, s 23(2)(c); ***Dykun v Odinshaw*** at para 42;
   c) conducting a proceeding to circumvent the effect of a court order: ***Stout v Track***, at paras 79-82, 84-87;
2. hopeless proceedings:
   a) bringing proceedings that cannot succeed or that have no reasonable expectation to provide relief: *Judicature Act*, s 23(2)(b); ***Dykun v Odinshaw*** at para 42;
   b) seeking forms of relief that cannot be obtained: ***Fearn v Canada Customs***, at para 106; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 196, 203, 543 AR 132; ***Onischuk v Alberta***, at paras 14, 35;

c) seeking relief that is unwarranted or grossly disproportionate to any plausible remedy: ***Stout v Track***, at paras 68-71; ***Arabi v Alberta***, 2014 ABQB 295, at paras 101-103; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 196, 203, 543 AR 132;

d) advancing excessive cost claims: ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 196, 203, 543 AR 132; ***Arabi v Alberta*** at paras 101-103;

e) advancing incomprehensible arguments and allegations: ***R v Fearn***, 2014 ABQB 233 at paras 22-23;

3. escalating proceedings:

a) grounds and issues tend to roll forward into subsequent actions, repeated and supplemented (***Dykun v Odinshaw*** at para 42; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 203, 205, 543 AR 132), this factor is aggravated where this results in simultaneous active overlapping actions (***Wong v Leung***, 2010 ABQB 628 at para 16);

b) with an 'accumulative' nature where, as proceedings continue:

i) new parties are added, frequently these are lawyers: ***Dykun v Odinshaw*** at para 42; ***Big Bear Hills Inc v Bennett Jones Alberta LLP***, 2010 ABQB 764, 507 AR 21; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at paras 203, 205, 543 AR 132; ***Arabi v Alberta***, at para 104; or

ii) unrelated issues and subjects which were not a part of the original action are added to the litigation: this decision, see paras 110-111;

4. bringing proceedings for improper purposes (*Judicature Act*, s 23(2)(c); ***Dykun v Odishaw*** at para 42), including proceedings:

a) without a legal basis and intended disrupt, pre-empt, or frustrate other litigation: ***R v Fearn***, 2014 ABQB 233 at para 48; ***O'Neill v Deacons***, 2007 ABQB 754 at para 25, 83 Alta LR (4th) 152; ***McDonald Estate (Re)***, 2013 ABQB 602 at para 44;

b) with an ulterior motive or to seek a collateral advantage: ***Hughes Estate v Hughes***, 2006 ABQB 159 at para 20, 396 AR 250, varied on other grounds 2007 ABCA 277, 285 DLR (4th) 57;

c) intended to extort a settlement or other benefit: ***Allen v Gray***, 2012 ABQB 66 at para 41, 532 AR 252, appeal dismissed for want of prosecution 2013 ABCA 176, 553 AR 124; ***Arabi v Alberta*** at para 100; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625 at paras 32, 38, 41, 543 AR 11

c) intended as revenge, harassment, to oppress, or to inflict harm: ***Stout v Track***, at paras 79-82; ***Serdahely Trust (Trustee of) v Serdahely Estate;***

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Haljan v Serdahely Estate, 2008 ABQB 472, 453 AR 337; ***Wong v Leung; V.W.W. v Leung***, 2011 ABQB 688 at para 36, 530 AR 82; and

d) conducted in retaliation to other persons' successes or their failure to cooperate with the plaintiff, including unwarranted complaints to professional bodies: ***McDonald Estate (Re)***, 2013 ABQB 602 at para 45;

5. initiating "busybody" lawsuits to enforce alleged rights of third parties: ***Wong v Giannacopoulos***, 2011 ABCA 206 at para 4, 510 AR 234, leave refused 2011 ABCA 277, 515 AR 58;

6. failure to honour court-ordered obligations:

a) failing to pay costs: *Judicature Act*, s 23(2)(e): ***Dykun v Odinshaw*** at para 42;

b) a failure to abide by court orders: ***R v Fearn***, 2014 ABQB 233 at paras 45, 49; ***BNP Paribas (Canada) v Pawlus***, 2007 ABCA 325 at para 4, 162 ACWS (3d) 420; ***McDonald Estate (Re)***, 2013 ABQB 602 at para 46;

c) misconduct that is intended to or has the effect of circumventing the operation of court orders: this decision, see paras 121-124.

7. persistently taking unsuccessful appeals from judicial decisions (*Judicature Act*, s 23(2)(f); ***Dykun v Odinshaw***, at para 42), spurious appeals intended to incur cost and cause delay are an aggravating factor (***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625 at paras 38, 41, 543 AR 11);

8. persistently engaging in inappropriate courtroom behaviour: *Judicature Act*, s 23(2)(g); ***Allen v Gray***, at para 44;

9. unsubstantiated allegations of conspiracy, fraud, and misconduct, including:

a) claims of judge and lawyer deception, fraud, perjury, conspiracy, tampering of records and transcripts, and other conspiratorial misconduct made without the positive evidence (reviewed in ***Fearn v Canada Customs***, at paras 73, 76-78, 85) legally required to support such allegations: ***Onischuk v Alberta***, at para 35; ***Koerner v Capital Health Authority***, 2011 ABQB 462 at para 21, 518 AR 35; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 625 at paras 27-29 38, 543 AR 11;

b) sensational claims of conspiracies and intimidation, harassment and racial bias: ***Allen v Gray***, at para 42; ***V.W.W. v Wasylyshen***, 2013 ABQB 327 at para 59, 563 AR 281, leave refused 2014 ABCA 121; ***Wong v Giannacopoulos***, at para 4;

c) pleadings that are "replete with extreme and unsubstantiated allegations, and often refer to far-flung conspiracies involving large numbers of individuals and institutions", "where the allegations may be unfounded in fact or merely speculative, but the language is vitriolic, offensive and defamatory": ***Del Bianco v 935074 Alberta Ltd.***, at para 35;

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10. scandalous or inflammatory language in pleadings or before the court: ***Wilson v Canada (Revenue)***, 2006 FC 1535 at para 31, 305 FTR 250; ***McMeekin v Alberta (Attorney General)***, 2012 ABQB 456 at para 205, 543 AR 132; ***Onischuk v Alberta***, at paras 14, 35; and

11. advancing Organized Pseudolegal Commercial Argument ["OPCA"] strategies: ***Meads v Meads***; ***R v Fearn***, 2014 ABQB 233 at para 49.

[93] *Any* of these indicia are a basis to classify a legal action as vexatious.

B. The RMRF Action is a Vexatious Proceeding

[94] Dr. Chutskoff's RMRF Action has devolved into a textbook example of vexatious litigation. It is irrelevant that this lawsuit may have been initiated for a potentially legitimate purpose and with alleged facts that could support a claim of some kind: ***Dykun v Odinshaw***, at para 42. This progression is particularly obvious when viewed as the latest component in the matrix of court actions which has resulted from Dr. Chutskoff's management of the Charles Chutskoff estate: ***McMeekin v Alberta (Attorney General)***; ***Fearn v Canada Customs***.

[95] In fact, the RMRF Action is only repeating a pattern that has been previously identified and commented upon by judges in other proceedings. Dr. Chutskoff initiates litigation on one point, but that action rapidly metastasizes into an attack on the result of the Wills Action and other later related litigation. For example, the Saskatchewan Court of Appeal in ***Chutskoff Estate v Ruskin Estate; Ruskin v Chutskoff Estate***, 2011 SKCA 10 at paras 32-33, 366 SaskR 166 concluded that Dr. Chutskoff's trustee-related inquiries were nothing more than pretense for him to access the court and then move to his true objective – an attack on the Will Action. Justice Miller observed the very same process in the Enforcement Action.

1. Collateral Attack

[96] This is the first general basis on which Dr. Chutskoff's litigation is vexatious. His true intent is to challenge all prior unfavourable results in the related Charles Chutskoff estate litigation which has preceded the RMRF Action. As he explicitly states in the Supplementary Materials, he has initiated the RMRF Action for no purpose less than to have this Court set aside the results in other now concluded proceedings. He seeks to attack, by one means or another, the outcomes in multiple Saskatchewan and Alberta decisions.

[97] This is not possible. A Court cannot review or vary the decision of another court except in the proper procedural context, such as an appeal. Any attempt to litigate outside of that context is a "collateral attack". That term was recently explained by Justice Abella in ***British Columbia (Workers' Compensation Board) v Figliola***, 2011 SCC 52, at para 28, [2011] 3 SCR 422:

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

[98] A collateral attack is a frivolous basis for a lawsuit. An attempt to conduct a collateral attack is vexatious: ***Dykun v Odinshaw*** at para 42.

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Tab 11

2017 ONSC 6631
Ontario Superior Court of Justice

Ferreira v. St. Mary's General Hospital

2017 CarswellOnt 18714, 2017 ONSC 6631, 286 A.C.W.S. (3d) 27

FERNANDO FERREIRA (Applicant) and ST. MARY'S GENERAL HOSPITAL (Respondent)

H.S. Arrell J.

Judgment: November 28, 2017
Docket: 688/17

Counsel: Georgiana Masgras, for Applicant
Daphne Jarvis, for Respondent, St, Mary's General Hospital
Sarit Batner, Sam Rogers, for Intervener, Chris Hinkewich

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.d Costs against solicitor personally
XXIV.7.d.ii Misconduct of solicitor

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — Misconduct of solicitor

Improper application — Solicitor was retained by patient to bring action for damages for injuries sustained in motor vehicle accident — Patient subsequently had major heart attack and was placed on life support — Solicitor brought successful ex parte application to enjoin hospital from withdrawing life support from patient — Hospital and doctor successfully brought emergency motion to rescind order — Application brought by solicitor included medical legal reports and medical records about patient's pre-heart attack condition, and affidavit sworn by owner of medical facility, which contained inaccurate information — Affidavit referred to patient as having lost his memory, which he had actually suffered severe hypoxic brain injury, and stated patient's family did not want him to live without memory when, in fact, they knew he did not want prolonged life support and wanted to donate his organs — Solicitor did not have instructions from applicant or family to bring application — On their emergency motion, doctor and hospital adduced evidence that patient had deteriorated further and brain death was likely, which would compromise organ donation — Doctor and hospital brought application for costs against solicitor personally — Application granted — Doctor and hospital were each awarded $7,500 costs against solicitor personally — Doctor and hospital incurred costs needlessly due to inappropriate application by solicitor who had no instructions, submitted misleading information and was at least negligent in preparation of materials — Solicitor's conduct was worthy of sanction by costs — Quantum of costs sought by doctor and hospital were disproportionate, and they should have had protocol in place to respond much faster to application than they did.

Table of Authorities

Cases considered by *H.S. Arrell J.*:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521, 48 C.P.C. (5th) 56, 71 O.R. (3d) 291, 188 O.A.C. 201 (Ont. C.A.) — considered

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Galganov v. Russell (Township) (2012), 2012 ONCA 410, 2012 CarswellOnt 7400, 294 O.A.C. 13, 350 D.L.R. (4th) 679 (Ont. C.A.) — followed

Salisbury v. Sun Life Assurance Co. of Canada (2013), 2013 ONCA 182, 2013 CarswellOnt 3240 (Ont. C.A.) — referred to

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

1985 Sawridge Trust v. Alberta (Public Trustee) (2017), 2017 ABQB 530, 2017 CarswellAlta 1569 (Alta. Q.B.) — considered

830356 Ontario Inc. v. 156170 Canada Ltd. (1995), 1995 CarswellOnt 4360 (Ont. Gen. Div.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 57 — referred to

R. 57.07(1) — considered

APPLICATION by doctor and hospital for costs against patient's solicitor personally.

***H.S. Arrell J.*:**

INTRODUCTION

1 Late in the evening of Friday, July 7th, 2017, an emergency application request came before me on an *ex parte* basis to enjoin St. Mary's Hospital from withdrawing life support for Mr. Fernando Ferreira.

2 Early in the morning of Saturday, July 8th, 2017, I issued such an order, based upon the application record filed before me at that time. I also ordered that the matter be returned to the Superior Court in Kitchener on Monday, July 10th, 2017 at 9:30 a.m. I further ordered that all materials in the application be served upon the respondent St. Mary's Hospital, and Mr. Ferreira's spouse.

3 As a result of my order, counsel for the hospital, and the treating physician, were retained later in the day on Saturday, July 8th.

4 On Sunday, July 9th, counsel for the hospital and Doctor brought an emergency motion by teleconference before Associate Chief Justice Marrocco to vary my order by rescinding it, which he quite correctly did, based upon the new information provided to him at that time. Life support was subsequently withdrawn and Mr. Ferreira died shortly thereafter.

5 St. Mary's Hospital and Dr. Hinkewich now seek their costs on a substantial indemnity basis from Ms. Masgras personally, being the lawyer who brought the original *ex parte* application on behalf of Mr. Ferreira. All counsel have filed extensive written material with case law outlining their positions on costs in detail. At a hearing on October 27th, 2017, all counsel agreed that further oral submissions were not necessary and that I should make my decision based upon the written material that had been filed. This is my decision.

FACTS:

6 Ms. Masgras is a lawyer practicing in Kitchener. Mr. Ferreira was involved in a motor vehicle accident on December 17th, 2016. He retained Ms. Masgras to represent him in that motor vehicle accident for injuries he allegedly sustained.

7 On July 3rd, 2017, Mr. Ferreira suffered a very severe heart attack and was hospitalized at St. Mary's Hospital and placed on life support.

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8 The application received by me, early on Saturday, July the 8th, 2017, consisted of the notice of application, along with three medical legal reports, and an in home assessment report, all predating the heart attack and dealing with the injuries of Mr. Ferreira from the motor vehicle accident. I also received clinical notes and records from St. Mary's Hospital and some notes and records from Spinetec Health Care Solutions, again well predating the heart attack. All of these records dealt with the injuries from the motor vehicle accident.

9 In addition to the above, I received an affidavit of Omar Irshidat being the owner of Spinetec Heath Care Solutions, who swore to have knowledge of the matters he deposed to. This affidavit in reality was information Mr. Irshidat obtained from Ms. Masgras.

10 A number of the facts in this affidavit have now turned out to be inaccurate and misleading. For example, the affidavit indicates:

a) This matter arises out of a motor vehicle accident that occurred on or about December 17th, 2016. That would appear to be untrue as the matter arose as a result of a heart attack suffered by Mr. Ferreira. There is no evidence that this heart attack was somehow related to the motor vehicle accident of December 17th, 2016.

b) The affidavit indicated that from discussions with Mr. Ferreira's wife, Mr. Ferreira was in intensive care and "had lost his memory." In fact, Mr. Ferreira had suffered a severe hypoxic brain injury and was on multiple forms of life support which I assume must have been known to Mr. Irshidat as he swore he had had discussions with Mr. Ferreira's wife.

c) The affidavit states that the family decided they would not allow Mr. Ferreira to continue living considering he had lost his memory. In fact, the family of some 25 members were at the hospital and knew Mr. Ferreira would not want extensive or prolonged life support and that he had previously indicated he wanted his organs donated; and a transplant team was at the hospital on July 8th, 2017. Again, this would appear to have been information available to the Affiant had he in fact had discussions with Mr. Ferriera's wife

d) The affidavit further indicated that the family consisted of Mr. Ferreira's brothers, and his wife and that they had decided to donate his organs and that they had decided he should not continue to live without his memory. In fact the family was much more extensive than that and it was understood that Mr. Ferreira's wishes were to make organ donations and he would not want to continue to live on prolonged life support.

e) The affidavit indicates that the decision to withdraw Mr. Ferreira's life support was not carefully considered by Mr. Ferreira's family. That facts would appear to be that the decision of the family was indeed carefully considered by some 25 members, most of whom were well aware of Mr. Ferreira's desire to not live in a vegetative state, and if possible, to donate his organs. As well, there appears to have been an extensive consultation by the family with the various doctors and specifically the treating physician.

11 I received a further supplementary affidavit early on July 8th, 2017 from Mr. Irshidat indicating he had served the application record on St. Mary's Hospital at 1:40 a.m. on July 8th, 2017 in the accompaniment of Ms. Masgras. This affidavit indicates that while Mr. Irshidat was at the hospital, he saw, spoke, and touched Mr. Ferreira in ICU and Mr. Irshidat believes his pulse went up based on his observations of the life support machine, while speaking to him. Mr. Irshidat swore in his affidavit that he was firmly convinced that Mr. Ferreira could hear him, although he did not open his eyes.

12 The record is now clear that Ms. Masgras did not have instructions on behalf of Mr. Ferreira or his family to bring the application that she did.

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13 The matter went before Associate Chief Justice Marrocco on Sunday, July 9th, 2017, once counsel for Dr. Hinkewich and the hospital had been retained. Additional material was filed by the doctor and the hospital, which clearly indicated that Mr. Ferreira's condition had deteriorated even further and brain death was likely and that would likely compromise the donation of his organs. As a result of this additional information, and a more fulsome record, the Associate Chief Justice quite correctly rescinded my ordered and reserved the issue of costs to me.

POSITION OF THE PARTIES:

14 St. Mary's Hospital takes the position that as Dr. Hinkewich was the critical care physician, he was the more appropriate respondent who was an independent healthcare practitioner with privileges at the hospital. He was not a hospital employee. The hospital points out, that this was made abundantly clear to Ms. Masgras late in the afternoon of Saturday, July 8th, and yet she was still unwilling to discontinue the application against St. Mary's Hospital. On Sunday, July 9th, Ms. Masgras amended her notice of application before A.C.J. Marrocco to add Dr. Hinkewich as a respondent but kept the hospital in as a respondent as well. As such, the hospital indicates counsel was forced to file material before A.C.J. Marrocco and make submissions. The hospital was successful and should be entitled to costs.

15 Ms. Masgras takes the position that Dr. Hinkewich should not be entitled to costs as he was not a respondent, although classified as an intervenor by A.C.J. Marrocco and added as a Respondent in an amended application. She further argues that costs should only be awarded as compensation to a successful party and not to punish a lawyer. She urges this court to find that neither Dr. Hinkewich nor the hospital can be considered successful parties on the facts of this case. Ms. Masgras further submits that she was simply doing her duty as an officer of the court by making sure a life was not ended without the decision being carefully considered and she should not be punished in costs for taking such action given her position as Mr. Ferreira's personal injury lawyer.

16 Counsel for Dr. Hinkewich submits that they were forced to respond to this application and forced to make submissions before A.C.J. Marrocco. The Doctor has incurred costs. He was successful and should be reimbursed for those expenses.

ANALYSIS:

17 A preliminary issue is Ms. Masgras' position that Dr. Hinkewich does not have standing in this matter to seek costs. I disagree.

18 Ms. Masgras did indeed serve the notice of application on Dr. Hinkewich and in that amended application, names him as a respondent. Dr. Hinkewich was therefore on notice that he was a respondent to the application and he did respond before A.C.J. Marrocco. Indeed, in the style of cause issued by A.C.J. Marrocco, the doctor is listed as an intervener, as the Associate Chief Justice was using the style of cause in the original application. The doctor's information before A.C.J. Marrocco, through counsel, was important and fully canvassed by the Associate Chief Justice as set out in his endorsement. As such I am of the view that the doctor is entitled to costs.

19 The fixing of costs in discretionary. I must consider what is fair and reasonable having regard to the factors set out in Rule 57 of the *Rules of Civil Procedure*. In particular I must have regard to "The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding." "Whether any step in the proceeding was improper, vexatious or unnecessary, or taken through negligence, mistake, or excessive caution."

20 Without doubt, this application raised issues of great importance being the life and death of Mr. Ferreira. The issue was of significant importance to Mr. Ferreira's family who had traveled far to be at the hospital with him while he was taken off life support. The matter was urgent.

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21 It is trite law to state that an *ex parte* application is a very serious matter. The court relies upon full and proper disclosure of all relevant facts in the supporting affidavit. There is a heavy onus on counsel to make sure that all relevant facts are before the court. See *830356 Ontario Inc. v. 156170 Canada Ltd.*, [1995] O.J. No. 687 (Ont. Gen. Div.) at para 23.

22 The Court of Appeal sets out a two part test in *Galganov v. Russell (Township)*, 2012 ONCA 410 (Ont. C.A.) at para 18 and 22 regarding costs against a lawyer personally:

> *The first step is to inquire whether the lawyer's conduct falls within rule 57.07(1) in the sense that it caused costs to be incurred unnecessarily. Rule 57.07(1) refers specifically to conduct that "caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default". The court in Marchand held that mere negligence can attract costs consequences in addition to actions or omissions which fall short of negligence. The court confirmed that "bad faith" is not a requirement for imposing the costs consequences of rule 57.07(1) and concluded, at para. 122, that "[i]t is only when a lawyer pursues a goal which is clearly unattainable or is clearly derelict in his or her duties as an officer of the court that resort should be had to [r]. 57.07."*
>
> *The second step is to consider, as a matter of discretion and applying the extreme caution principle enunciated in Young, whether, in the circumstances, the imposition of costs against the lawyer personally is warranted. The "extreme caution" principle, as stated in Young, means that "these awards must only be made sparingly, with care and discretion, only in clear cases, and not simply because the conduct of a lawyer may appear to fall within the circumstances described in [r]ule 57.07(1)": Carleton, at para. 15.*

23 I have concluded that this application was brought without instructions. It was also brought for relief that Mr. Ferreira's family did not want, and they believed, quite correctly, Mr. Ferreira would not have wanted, had he been capable of knowing the complete picture of his medical condition and prognosis.

24 I am satisfied that I would not have issued the order I did, had I been advised of all of the facts.

25 I am also satisfied that the hospital and Doctor were slow to engage counsel having been served with the application record in the early morning hours of July 8, 2017, in what was obviously a situation where time was of the essence.

26 The Court of Appeal instructs that it is inappropriate for a lawyer to commence an action without instructions from a client competent to instruct. See *Salisbury v. Sun Life Assurance Co. of Canada*, 2013 ONCA 182 (Ont. C.A.) at para. 3.

27 I accept the reasoning in *1985 Sawridge Trust v. Alberta (Public Trustee)*, 2017 ABQB 530 (Alta. Q.B.) at para.121, 122, 138 where the learned judge stated:

> *[121] I reject that 'litigating from one's heart' is any defence to a potential costs award vs a lawyer, or for that matter from any other sanction potentially faced by a lawyer. Lawyers are not actors, orators, or musicians, whose task is to convey and elicit emotions. They are highly trained technicians within a domain called law. A perceived injustice is no basis to abuse the court, breach one's oath of office, or your duties as a court officer.*
>
> *[122] When a lawyer participates in abusive litigation that lawyer is not an empty vessel, but an accessory to that abuse. Persons are subject to sanctions including imprisonment where they engage in misconduct but are willfully blind to that wrongdoing. Lawyers have responsibilities and are held to a standard that flows from their education and training, and it is on that basis that Canadian courts give them a special trusted status. Abuse of that trust will have consequences.*
>
> *[138] I adopt the reasoning of Graesser J in **Morin v TransAlta Utilities Corporation** that a costs award against a lawyer is appropriate where that lawyer engages in unauthorized "busybody litigation". This is a deep and fundamental breach of a lawyer's professional, contractual, and court-related obligations.*

28 I am cognizant of the caution set out in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at pp135-136;

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The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister . . . Courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

29 I am satisfied that the Respondents incurred costs needlessly as set out in Rule 57.07(1) as a result of the inappropriate application brought by Ms. Masgras who had no instructions, submitted misleading material to the court, and was at the very least negligent or mistaken in her preparation of the material submitted to me. Her conduct is in my view worthy of sanction and falls within Rule 57.07(1) and the case law. She interfered in a dynamic and very personal family decision without any authority and submitted misleading material to the court.

30 I conclude that the amount of costs requested by the respondents is excessive and out of proportion to what was called for in this situation. As well the respondents should have had protocol in place to be able to respond to this situation much faster and thereby avoid incurring as much in costs as they did.

31 As noted by Armstrong J.A. in *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.) the fixing of costs involves more than merely a calculation using the hours docketed and the cost grid. He further stated in para. 24,

"In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant."

32 In following that instruction I therefore fix costs at $15,000.00 in total with each respondent receiving $7,500.00, inclusive of disbursements and taxes, payable by Ms. Masgras within 90 days.

Application granted.

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Tab 12

2018 ONCA 247
Ontario Court of Appeal

Ferreira v. St. Mary's General Hospital

2018 CarswellOnt 3692, 2018 ONCA 247

Fernando Ferreira (Applicant / Appellant) and St. Mary's General Hospital and Dr. Christopher Hinkewich (Respondents)

R.G. Juriansz J.A., B.W. Miller J.A., I.V.B. Nordheimer J.A.

Heard: March 1, 2018
Judgment: March 14, 2018
Docket: CA C64204

Proceedings: Affirmed, 2017 CarswellOnt 10643, 2017 ONSC 4243, 281 A.C.W.S. (3d) 166 (Ont. S.C.J.); Affirmed, 2017 CarswellOnt 18714, 2017 ONSC 6631, 286 A.C.W.S. (3d) 27 (Ont. S.C.J.)

Counsel: Jordan Palmer, for Georgiana Masgras
Daphne Jarvis, for Respondent, St. Mary's General Hospital
Sarit Batner, for Respondent, Dr. Christopher Hinkewich

Subject: Civil Practice and Procedure; Public
Headnote
Civil practice and procedure
Health law

On appeal from the order of Associate Chief Justice Frank Marrocco of the Superior Court of Justice dated July 9, 2017 and of the costs order of Regional Senior Justice Harrison Arrell of the Superior Court of Justice dated November 28, 2017.

I.V.B. Nordheimer J.A.:

1 Ms. Masgras is a lawyer. She purports to bring this appeal on behalf of Mr. Ferreira. As the background to this matter demonstrates, this is an unusual case that arises out of an unfortunate factual situation. The case revolves around a lawyer's claim of authority to take steps on behalf of a client who is incapacitated. Mr. Ferreira was the client and Ms. Masgras was his lawyer. Ms. Masgras purports to appeal the order of Marrocco A.C.J.S.C. (the "reviewing judge") as it relates to a decision to set aside an interim injunction that prohibited the removal of Mr. Ferreira from life support. She also appeals the costs order made against her personally by Arrell R.S.J. (the "application judge"). As I shall explain, while she has the right to do the latter, she does not have the right to do the former.

Background

2 In December 2016, Mr. Ferreira was in a motor vehicle accident. He retained Ms. Masgras in respect of his claims for compensation for neck and lower back pain and related injuries.

3 On July 3, 2017, Mr. Ferreira was quite unexpectedly found in cardiac arrest at his home. EMS personnel were able to restore his pulse, and brought him to St. Mary's General Hospital in Kitchener ("the Hospital"), where he was provided with life support in the Intensive Care Unit ("ICU").

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4 Over the following days, it became clear that Mr. Ferreira had suffered a very significant brain injury as a result of a lack of oxygen to his brain caused by the cardiac arrest. His condition continued to deteriorate in spite of the intensive care provided. There was no prospect of recovery.

5 After consultations with the physicians involved and Mr. Ferreira's family, on July 6, Mr. Ferreira's wife made the decision to remove Mr. Ferreira from life support. No family member, of the over 15 in attendance, nor any of the medical professionals, thought that this was the wrong medical decision or inconsistent with Mr. Ferreira's wishes.

6 As is legally required, the Trillium Gift of Life agency ("TGOL") was contacted and advised of Mr. Ferreira's imminent death. Further discussions between TGOL and the family on July 7 led to a decision to offer organ donation. In coordination with TGOL, the withdrawal of life support was scheduled to take place in the morning of Saturday, July 8 to allow the broader family to gather to support each other and to pay their respects.

7 During this time, Ms. Masgras became aware of Mr. Ferreira's condition. Both she and her husband, a chiropractor who was treating Mr. Ferreira, contacted Mr. Ferreira's wife and urged her to reconsider the decision to remove Mr. Ferreira from life support. They also contacted members of Mr. Ferreira's family, through a friend of Mr. Ferreira's, to urge the same thing. Notwithstanding these entreaties from Ms. Masgras, the family did not change their minds.

8 Convinced that the decision to remove Mr. Ferreira from life support needed to be given "further consideration", Ms. Masgras decided to bring an application for an interim injunction restraining the Hospital from withdrawing Mr. Ferreira from life support.

9 In furtherance of this application, at or around 7:00 p.m. on Friday, July 7, Ms. Masgras contacted the duty judge line for Central South Region. She was put in touch with a trial co-ordinator. When the trial co-ordinator learned of the relief being sought, she advised Ms. Masgras that the matter could be put in front of a judge immediately once the application materials were ready. She also told Ms. Masgras that she needed to serve the respondent with the application materials before it would be considered by a judge.

10 Ms. Masgras spent the next number of hours preparing the application materials. Around 3:00 a.m., she arranged to have some application materials served on a nurse at the ICU in the Hospital. The materials were then sent by email to the court. Ms. Masgras did not serve Mr. Ferreira's wife with the materials or advise her of the proposed application.

11 At approximately 9:00 a.m. on Saturday, July 8, Ms. Masgras re-attended at the ICU and advised the respondent, Dr. Christopher Hinkewich, the physician most responsible for Mr. Ferreira, that she had the application judge on the phone. She told Dr. Hinkewich that the application judge had made a verbal order not to remove Mr. Ferreira from life support.

12 In light of the verbal order, Dr. Hinkewich retained counsel. The TGOL physicians, who were there to perform the organ donations, left. The family were told of this development. They were upset and confused. Later that day, Ms. Masgras served the formal injunction order, and later that evening she served copies of her application record.

13 Mr. Ferreira's condition continued to deteriorate. Brain death seemed possible, and testing was initiated to determine whether it had occurred. If brain death had occurred, harm to Mr. Ferreira's organs preventing their donation was a real possibility. As a result, on Sunday, July 9, Dr. Hinkewich's counsel brought a motion to vary the injunction order.

14 The motion was heard that day by the reviewing judge on an urgent basis by telephone. Ms. Masgras participated in the motion, as did counsel for the Hospital and for Dr. Hinkewich. During the hearing, the court was advised that Mr. Ferreira had been declared brain dead. The reviewing judge set aside the interim injunction and dismissed the application. He ordered that the costs of the application, including the costs of the motion to vary, be reserved to the application judge.

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15 The order of the reviewing judge was immediately communicated to the respondents. Mr. Ferreira was removed from life support and he passed away. The organ donation was accomplished.

16 On August 18, 2017, Ms. Masgras filed a notice of appeal from the order of the reviewing judge with this court. The notice of appeal seeks to have the order of the reviewing judge set aside. The notice of appeal also seeks a series of orders that are best described as declarations, including an order that Ms. Masgras "had standing in the matter of whether Mr. Ferreira's life support system should be maintained or removed."

17 In light of the appeal, Ms. Masgras sought to adjourn the costs hearing that was scheduled to be heard before the application judge on October 11, 2017. Ultimately, the costs hearing was held on October 27. At that hearing, all counsel agreed that further oral submissions were not necessary and that the costs could be determined on the basis of the written materials.

18 The respondents sought their costs of the application on a substantial indemnity basis against Ms. Masgras personally. Dr. Hinkewich sought costs in the amount of $20,796.52. The Hospital sought costs in the amount of $20,048.46. On November 28, 2017, the application judge awarded costs of $7,500 to each of the respondents, payable by Ms. Masgras personally.

19 In giving his reasons, the application judge said, at para. 29:

> I am satisfied that the Respondents incurred costs needlessly as set out in Rule 57.07(1) as a result of the inappropriate application brought by Ms. Masgras who had no instructions, submitted misleading material to the court, and was at the very least negligent or mistaken in her preparation of the material submitted to me.

The Main Appeal

20 The main appeal, that is the appeal from the order of the reviewing judge, can be dealt with briefly. It cannot succeed for two fundamental reasons. First, Ms. Masgras had no instructions to bring this appeal. Indeed, she had no instructions to bring the underlying application. Further, the underlying application was stayed as a result of Mr. Ferreira's death by virtue of r. 11.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, unless and until an order to continue is granted under r. 11.02. No such order has ever been obtained. Once death occurred, the right to bring this appeal vested in the estate trustee. Consequently, this appeal is improperly constituted as it has not been brought by the estate trustee nor has it been assigned by the estate trustee to Ms. Masgras. As a result, the appeal must be quashed. Alternatively, the underlying application must be dismissed pursuant to r. 15.02(4) as it was commenced without Mr. Ferreira's authorization.

21 Second, and in any event, as is apparent from the facts, the appeal is now moot. Even if Ms. Masgras could bring a successful appeal to set aside the reviewing judge's order (and it would not be successful), the result would be of no moment given that the Mr. Ferreira is deceased. Further, there is no basis for this court to give the type of declaratory orders that are sought in the notice of appeal.

22 The main appeal must therefore be dismissed.

The Costs Appeal

23 I begin by noting that Ms. Masgras was given an indulgence by this court. She was allowed to wrap her costs appeal into her main appeal even though she did not seek leave to appeal the costs award as required by s. 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and r. 61.03.1(17) of the *Rules of Civil Procedure*.

24 The costs decision directly engages the propriety of Ms. Masgras' conduct throughout this entire proceeding. Ms. Masgras submits that she was entitled to take the steps that she did in obtaining the interim injunction, and then

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opposing the motion to set aside that order, and indeed then bringing an appeal, on the basis that she was obliged as Mr. Ferreira's personal injury lawyer in a separate matter, to protect his interests and further "his cause".

25 In support of her position, Ms. Masgras relies on r. 3.2-9 of the *Rules of Professional Conduct* of the Law Society of Ontario, which reads:

> When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

26 She also relies on commentary 3 to that Rule, but only on the final sentence that reads "In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned." To put that statement into context, the whole of the commentary needs to be considered. The entirety of commentary 3 reads:

> A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

27 Ms. Masgras did not take any steps to have an authorized representative appointed. Indeed, it is not apparent on the record that Ms. Masgras sought or obtained any form of instructions from any next of kin of Mr. Ferreira, most notably, his wife. I note, on this point, that under the *Health Care Consent Act, 1996*, S.O. 1996, c. 2, Sched. A, s. 20, if a person is incapable with respect to treatment, consent may be given by a person designated in the section, one of which is the incapable person's spouse.

28 In fact, rather than attempting to obtain instructions from a next of kin, what is clear on the record is that Ms. Masgras acted in a manner that contravened the wishes of Mr. Ferreira's next of kin without ever advising Mr. Ferreira's wife, or any other member of his family, of her intended actions. More specifically, Ms. Masgras never told any member of Mr. Ferreira's family, that she intended to go to court and obtain an injunction to restrain the family from doing what they had decided to do, that is, to remove Mr. Ferreira from life support.

29 Ms. Masgras contends that her perceived obligation to protect Mr. Ferreira gave her the right to act in such a fashion. In addition to her reliance on the *Rules of Professional Conduct*, to which I have referred above, Ms. Masgras also relies on the decision in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401. In particular, Ms. Masgras relies on the various references in that decision to the "lawyer's duty of commitment to the client's cause".

30 Ms. Masgras fundamentally misunderstands the principles enunciated in that case. That decision does not support Ms. Masgras' proposition that a lawyer is entitled to take whatever steps s/he wishes in furtherance of what the lawyer thinks is the client's "cause". What Ms. Masgras appears not to understand is the fundamental principle that lawyers must act in accordance with the instructions of their clients. [1] Lawyers do not have a *carte blanche* to take steps of their own volition under the guise of furthering the client's perceived cause. In particular, lawyers do not have the right to institute proceedings without being armed with instructions from their clients to do so.

31 Simply put, Ms. Masgras had no authority to take the steps that she did. In doing so, Ms. Masgras breached the basic principles that apply to the conduct of lawyers, particularly their duty to act honourably.

32 In my view, that conclusion is sufficient to dispose of Ms. Masgras' costs appeal against the application judge's order requiring her to personally pay the costs of the injunction application. It is worth repeating that Ms. Masgras launched the application for an interim injunction without instructions. She did so without advising Mr. Ferreira's family of her intentions to do so. She also obtained the interim injunction without first giving any notice of her intentions to the Hospital or to the physician treating Mr. Ferreira, save and except for serving the application materials on a nurse in the

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ICU at 3:00 in the morning on the day that she obtained the *ex parte* injunction. Further, she obtained the extraordinary injunctive relief based on what the application judge found to be misleading material.

33 Ms. Masgras submits that her actions were undertaken in good faith and thus do not rise to the level necessary to warrant a costs award against her personally. In support of her submission, she points to the decision in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, [2017] 1 S.C.R. 478.

34 It is not clear to me how Ms. Masgras derives any support for her position from the decision in *Jodoin*. The authority of a court to award costs against a lawyer personally was reviewed in that decision. The general requirement was stated by Gascon J., at para. 29:

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

35 In my view, the facts of this case amply establish that Ms. Masgras' actions "seriously interfered with the administration of justice." She acted without instructions. She acted in a manner that was directly contrary to the wishes of Mr. Ferreira's family. And she did so when one of the most difficult, emotional, and personal of decisions was being undertaken by them. Further, Ms. Masgras' actions potentially interfered with the ability of another individual to receive what might well have been a life-saving organ transplant. Ms. Masgras misused the court process and, in doing so, she brought the integrity of the administration of justice into disrepute. On this point, I refer to rule 2.1-1 of the *Rules of Professional Conduct* which reads:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

36 Ms. Masgras contends that she was just trying to protect her client and to ensure that all available information was considered and reviewed by an independent party, namely a judge, before the decision to remove Mr. Ferreira from life support was taken. Even if one could accept the *bona fides* of Ms. Masgras' intentions, that objective had been met once the matter was before the reviewing judge. Yet Ms. Masgras did not let the matter go. Rather, she opposed the motion to set aside the interim injunction and she then appealed the reviewing judge's decision. Indeed, she told the reviewing judge, right after he announced his decision, that she intended to appeal it. It is readily apparent from her conduct in this regard that Ms. Masgras was not interested in an independent review. Rather, she was intent on achieving her own personal objective.

37 As a final defence, Ms. Masgras raises various procedural complaints with respect to the manner in which the costs hearing took place. Specifically, she says that she was not made fully aware that costs would be sought against her personally and she was not "present" when the costs issue was determined. On the first point, the record clearly establishes that Ms. Masgras knew that costs were being sought against her personally. Indeed, her own costs submissions directly address that prospect. On the second point, Ms. Masgras agreed with the other counsel, after the costs hearing had been adjourned at least twice, that the application judge could proceed to determine the costs based on the written material. She cannot now complain about the process that she consented to.

38 Finally, in making the costs award against Ms. Masgras, the application judge considered the appropriate principles. There is no foundation for any challenge to his conclusion that Ms. Masgras' conduct warranted a costs award against her personally. In fact, the application judge was more than generous towards Ms. Masgras, given her conduct, in fixing the costs in the amounts that he did. Ms. Masgras was entirely responsible for all of the costs incurred by Dr. Hinkewich and the Hospital. In my view, an order awarding them costs on a full indemnity basis would have been justified.

39 Nevertheless, Ms. Masgras was not deterred. Rather than learning her lesson, she continued with the main appeal. As should be apparent from the above, there was no merit to the main appeal as there is no merit to the costs appeal. I would dismiss Ms. Masgras' appeal of the costs award.

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40 The respondents are entitled to their costs of the appeals on a substantial indemnity basis given the conduct of Ms. Masgras. Ms. Masgras will personally pay the costs of the Hospital and Dr. Hinkewich. I would fix the costs of the Hospital at $19,885.74 and the costs of Dr. Hinkewich at $11,642.00. Both amounts are inclusive of disbursements and HST.

***R.G. Juriansz J.A.*:**

I agree.

***B.W. Miller J.A.*:**

I agree.

Footnotes

1 I recognize that there are certain exceptions to the rule that lawyers must follow the instructions of their clients but those exceptions are not engaged in this case.

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Tab 13

GENERAL RULE FOR PAYMENT OF LITIGATION COSTS

10.29 (1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

(a) the Court's general discretion under rule 10.31,

(b) the assessment officer's discretion under rule 10.41,

(c) particular rules governing who is to pay costs in particular circumstances,

(d) an enactment governing who is to pay costs in particular circumstances, and

(e) subrule (2).

(2) If an application or proceeding is heard without notice to a party, the Court may

(a) make a costs award with respect to the application or proceeding, or

(b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

Commentary

Rule 10.29

1. — General rule

In *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 116, 2013 CarswellAlta 835, 87 Alta. L.R. (5th) 108, the Court said, at paragraph 5:

> [5] The general rule is that the successful party is entitled to receive costs, and there is rarely any justification for making a successful party pay costs: R. 10.29(1); *Kretschmer v. Terrigno*, 2012 ABCA 345 at paras. 1, 116, 539 AR 212 . . .

In *Donselaar v. Donselaar*, 2013 ABQB 276, 2013 CarswellAlta 851, Madam Justice Veldhuis said, at paragraph 4:

> 4The basic rule, which is subject to the court's discretion, is that a successful party is entitled to an award of costs against the unsuccessful party: Rule 10.29 of the Alberta Rules of Court. A party is entitled to costs if he or she is substantially successful at trial. It is not necessary to succeed entirely: *Adams v. Adams*, 2011 ABQB 812 at para 5.

Tab 14

1999 ABQB 514
Alberta Court of Queen's Bench

Lynch v. Checker Cabs Ltd.

1999 CarswellAlta 640, 1999 ABQB 514, [1999] A.J. No. 782, [2000] 2 W.W.R. 59, 245 A.R. 182, 36 C.P.C. (4th) 58, 73 Alta. L.R. (3d) 74

Eulene Yvette Lynch, Cyriline Lynch-Parker and Delroy Lynch Ferrel, a minor by his next friend Eulene Yvette Lynch, Plaintiffs and Checker Cabs Ltd. and Farhan Bajwa, Defendants

Phillips J.

Judgment: June 30, 1999
Docket: Calgary 9701-16341

Counsel: *V.R. Shibley*, for the plaintiffs' counsel J.A. Sutherland.
Z. Verjee, for the defendants.

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.2 Jurisdiction and discretion as to costs
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.d Costs against solicitor personally
XXIV.7.d.i Negligence of solicitor
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.G Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.10 Costs of particular proceedings
XXIV.10.k Jury trial

Headnote

Practice --- Costs — Jurisdiction and discretion as to costs

Personal injury trial between parties was set down for jury trial upon successful application of defendants — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Application granted — Court had jurisdiction to award costs before new trial, and was in better position to award costs for mistrial than judge at new trial — Plaintiffs' counsel was in conflict of interest with clients, which had to be resolved by awarding costs prior to new trial.

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Practice --- Costs — Costs of particular proceedings — Jury trial
Personal injury trial between parties was set down for jury trial upon successful application of defendants — Plaintiffs' counsel intended to call expert witness despite defendants' counsel's warning that he would take issue with qualifications of witness — At trial, plaintiffs' expert witness was deemed qualified in only one area, and plaintiffs' counsel informed court of intention to call 10 additional witnesses — Jury was dismissed on basis additional witnesses increased length of trial beyond time booked for jury — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Necessity of discharging jury was separate issue from mistrial — Plaintiffs' counsel had not acted unreasonably in proceeding on basis that his expert was qualified, and disqualification of expert was result of unpredictable disposition of court — Dismissal of jury was not directly caused by plaintiffs' counsel and jury costs were in cause.
Practice --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — General
Personal injury trial between parties was set down for jury trial upon successful application of defendants — Jury was dismissed on basis additional witnesses increased length of trial beyond time booked for jury — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Application granted — Court had jurisdiction to award solicitor-and-client costs for cases of misconduct, default or negligence serious in nature — Plaintiffs' counsel was sole cause of mistrial, and solicitor and client costs remedied inequity of compelling innocent party to pay costs.
Practice --- Costs — Particular orders as to costs — Costs against solicitor personally — Negligence of solicitor
Personal injury trial between parties was set down for jury trial upon successful application of defendants — Jury was dismissed on basis additional witnesses increased length of trial beyond time booked for jury — At trial, plaintiffs' counsel handed court letter containing defendants' offer to settle, under pretence it showed defendants' counsel's poor view of plaintiffs' expert's report — Upon viewing letter, mistrial ordered — Defendants applied for costs on solicitor-and-client basis against plaintiffs' solicitor personally, on ground he was direct cause of mistrial — Application granted — Plaintiffs' counsel's conduct in passing offer of settlement to judge was breach of fundamental rule of ethics and procedure and met test for award of costs against solicitor personally — Costs were awarded against plaintiffs' counsel for causing mistrial — Court is able to award costs against party responsible for causing mistrial, including solicitor.

Table of Authorities

Cases considered by *Phillips J.*:

Anderson (Guardian ad litem of) v. Erickson (April 25, 1989), Doc. Vancouver B870686 (B.C. S.C.) — considered

Blanchard v. C.P.U., Local 263 (1991), 49 C.P.C. (2d) 151, 113 N.B.R. (2d) 344, 285 A.P.R. 344 (N.B. C.A.) — considered

Carbone v. De La Rocha (January 17, 1994), Doc. Sault Ste. Marie 1855/89 (Ont. Gen. Div.) — considered

Collins v. National Life Assurance Co. of Canada (1995), 33 Alta. L.R. (3d) 403, 40 C.P.C. (3d) 89, 174 A.R. 206, 102 W.A.C. 206 (Alta. C.A.) — considered

Drosos v. Chong (1992), 8 C.P.C. (3d) 312 (Ont. Gen. Div.) — considered

First National Bank of Oregon v. A.H. Watson Ranching Ltd. (1984), 34 Alta. L.R. (2d) 110, 57 A.R. 169 (Alta. Q.B.) — considered

Jackson v. Trimac Industries Ltd., 8 Alta. L.R. (3d) 403, 138 A.R. 161, [1993] 4 W.W.R. 670 (Alta. Q.B.) — considered

Kirkeby (Next Friend of) v. Waddell (1996), (sub nom. *Kirkeby v. Waddell)* 183 A.R. 350 (Alta. Q.B.) — considered

Kirkeby (Next Friend of) v. Waddell (1998), (sub nom. *Kirkeby v. Waddell)* 228 A.R. 113, (sub nom. *Kirkeby v. Waddell)* 188 W.A.C. 113 (Alta. C.A.) — referred to

Markdale Ltd. v. Ducharme, 238 A.R. 98 (Alta. Q.B.) — considered

Martin v. Pacific Western Airlines Ltd. (1981), 34 B.C.L.R. 39, 24 C.P.C. 237 (B.C. S.C.) — referred to

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which he did. I informed him that I was concerned that he had passed me the letter deliberately to disqualify me and I asked for an explanation. His counsel requested an adjournment before responding to the question. An adjournment was granted but no response has, as yet, been forthcoming. I indicated that I thought that an Affidavit should be taken from Mr. Sutherland as to why he had done that. His counsel said that she would consider whether or not to file an Affidavit and later indicated that one would not be filed. Mr. Sutherland did, however, write me a letter which I received the day before this application and which was not copied to the other side. This letter dated April 26, 1999 from Mr. Sutherland offered the explanation that he gave me the settlement letter to show "the Plaintiffs' continuing desire to have this matter resolved short of trial."

10 On April 28, 1999 I then heard submissions from Mr. Sutherland's counsel and Defendants' counsel on the matter of costs. Prior to making a determination as to costs, I ruled on the Defendants' Notice of Motion filed April 21, 1999. In that regard, I adjourned *sine die* the allegation of civil contempt against Mr. Sutherland and struck out the Affidavit of Cyriline Lynch-Parker filed on April 12, 1999 and served by way of a cover letter on April 20, 1999, as being irrelevant to this application on costs and creating a potential conflict of interest.

11 After hearing the submissions on costs, I awarded costs to the Defendants, payable by Mr. Sutherland personally and indicated I would issue written Reasons with respect to this decision and the amount of those costs.

III. Issues

1. Does the Court have jurisdiction to award costs even though the trial concluded with a mistrial?

2. (a) If it does, should costs be awarded for the dismissal of the jury?

(b) On what basis should the jury costs be awarded?

(c) Whatever the basis, should they be payable by Mr. Sutherland personally?

3. (a) Should costs be awarded for the mistrial?

(b) If so, on what basis should the costs be awarded?

(c) Whatever the basis, should they be payable by Mr. Sutherland personally?

IV. Decision

12 For the reasons that follow, Mr. Sutherland is hereby ordered to personally pay the Defendants' thrown away costs of the mistrial approaching a solicitor-client basis in the sum of $25,000. This amount includes the Schedule "C" costs on a party-party basis for this application in which Mr. Sutherland appeared as a represented party found responsible for costs in the normal course. This amount, however, does not include costs related to the jury and its discharge, or costs of the litigation not thrown away as a result of the mistrial.

V. Analysis

13 As a preliminary matter I wish to address the letter from Mr. Sutherland to myself dated April 26, 1999 that was sent to me by his counsel the day before the hearing of this matter. This letter reads in part as follows:

> April 26, 1999
>
> **THE HONOURABLE MADAM JUSTICE C.S. PHILLIPS**
>
> **Court of Queen's Bench of Alberta**
>
> **The Court House**

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for any of their costs thrown away. To award party-and-party costs would be to make the innocent party effectively subsidize waste caused solely by the other party, in this case by their counsel, Mr. Sutherland.

42 The authority for granting costs against Mr. Sutherland personally is found in Rule 602 of the *Alberta Rules of Court* which reads:

> **602.** In any proper case any barrister and solicitor who has acted for any of the parties to any proceeding, may be ordered to pay any of the costs thereof.

Defendants' counsel cites *First National Bank of Oregon v. A.H. Watson Ranching Ltd.* (1984), 34 Alta. L.R. (2d) 110 (Alta. Q.B.) for its endorsement of the standard espoused by the House of Lords in *Myers v. Elman* (1939), [1940] A.C. 282 (U.K. H.L.), at 289:

> Misconduct or default or negligence in the course of the proceedings is in some cases sufficient to justify an order [requiring a solicitor to pay the costs of proceedings]. The primary object of the Court is not to punish the solicitor, but to protect the client who has suffered and to indemnify the party who has been injured. Order LXV, s. II, of the Rules of the Supreme Court provides the necessary machinery where the person injured is the client of the solicitor. It is a rule supplementary to the summary jurisdiction of the Court. It is not limited to misconduct or default, but expressly extends to costs incurred improperly or without reasonable cause, or which have proved fruitless by reason of undue delay in proceeding under a judgment or order.

43 Later, at page 290 Viscount Maugham said:

> ...These cases did not depend on disgraceful or dishonourable conduct by the solicitor, but on mere negligence of a serious character, the result of which was to occasion useless costs to the other parties.

44 Defendants' counsel also provided us with a copy of *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), and referred to page 11. This is presumably an incorrect page number as it leads to an index instead of to the correct portion of the quote found on pages 68 and 69. It reads:

> ...The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in had faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

45 Defendants' counsel refers as well to *Kirkeby (Next Friend of) v. Waddell* (1996), 183 A.R. 350 (Alta. Q.B.) for the point that solicitor-client costs can be awarded against a lawyer personally. In that case Justice LoVecchio awarded costs against a lawyer personally after he had made unfounded allegations of misconduct against the lawyer on the other side. The Court of Appeal [(1998), 228 A.R. 113 (Alta. C.A.)] allowed the appeal and said that an adjournment to retain independent counsel and to consider his position should have first been given to the lawyer. This opportunity was given to Mr. Sutherland in this case.

46 The last case is *Markdale Ltd. v. Ducharme* (1998), 238 A.R. 98 (Alta. Q.B.) in which the solicitor was made jointly and severally liable for $10,000 of the costs due to his obstructionist behaviour and general poor handling of the case.

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This was about half of the total costs awarded against the party. Solicitor-client costs were apparently disallowed to avoid double recovery.

47 Again, the broad principles contained in these cases justify the awarding of costs personally against Mr. Sutherland. Even if one accepts the somewhat dubious explanation that he lost his senses in the heat of battle and used poor judgment, his conduct in passing up the offer of settlement in clear breach of a fundamental rule of ethics and procedure still meets the test for costs payable personally. As the House of Lords said in *Myers*, *supra*, the object of imposing personal liability for costs is not punitive but compensatory. Mr. Sutherland seeks to avoid personal liability by pleading that he made a mistake. Yet if Mr. Sutherland does not pay the costs personally, who will bear the expense for that mistake and for all the wasted time, effort and cost that it caused? It will of course either be the Defendants or the Plaintiffs. There is no reason that the Defendants should be forced to shoulder the burden of wasted costs caused solely by the conduct of an opposing lawyer. The thrown away costs were the result of an act by Mr. Sutherland and of that act alone. Any excuse that Mr. Sutherland may advance cannot, in these circumstances, justify foisting these costs upon the Defendants.

48 The same is true of Mr. Sutherland's clients, the Plaintiffs. As the House of Lords said in *Myers*, *supra*, "the primary object of the Court is not to punish the solicitor, but to protect the client." The act of passing up to the judge a written offer of settlement in the course of a trial is a fundamental breach of one of the most basic tenets of civil procedure. Even if I accept that Mr. Sutherland lost his judgment and his senses, such conduct still represents serious and substantial negligence on his part and a breach of his duty to this Court not to disclose a settlement offer prior to the conclusion of the trial. This is especially so, given that Mr. Sutherland is experienced litigation counsel. Clearly, the Plaintiffs should not have to absorb the consequences of their lawyer's conduct in this case.

49 In returning to the line of cases regarding mistrials compiled in Orkin, I note also that this is not the first time that solicitor-client costs have been awarded personally against a solicitor for following a course of conduct that caused a mistrial. In *Drosos*, *supra*, Herold J. considered the potential candidates for paying the mistrial costs and decided that the former solicitor and the plaintiffs, neither of whom had disclosed the existence of the two previous accidents, were not so blameworthy as to deserve to pay costs. The learned judge then turned to counsel for the plaintiff at page 319:

> Mr. Arenson [plaintiff's counsel] has been left as the only target. He gave evidence at this hearing and I accept his evidence. Mr. Arenson is an experienced trial counsel specializing in plaintiff's personal injury cases. He testified that he was certainly aware of the order which had been made excluding witnesses, but that his experience with such orders was such that a request is usually made to the trial judge to except from the order, in addition to the parties to the action, witnesses who will be giving expert evidence. I agree that such an order is often sought and sometimes made but it was neither sought nor made in this case. Mr. Arenson testified that based on his usual experience with orders of this sort he did not for a moment consider his disclosure to the doctors to be in breach of the order and I accept this as well. The fact is, however, that it was a breach of the order as made and it was this breach which put the defendants in a situation where a mistrial was necessary.

50 Herold J. reviewed the rule allowing the court to order solicitors to pay costs personally and decided that mere negligence was not enough to warrant invoking it. Rather it should be used in cases of "serious negligence" or "other default", that being the breach of his duty as an officer of the court. Both grounds were met. At page 320 Herold J. said that while the impropriety was not intentional, the breach of the order was, and that the act amounted to substantial negligence. Accordingly, the lawyer was found personally liable for the defendants' costs thrown away.

51 It is noteworthy that in *Drosos*, *supra*, on the parallel application to assess Mr. Arenson's bill to his own clients, he was praised for his conduct of the action apart from the breach causing the mistrial and his bill was allowed to stand as a lien against the proceeds of the litigation. This was in large part because the plaintiffs were partially responsible for the mistrial by not disclosing the earlier accidents to their counsel. Nevertheless, at the end of the day the plaintiffs' lawyer, Mr. Arenson, was personally liable as he was responsible for causing the mistrial by breaching the order.

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57 I am therefore satisfied that the letter in question was not written pursuant to Rule 169 but rather was a settlement negotiation governed by the common law. Some recent guidance in this regard comes from a judgment of Veit J. in the case of *Purich v. Purich* (March 19, 1999), Doc. Calgary 4801-091145, 9701-05227 (Alta. Q.B.) in which a defendant sought double costs as the somewhat victorious plaintiff had fallen slightly short of meeting his offer of settlement.

58 The defendant sought to use as evidence the result of a mini-trial in which the plaintiff had been told that she would not get what she claimed. Veit J. held that the mini-trial was a form of settlement negotiation which could not be put before the Court. She stated at page 3:

> Without more, the results of a mini-trial should not be taken into account in a costs determination.
>
> Settlement negotiations are, generally, privileged. This privilege supports the underlying policy that fair settlements are a worthwhile objective and that parties should feel free to make concessions for the purposes of settlement which should not come back to haunt them if no settlement is, in fact, reached.
>
> The Rules create a statutory interference with the privilege in order to give punch to certain, defined, types of offers of settlement. The common law establishes that a party can put the party opposite on notice that if an offer of settlement is not accepted, that party intends to ask for costs. Without such glosses on the privilege, no reference at all could be made to settlement negotiations at the costs hearing because those negotiations are privileged.

59 A number of points are made in this one short passage. First, all settlement negotiations, formal or informal, are generally privileged and are not to be before the Court under any circumstances, even on a costs application, and certainly never when liability is still an issue. Second, the Rules of Court and the common law, as an exception to this general rule, allow a party to put the other on notice that they may put before the Court their own offer of settlement in a later costs application. There is neither statutory or common law authority for providing a Court with the other side's settlement offer during the course of a trial and before liability and quantum of damages have been decided.

60 In my view the distinction which counsel for Mr. Sutherland urges me to accept is without merit and I reject it accordingly. The consequences of Mr. Sutherland's conduct cannot be excused and overlooked simply because the Court had not specifically or expressly ordered him not to break an entrenched and fundamental principle of civil procedure.

61 In any event, Mr. Sutherland's conduct does not affect the underlying principle set out in all the cases which militates in favour of awarding costs against the party responsible for causing the mistrial. This is simply that the party who was in no way responsible for causing the mistrial and the throwing away of the related costs ought not to have to, in any way, bear the burden of the lost costs. This is the same policy factor which drives the awarding of costs against Mr. Sutherland personally, namely that his client, the Plaintiffs ought not pay for their counsel's unfortunate actions.

62 In short, Mr. Sutherland will bear the burden of costs occasioned by his causing of the mistrial.

VI. Conclusion

63 Since a realistic assessment of the costs of the proceedings to date requires a review of the conduct of the respective parties, it is appropriate and necessary for this matter to be dealt with at this point by myself and not by a different judge. In my view it is, conceptually at least, appropriate to distinguish between "jury discharge specific" costs and the "thrown away" costs occasioned by the mistrial. They arose from different causes. The discharge of the jury was not the result of a motion by either party so no one can be deemed the successful applicant. Further, it was not caused by either party acting unreasonably. Defendants' counsel had a right to oppose an application for the unlimited qualification of Plaintiffs' expert witness and Mr. Sutherland was reasonable in anticipating that his expert would be fully qualified. As such, to the extent that "jury specific costs", which were already off the table at the time of the mistrial, can be isolated, they should be awarded in the cause.

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64 With respect to the mistrial itself, it was caused solely by the actions of Mr. Sutherland acting in breach of procedure and principle. The authorities and their underlying principles clearly tell this Court that precipitating a mistrial the way in which Mr. Sutherland did, and causing the attendant costs to be thrown away entirely, warrants costs on a solicitor-client basis approaching full indemnity. And since the cause of the mistrial was not the Plaintiffs but their lawyer, acting on his own judgment, it is unfair for the Plaintiffs to have to bear those costs. It is in keeping with the law and practice applied in our Courts for Mr. Sutherland to pay those thrown away costs personally.

65 For the sake of clarity it should also be specified what is meant by thrown away costs. It does not include costs for steps which may yet be profitably employed in a later trial or the ultimate resolution of the dispute. It includes only those costs which were made useless by the declaration of the mistrial. This is also in keeping with the line of cases reviewed above.

VII. Order

66 In light of the authorities, the Defendants will have their thrown away costs from the mistrial approaching a solicitor-client indemnity basis. Defendants' counsel calculates these to be $36,040.82. However, Ms. Shibley, on behalf of Mr. Sutherland, has reduced these to $19,761.24 to reflect her deduction of time and disbursements relating specifically to the jury or expended on inevitable steps in the litigation not directly related to the mistrial and hence not wasted.

67 After having reviewed and given careful consideration to the written briefs and the accounts submitted, I am satisfied that the Defendants will be adequately compensated for the thrown away costs from the mistrial by an award of costs of $25,000.00. This does not include what I will call "jury specific" costs, for instance the jury deposit and an application for a jury trial, and it does not include costs not specifically related to the mistrial, for instance (but not restricted to) interlocutory disputes over production of documents. To the extent that these costs have not already been the subject of a costs award, they will be awarded in the cause on a basis to be determined by the ultimate trial judge.

68 Therefore, I order Mr. Sutherland to personally pay to the Defendants costs for the mistrial caused by his actions in the sum of $25,000.00 (which amount includes the Schedule "C" costs for this application in which Mr. Sutherland appeared as a represented party found responsible for costs in the normal course).

Application granted.

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