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June 12, 2019

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Re: ***Priscilla Kennedy (A) v. Roland Twinn (R) and others***
Appeal No. 1703-0239AC & 1803-0076AC

This is to advise that the reserved judgment in the above named case will be released the morning of **June 13, 2019**. On that day, **between 9:30 a.m. and 10:00 a.m.**, a copy of the judgment will be sent to you as set out above.

That same day, the judgment will also be sent to the Canadian Legal Information Institute (CanLII) at 10:00 a.m. for publishing to its website, which may occur that same day. Any concerns with on-line judgments should be raised directly with CanLII.

If you have any concerns about the judgment being sent to you as set out above, please contact our office as soon as possible to make alternate delivery arrangements.

Thank you,

Deputy Registrar
Court of Appeal – Edmonton
/rz

□ Date: _____

As indicated above, attached is the judgment which was released today.

Thank you.

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2019 ABCA 243

Date: 20190613
Docket: 1703-0239-AC
Registry: Edmonton

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

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

Between:

Maurice Felix Stoney and His Brothers and Sisters

Interested Party
(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
(Respondent)

- and -

Public Trustee of Alberta

Not a Party to the Appeal
(Respondent)

- and -

The Sawridge Band

Respondent
(Intervenor)

- and -

Priscilla Kennedy, Counsel for Maurice Felix Stoney and His Brothers and Sisters

Appellant
(Not a Party at the Trial Court)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 20th day of March, 2018
Filed on the 2nd day of May, 2018
(2018 ABQB 213, Docket: 1103 14112)

Memorandum of Judgment

The Court:

I. Introduction

[1] This is an appeal of a decision awarding substantial costs (estimated to be in the range of several hundred thousand dollars) against a lawyer personally.

[2] The lawyer was ordered by the case management judge to pay costs on a solicitor and own client basis, jointly and severally with her client, after an unsuccessful application in which the client sought status as a party or intervenor in the action.

[3] The broader action is ongoing and concerns potential amendments to the 1985 Sawridge Trust (Trust) established decades ago by the Sawridge Indian Band, now known as the Sawridge First Nation (SFN), for its members. The action will be referred to throughout as the Advice and Direction Action.

II. Background

[4] While this appeal pertains only to costs of an interlocutory application and subsequent costs hearing, a fair amount of background information is necessary for a proper consideration of the issues on appeal.

A. The 1985 Sawridge Trust

[5] The formation of the Trust was described by this Court in a previous interlocutory decision, *Twinn v Twinn*, 2017 ABCA 419 [*Twinn*] at paragraph 2:

> In 1982, various assets purchased with Band [SFN] funds were placed in a formal trust for Band members. On April 15, 1985, then Chief Walter Patrick Twinn established the 1985 Sawridge Trust, into which those assets were transferred. The Trust was established in anticipation of proposed amendments to the *Indian Act*, RSC 1970, c I-6, intended to make the *Indian Act* compliant with the *Canadian Charter of Rights and Freedoms* by addressing gender discrimination in provisions governing band membership. It was expected that the legislative amendments (later known as Bill C-31) would result in an increase in the number of individuals included on the Band membership list. Specifically, it was expected that persons, mainly women and their descendants, who had been excluded from Band membership under earlier membership rules, would become members of the Band under the new amendments.

[6] The assets of the Trust are significant – approximating $70 million. The beneficiaries of the Trust are "those persons who qualified as members of the Band under the provisions of the *Indian Act* in existence as of April 15, 1982" (*Twinn* at para 3). The pool of possible beneficiaries is not large; as of 2013, SFN was composed of 41 adult members and 31 minors, most but not all of whom qualified as beneficiaries under the Trust.

[7] Since 1985, and continuing to the present day, there has been extensive litigation regarding who is entitled to be a member of the SFN (See for instance, *Sawridge First Nation v Canada*, 2009 FCA 123, 391 NR 375, leave to appeal to SCC refused, 33219 (10 December 2009); *Twinn v Poitras*, 2012 FCA 47, 428 NR 282; *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253).

B. Advice and Direction Action

[8] In 2011, the Trustees initiated the Advice and Direction Action with an aim to possibly amend the Trust—specifically the definition of "beneficiary"—because there were concerns that the existing definition was potentially discriminatory. Should the Trust ultimately be amended as a result of this action, some current beneficiaries may cease to be beneficiaries, while others who currently are not may become beneficiaries.

[9] Initially, the parties to the Advice and Direction Action were the Trustees and the Office of the Public Trustee of Alberta (Public Trustee). The former, as noted, sought advice and direction from the court with respect to possible amendments to the Trust, and the latter successfully applied to become the litigation representative of minors who may be affected by the change in the definition of "Beneficiaries." Later, the SFN gained limited status to intervene.

[10] The Advice and Direction Action has resulted in numerous interlocutory decisions and appeals, some of which will be referred to during the course of these reasons.

[11] The focus of this appeal, however, is two interlocutory decisions of the case management judge (*1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, [2017] AJ No 725 (QL) [*Sawridge #6*] and 2017 ABQB 530, [2017] AJ No 897 (QL) [*Sawridge #7*]).

C. Source of current appeal

[12] Although this is an appeal of *Sawridge #7*, it has its origins in *Sawridge #6*.

[13] *Sawridge #6* was an application brought by Maurice Felix Stoney and his "brothers and sisters" to be added as intervenors or parties to the Advice and Direction Action. The case management judge dismissed that application, and in so doing concluded it was a collateral attack on previously decided issues, hopeless, without merit, and an abuse of court. The court also found no evidence to support that Mr. Stoney's "10 living brothers or sisters" were voluntary participants in the application. The case management judge's dismissal of the application to be made parties or

intervenors in the Advice and Direction Action in *Sawridge #6* was appealed but that appeal was eventually abandoned.[1]

[14] In *Sawridge #6*, issued on July 12, 2017, the case management judge, at his own behest, directed a further application (i.e., the *Sawridge #7* application) in which the applicant's lawyer, Ms. Kennedy, was "to make submissions on why she should not be personally responsible for some or all of the costs awards against her client, Maurice Stoney" (para 79). That application proceeded by way of an oral hearing, where a senior lawyer from Ms. Kennedy's law firm spoke on her behalf. The lawyer essentially conceded, on Ms. Kennedy's behalf, that she had made a mistake in bringing the *Sawridge #6* application, but that her motives in bringing it were sincere and she made it in good faith. Notwithstanding that argument, the case management judge ordered Ms. Kennedy to pay the Trustee's and SFN's costs from the *Sawridge #6* application on a solicitor and own client basis (*Sawridge #7*).

[15] To appreciate *Sawridge #7*, some further background as to Mr. Stoney's and Ms. Kennedy's involvement in this and other litigation is helpful.

D. Stoney/Kennedy Involvement in Judicial Proceedings

[16] In 1944, Mr. Stoney's father applied to Indian Affairs to be "enfranchised" under the *Indian Act*, RSC 1970, c I-6. In consideration of payments totalling $871.35, Mr. Stoney's father surrendered his Indian status and his membership in SFN. By operation of the legislation, Mr. Stoney's father, mother, and their children lost their Indian status and their membership in the SFN.

[17] In 1998, Mr. Stoney and others filed a statement of claim in the Federal Court seeking to have their names added to the SFN membership list. In 2000, the Federal Court of Appeal held that the statement of claim disclosed no reasonable cause of action to the extent the plaintiffs alleged they were entitled to membership in the SFN without the consent of SFN (*Huzar v Canada*, 258 NR 246, [2000] FCJ No 873 (QL)(FCA) [*Huzar*]). Their claim was struck on that basis.

[18] In August 2011, Mr. Stoney applied directly to SFN for membership. The SFN Chief and Council denied that application. In April 2012, Mr. Stoney appealed the SFN decision to the SFN Appeal Committee. That appeal was unanimously dismissed.

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[1] Mr. Stoney commenced an appeal of that decision, but this Court granted security for costs against him and the appeal was stayed until that security was posted. Mr. Stoney applied to extend time to post the security, but his application was dismissed and ultimately the appeal was abandoned: para 4. See *1985 Sawridge Trust v Alberta (Public Trustee)*, 2018 ABQB 213 at para 4, [2018] AJ No 337 (QL); *Stoney v Trustees for the 1985 Sawridge Trust*, 2017 ABCA 437; *Stoney v Twinn*, 2018 ABCA 81.

[19] Mr. Stoney and others subsequently commenced an application for judicial review in the Federal Court of the decision of the SFN Appeal Committee. In May 2013, in *Stoney v Sawridge First Nation*, 2013 FC 509, 432 FTR 253 [*Stoney FC*], Barnes, J. determined that nothing in the legislative amendments that were passed in 1985 (i.e., Bill C-31) would extend an automatic right to membership in SFN to Mr. Stoney. Justice Barnes noted that, if he was wrong in his conclusion, Mr. Stoney was barred by the principle of issue estoppel from re-litigating this issue because it had been resolved in *Huzar*. Mr. Stoney was represented by Ms. Kennedy in the judicial review application. Mr. Stoney did not appeal the *Stoney FC* decision.

[20] In January 2014, Mr. Stoney filed a complaint with the Human Rights Commission concerning SFN's decision to refuse him membership. The complaint appears to have been dismissed because the issue had already been decided in the Federal Court.

[21] In early 2016 (just prior to the *Sawridge #6* application), Mr. Stoney sought permission to extend time to appeal an interlocutory decision in the Advice and Direction Action, despite his not being a named party (2015 ABQB 799 [*Sawridge #3*]). A single judge of this Court dismissed Mr. Stoney's extension of time application to appeal *Sawridge #3* because Mr. Stoney did not have a participatory right in the Advice and Direction Action nor did he have standing to appeal a decision made in that action (*Stoney v 1985 Sawridge Trust*, 2016 ABCA 51, 616 AR 176 [*Permission Decision*]). Nonetheless, and as will be discussed later, the justice who heard his application suggested there still may have been an opportunity for Mr. Stoney to apply to participate in the Advice and Direction Action.

[22] As it turns out, Mr. Stoney in fact did make such an application—the application leading to *Sawridge #6*.

[23] Not only was Mr. Stoney unsuccessful in *Sawridge #6*, but that application ultimately resulted in the subsequent designation of Mr. Stoney as vexatious litigant (2017 ABQB 548, [2017] AJ No 937 (QL) [*Sawridge #8*]), and two solicitor and client costs awards against Ms. Kennedy—one in *Sawridge #7* and the other in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2018 ABQB 213, [2018] AJ No 337 (QL) [*Sawridge #9*]).

[24] *Sawridge #9* is the subject of a companion appeal that is considered in a separate memorandum of judgment (2019 ABCA 244).

III. Decision under appeal

[25] In *Sawridge #7* (the decision under appeal), the case management judge concluded that Ms. Kennedy had conducted ligation (i.e., her participation in the *Sawridge #6* application) amounting to a serious abuse of the judicial system, both because it was a collateral attack on a prior decision of a Canadian court and because she had not been instructed to act on behalf of Mr. Stoney and his "brothers and sisters." He awarded solicitor and own client costs against her for her participation in the litigation.

[26] The case management judge interpreted the recent *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478 decision as creating a new "two branch analysis" or test as to when it is appropriate to award costs against a lawyer personally (*Sawridge #7* at para 34); specifically, such an award would be appropriate for 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."

(*Sawridge #7* at para 32, citing *Jodoin* at para 29)

[27] The first branch, according to the case management judge, was a new basis upon which to award costs against a lawyer, and it was under this category that he ordered costs against Ms. Kennedy.

[28] The case management judge found the *Sawridge #6* application to be an unfounded, frivolous and vexatious proceeding denoting a serious abuse of the judicial system for two independent reasons. First, because it was a collateral attack not only on *Stoney FC*, but also the earlier *Huzar* decision of the Federal Court of Appeal. In both instances, the courts rejected Mr. Stoney's claim that he was a member of the SFN. Mr. Stoney then made the same argument in *Sawridge #6*, asserting, among other things, that he should be added as a beneficiary of the Trust because he is in fact and law a member of SFN.

[29] The second reason for ordering costs against Ms. Kennedy was the case management judge's finding that Ms. Kennedy did not have instructions from Mr. Stoney's brothers and sisters to bring the *Sawridge #6* application on their behalf. According to the case management judge, Ms. Kennedy had not provided or filed material which showed that she had been properly retained in *Sawridge #6*; the affidavits she did provide in *Sawridge #7* were insufficient to persuade him that she had been properly instructed to act for the siblings.

[30] The case management judge also found the following three aggravating factors further supported the punitive costs award against Ms. Kennedy for bringing the *Sawridge #6* application:

1. Mr. Stoney brought the application despite having outstanding costs awards against him from the *Stoney FC* and the *Permission Decision* (relates to Mr. Stoney's conduct);
2. Mr. Stoney and Ms. Kennedy ignored the instruction given by the case management judge in *Sawridge* #3 at paragraph 35 that the court would not take jurisdiction to review the SFN membership process (relates to Ms. Kennedy's conduct); and
3. Mr. Stoney's challenging of the status and internal decision-making, self-determination, and self-government of an aboriginal community was a serious matter having unusual consequences to both the band members and their

> community. To bring an application that had no basis in law or fact in such a context was in and of itself a serious abuse of the judicial system (see paras 148-149)(relates to Mr. Stoney's conduct).

IV. Grounds of Appeal

[31] The appellant, Ms. Kennedy, submits that the case management judge erred: (1) in identifying and describing the test for an award of costs against a lawyer personally; and (2) in finding her conduct warranted personal liability for costs. She also challenges the magnitude of those costs (ordered on a solicitor and own client basis) in the event it was an appropriate case to award them.

V. Standard of Review

[32] The law is clear that costs awards, including those in which costs are awarded against lawyers, are discretionary and are entitled to deference on appeal (*Jodoin* at para 52; see too *Twinn* at para 14).

[33] However, this is not a situation in which a trial judge has wide-ranging discretion. The case law has set stringent criteria as to when it may be appropriate for a court to awards costs against a lawyer personally. These criteria are legal criteria, and the failure to apply them or a misapplication of them raises a question of law (*Pelech v Pelech*, [1987] 1 SCR 801 at 814-15, 38 DLR (4th) 641, ref'd in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 43, [2003] 3 SCR 371). The reason for the cautious approach to imposing such a sanction is the importance of a lawyer's duty to bring forward with courage even unpopular causes and to avoid breaching the confidentiality of the client's instructions to her or her lawyer (*Jodoin* at para 25, quoting from *Young v Young*, [1993] 4 SCR 3 at 136).

[34] In short, while there is no question the case management judge is owed deference in his costs award, that deference applies only to his exercise of discretion once the criteria for awarding costs against a lawyer have been established.

VI. Discussion

A. Criteria for Awarding Costs against a Lawyer

[35] An award of costs award against a lawyer is guided, at least in the civil context, by Rule 10.50 of the *Alberta Rules of Court*, Alta Reg 124/2010, which states the following:

> 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. (emphasis added)

[36] The substance of Rule 10.50 did not appear in the old *Rules of Court*, Alta Reg 390/1968, nor was there legislated direction that costs against a lawyer could be awarded in the event of serious misconduct on the part of the lawyer. The recent *Jodoin* decision from the Supreme Court of Canada is therefore particularly helpful to consider in this context because it directs that "[o]nly serious misconduct can justify such a sanction against a lawyer" (para 25).

[37] *Jodoin* is clear that costs against a lawyer can be justified only when a lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice (para 29). Put in a slightly different way, to justify such a costs award, there must be serious misconduct that has the effect of either seriously undermining the authority of the courts or seriously interfering with the administration of justice.

[38] The Supreme Court also provides what are, in our view, indicia or marks of a lawyer's conduct that would meet this high threshold; namely:

1. "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", or

2. "dishonest or malicious misconduct on his or her part, that is deliberate."

(*Jodoin* at para 29)

[39] These indicia highlight the type of misconduct that would have the effect of seriously undermining the authority of the courts or seriously interfering with the administration of justice. There may be other types of misconduct that would have the same effect.

[40] *Jodoin* also emphasizes that awarding costs against a lawyer is an exceptional remedy. It is a power that a court rarely exercises and in fact must not be exercised in an arbitrary and limited matter, but rather with restraint and caution (paras 25-29; see too *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2018 ABCA 110 at para 22). Such an award is appropriate only in the clearest of cases (*R v Trang*, 2002 ABQB 744 at para 481, 323 AR 297, cited in *Jodoin* at para 25).

[41] Further, a mere mistake or error in judgment will not be sufficient to justify such an award; there must be at the very least gross neglect or inaccuracy (*Jodoin* at para 27, citing *Myers v Elman*, [1940] AC 282 at 319). The conduct must represent a marked and unacceptable departure from the standard of reasonable conduct expected of a lawyer (*Jodoin* at para 27, citing *Canada (Procureur général) v Bisson*, [1995] RJQ 2409, *R v Ciarniello* (2006), 81 OR (3d) 561 at para 31 (CA), *Leyshon-Hughes v Ontario Review Board*, 2009 ONCA 16 at para 62, 240 CCC (3d) 181, *Fearn v Canada Customs*, 2014 ABQB 114 at para 119 and *R v Smith* (1999), 133 Man R (2d) 89 at para 58).

[42] The above guidance is necessarily high level because, of course, the particular circumstances in which a lawyer might engage in serious misconduct are wide-ranging,

context-driven, and largely turn on their facts (see, for instance, *Robertson v Edmonton (City) Police Service (#11)*, 2005 ABQB 499 at para 21).

[43] In the context of this case, it is helpful to consider that Canadian courts have awarded costs against a lawyers for collateral attacks (see, for instance, *Best v Ranking*, 2015 ONSC 6279, aff'd 2016 ONCA 492 and *Soderstrom v Hoffman-La Roche Limited*, 2008 CanLii 15778, 58 CPC (6th) 160 (Ont SC)), as well as for situations in which a lawyer did not have authority to act for a client (see *Morin v TransAlta Utilities Corporation*, 2017 ABQB 409, 64 Alta LR (6th) 60). Having said that, a finding of collateral attack or that a lawyer was acting without authority to act will only justify a costs award against a lawyer when such conduct meets the criteria set out in *Jodoin*.

[44] To summarize, the following criteria should guide a trial judge when considering whether to award costs against a lawyer personally:

1) Awarding costs against a lawyer is appropriate only in exceptional circumstances, and then only in the clearest of cases.

2) Such an award will be appropriate only when the lawyer has engaged in serious misconduct, where that misconduct has the effect of either seriously undermining the authority of the courts or seriously interfering with the administration of justice.

3) Instances of serious misconduct having that effect may include:

   a) "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," or

   b) "dishonest or malicious misconduct on his or her part, that is deliberate."

(*Jodoin*, at para 29)

4) A mere mistake by a lawyer or an error in judgment will not justify such a costs sanction. There must be "gross neglect or inaccuracy", or a "marked and unacceptable departure from the standard of reasonable conduct expected of a lawyer" (*Jodoin* at para 27).

5) Assessing a lawyer's conduct is contextual and fact-specific.

B. Chambers judge's articulation of test for awarding costs against lawyer

[45] The appellant argues that the case management judge erred in his articulation of the criteria necessary to ground an order of costs against a lawyer personally.

[46] First, the appellant submits that the because of a translation error between the original *Jodoin* decision (in French) and the English version, the case management judge incorrectly omitted the requirement of *deliberate* (misconduct) from first "branch" of the analysis, which had the effect of lowering the high threshold required to be met in awarding costs against a lawyer. We disagree.

[47] It is difficult to imagine a scenario in which a lawyer could advance an unfounded, frivolous, dilatory or vexatious proceeding without deliberation. In any event, our interpretation of the case management judge's decision is that he was persuaded that Ms. Kennedy's conduct was effectively deliberate (*Sawridge #7* at paras 91-96).

[48] Second, the appellant submits that the case management judge erred when he suggested that *Jodoin* has created a new, "two branch analysis" or "test" as to when costs may be awarded against a lawyer. We are of the view that if either of the two "branches" set out at paragraph 38 of this judgment are satisfied, a court would have before it the sort of misconduct that may warrant a trial judge's discretion to make such a costs award. To the extent that the case management judge perceived those "branches" as constituting two criteria, either of which must be met before costs could be ordered against a lawyer personally, he erred.

[49] Nevertheless, the case management judge's articulation of the criteria for awarding costs against a lawyer was not fatal to his conclusion that costs should be awarded against Mr. Kennedy. Indeed, establishing either of the two "branches" identified by the case management judge would meet the threshold for such an award of costs.

[50] We proceed, therefore, with an assessment of the case management judge's analysis to determine whether he correctly applied the legal criterial that would justify the costs award against Ms. Kennedy.

C. Awarding Costs against the Appellant

[51] The appellant submits that her conduct fell well short the threshold required to justify such an award. In particular, she asserts that:

(i) she did not engage in deliberate or willful misconduct;
(ii) she brought the *Sawridge #6* application with a genuine belief in its merit;
(iii) she sought to protect the potential interests of her client, Mr. Stoney and those of his identically or similarly situated siblings in the process leading to the distribution of the Trust;
(iv) her representation of Mr. Stoney's siblings was by way of a representative motion, the most economical means for determining an issue concerning a group;

(v) the potential interest the appellant sought to protect was rooted in the assertion the group (i.e., Mr. Stoney and his siblings) was entitled to membership in SFN on a novel basis never adjudicated by any court;

(vi) she disclosed and addressed previous judicial decisions concerning her client and the SFN;

(vii) the *Sawridge #6* application did not ask the case management judge, who had previously said he would not adjudicate band membership issues, to do so but rather to recognize the applicants' claim as sufficiently meritorious to warrant their participation in the proceedings;

(viii) the *Sawridge #6* application was based on the applicants' claim of historic connections to the band, the undisputed fact that they were treaty Indians with formal Indian status, and a novel legal argument concerning the effect, as opposed to the language, of Bill C-31.

[52] The case management judge found two independent bases upon which to order costs against Ms. Kennedy. The first was that *Sawridge #6* was a collateral attack on previous federal court decisions. The second was that Ms. Kennedy did not have instructions to bring the *Sawridge #6* application on behalf of Mr. Stoney's brothers and sisters. Below is a discussion with respect to the merit of each of these bases.

[53] It is critical to keep in mind that the underlying question on appeal is whether, in light of the *Jodoin* criteria, costs were appropriately awarded pursuant to Rule 10.50. While instances of collateral attack and acting without representation have certainly resulted in costs awards against lawyers, such a finding may not, in and of itself, meet the high threshold that would justify such an award. What may or may not amount to serious misconduct deserving of an award of costs against a lawyer is fact and context driven.

1. Finding of collateral attack as basis for costs sanction

[54] The rule against collateral attack seeks to ensure "that a judicial order pronounced by a court of competent jurisdiction [is] not ... brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (*Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 20, 201 DLR (4th) 193, citing *Wilson v The Queen*, [1983] 2 SCR 594).

[55] Notwithstanding the appellant's argument that the legal theory underpinning his claim to SFN membership has not been adjudicated before, Mr. Stoney's written submissions made the questionable assertion (including arguments to support that assertion) that he is a member of the SFN. That assertion conflicts with determinations made in the prior federal court decisions, which are essentially that Mr. Stoney is not entitled to membership in the SFN (*Huzar*), and that nothing in the legislative amendments passed in 1985 would extend to Mr. Stoney an automatic right to membership in SFN (*Stoney FC*). Had there been any doubt as to the effect of those decisions, Mr. Stoney should have pursued it in the federal courts. That aspect of his submissions could properly be viewed as a collateral attack.

[56] With that said, we are not persuaded that the *Sawridge #6* application, viewed in its entirety, constituted a collateral attack that would justify a costs award against Ms. Kennedy. In our view, Ms. Kennedy's involvement in *Sawridge #6*, acting as she did for Mr. Stoney and some of his siblings, was not serious misconduct for the purposes of Rule 10.50. Neither are we persuaded that her conduct resulted in a serious undermining of the authority of the courts or serious interfering with the administration of justice.

[57] First, the *Sawridge #6* application must be viewed through the lens of the broader Advice and Direction Action, the purpose of which was to seek the court's advice and direction with respect to possible amendments to the Trust and more specifically to the definition of "Beneficiaries" under the Trust, which the Trustees recognized as being potentially discriminatory.

[58] Mr. Stoney did not, strictly speaking, seek a declaration that he be considered a member of the SFN. Rather, what he sought was to be added as a party or an intervenor to the Advice and Direction Action and ultimately to be added as a beneficiary to the Trust. It remains to be seen whether the proper beneficiaries of the Trust will be limited to SFN members, to a segment of SFN members or, for that matter, to certain persons who for some reason do not have SFN member status. In making the application, Ms. Kennedy did not try to deceive the court by ignoring the existence of the prior federal courts decisions against Mr. Stoney; she specifically acknowledged them, although she did argue that Mr. Stoney is or ought to be a member of the SFN.

[59] Second, Mr. Stoney's grounds for seeking participatory status in the Advice and Direction Action were not solely based on his assertion that he is or ought to be a member of the SFN. The first two of the five grounds listed in his formal pleading for the *Sawridge #6* application reference his prior historical connection to SFN (i.e., that he and his family were once members of the SFN) as opposed to his current membership status.

[60] Mr. Stoney might have been better advised to more directly pursue the "historical connection" grounds rather than assert his entitlement to current SFN membership; however, his pleadings disclose several grounds for his participation in the Advice and Direction Action. Had there been an oral hearing for Mr. Stoney's application, Ms. Kennedy may have had the opportunity to provide some clarification of these grounds.

[61] Third, Mr. Stoney sought to participate in the Advice and Direction Action "as a Party or Intervener." A person may be granted status as *intervenor* "subject to any terms and conditions and with the rights and privileges specified by the Court" (Rule 2.10). Despite the apparent shortcomings in Mr. Stoney's ultimate entitlement to beneficiary status under the Trust, the case management judge might have at least considered the appropriateness of the *Sawridge #6* application insofar as its purpose was to have the applicants participate as intervenors.

[62] And fourth, the timing of the *Sawridge #6* application (August 12, 2016) and the context within which it was made do not support the conclusion that Ms. Stoney's involvement in the *Sawridge #6* application amounted to serious misconduct warranting costs against her.

[63] For instance, earlier in the Advice and Direction Action, in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365, 543 AR 90 [*Sawridge #1*]; aff'd 2013 ABCA 226, 2013 ABCA 226 [*Sawridge #2*], the case management judge had indicated that SFN membership processes were in fact relevant (see *Sawridge #1* at paras 46-49; 53-54). The case management judge states at paragraph 54 of *Sawridge #1*:

> [T]his Court has the authority to examine the band membership processes and evaluate, for example, whether or not those processes are discriminatory, biased, unreasonable, delayed without reason, and otherwise breach Charter principles and the requirements of natural justice.

[64] That said, the case management judge in *Sawridge #1* made it clear that investigations into SFN membership could not duplicate the exclusive jurisdiction of the Federal Court to order "relief" against the SFN (para 53-54).

[65] The apparent lack of clarity as to scope of the Advice and Direction Action regarding SFN membership processes was addressed in *Sawridge #3*, where the case management judge noted that it was his intention "to refocus these proceedings and provide a well-defined process to achieve a fair and just distribution of assets of the 1985 Sawridge Trust" (para 26). The case management judge indicated that part of the "refocus" meant not raising membership processes of the SFN (see paras 66-69).

[66] The substance of *Sawridge #3* itself highlighted the need for greater clarity around the scope of the Advice and Direction Action; *Sawridge #3* was an application by the Public Trustee to obtain wider disclosure from SFN with respect to SFN minor beneficiary information. The court rejected the application because SFN was a third party to the litigation, and the case management judge was not persuaded that such production (i.e., in relation to SFN membership) would be relevant and material to the issues before the court in the broader action concerning potential beneficiaries under the Trust.

[67] Despite the case management judge's effort to keep the ambit of the proceeding narrow, there remained at least some uncertainty in this regard at the time that Ms. Kennedy pursued the *Sawridge #6* application in August 2016. This uncertainty was remarked upon by this Court in *Twinn* which, although issued in December 2017, speaks to the same timeframe as the *Sawridge #6* application.[2] *Twinn* suggests the lack of clarity in the Advice and Direction Action at that time may

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[2] *Twinn* was an appeal of an award of solicitor and own client costs against Mr. Twinn and others' as a result of their unsuccessful application to be added as parties to the Advice and Direction Application (*1985 Sawridge Trust v*

have resulted from the absence of an originating application (*Twinn* at para 21). The Court in *Twinn* indicated that lack of such a pleading which would have set out specifics of the relief being sought, "has resulted in a lack of clarity regarding if and how the Trust will be varied, whose interests will be affected by the variation, and how those interests might be affected" (para 21).

[68] Further, we note that a few months before the *Sawridge #6* application was filed in August of 2016, this Court's *Permission Decision* was released. In that decision, the application justice dismissed Mr. Stoney's attempt to extend time to appeal *Sawridge #3* because he was not a party in the Advice and Direction Action and therefore had no participatory right or standing to appeal. However, the application justice suggested that there may still have been an opportunity for Mr. Stoney to apply to be a participant in the action. For instance, he indicated, among other things, that Mr. Stoney's position as to whether or not he should be considered to be entitled to be a beneficiary in the trust had not arisen yet, but that it was going to have to be decided at some point in time (*Permission Decision* at paras 17-19).

[69] The remarks of the application justice may have suggested to Ms. Kennedy that she ought to have been attempting to somehow seek status for her client in these proceedings. By no means do we suggest that Ms. Kennedy should have relied upon the comment of a single judge of this Court who was hearing an interlocutory application relating to a matter with which he hitherto had no involvement. Nonetheless, there is little doubt Ms. Kennedy would have read and considered that suggestion.

[70] In any event, this Court's decision was not made in a vacuum. The application justice was aware of the previous federal court decisions involving Mr. Stoney (see *Permission Decision* at para 13) and he was generally alive to the nature of what had occurred prior to that point in time in the Advice and Direction Action.

[71] Considered together, the apparent state of uncertainty with respect to whether SFN membership was somehow at issue at the time of the *Sawridge #6* application and the release of the *Permission Decision* in the months leading up to the filing of that application, provide some rationale as to why Ms. Kennedy sought status on behalf of her client(s) in the Advice and Direction Action.

[72] In conclusion, we are not persuaded that the *Sawridge #6* application, viewed in its entirety, constituted a collateral attack that would justify a costs award against Ms. Kennedy. Put another way, we are not persuaded that Ms. Kennedy's role in bringing that application amounted to serious misconduct under Rule 10.50 that warranted a costs award against her. The content of the application itself and the circumstances at the time Ms. Kennedy brought it provide some legitimacy for Mr. Stoney's decision to seek status of some sort in the action.

Alberta (Public Trustee), 2017 ABQB 299 [*Sawridge #5*]). The *Twinn* appeal was initiated within weeks of the *Sawridge #6* application.

[73] In arriving at this conclusion, we have put little weight on oral submissions of Ms. Kennedy's counsel at the *Sawridge #7* hearing, particularly to the extent he suggested that the *Sawridge #6* application had the effect of being an abuse of court processes. Counsel admitted he had little familiarity with the file, and the approach he took on behalf of his client was one of contrition. The *Sawridge #7* hearing took place a short time after the release of *Sawridge #6*, in which a number of serious allegations were raised against Ms. Kennedy personally and for the first time. It is understandable why Ms. Kennedy would have taken an apologetic approach rather than a defending the actions she had taken about which the case management judge had clearly disapproved.

2. Acting without Instructions

[74] The second, independent basis for the case management judge's costs award against Ms. Kennedy was that she did not have instructions to bring the *Sawridge #6* application on behalf of Mr. Stoney's "10 living brothers and sisters."

[75] A finding that a lawyer did not have instructions to act may not, in and of itself, justify sanctioning that lawyer with a costs award. Situations do arise in which counsel, through inadvertence, neglect, or sometimes to preserve a party's position, fail to obtain proper instructions, but not all such instances would properly result in the sanctioning of the lawyer. Awarding costs against a lawyer is only appropriate where the lawyer's conduct meets the criteria enunciated in *Jodoin*; namely, whether acting without instructions amounted to serious misconduct that would seriously undermine of the authority of the courts or seriously interfere with the administration of justice. Each case must be assessed on its own facts.

i. Background

[76] In *Sawridge #6*, the case management judge refused to consider Mr. Stoney's brothers and sisters as participating in "the application and its consequences" (see *Sawridge #6* at paras 8-12). The court characterized the application as an attempt by Ms. Kennedy to involve third parties on a "busybody" basis, with potentially serious implications to those siblings' rights.

[77] In his *Sawridge #6* decision, the case management judge directed Ms. Kennedy to appear before him to speak to why she should not be personally responsible for some or all of the costs awarded against her client in *Sawridge #6* (i.e., the *Sawridge #7* application). He indicated that it was a live issue as to whether Ms. Kennedy had the authority to represent Mr. Stoney's "10 brothers and sisters."

[78] For the *Sawridge #7* application, Ms. Kennedy provided three affidavits to the court. Two of the affiants (Bill Stoney and Gail Stoney, who were siblings of Mr. Stoney) were named in the *Sawridge #6* application, and they swore to having authorized Mr. Stoney to represent them in advance of that application. The third affiant (Shelley Stoney) was the daughter of one of the

named applicants and niece of Mr. Stoney. She deposed that her understanding was that Mr. Stoney was authorized by his brothers and sisters to represent them in the application.

[79] The case management judge rejected Shelley Stoney's evidence as being hearsay. With respect to the other two affiants, he indicated that "at the most generous [the affidavits] only indicate that Bill and Gail Stoney gave some kind of oral sanction for [Mr. Stoney] to act on their behalf." In the case management judge's view, Mr. Stoney did not establish having been appointed as the siblings' litigation representative under Rules 2.11-2.21. The case management judge also stated that this was not a class action scenario where Mr. Stoney was a representative applicant.

[80] The case management judge referred to *Morin* as authority for the proposition that when a lawyer's authority to represent someone is called into question, the lawyer must demonstrate she has such authority (*Sawridge #6* at para 80). In this case, Ms. Kennedy failed to do so; therefore the case management judge found that on a balance of probabilities she did not have instructions or a legal basis to file the *Sawridge #6* application on behalf of Mr. Stoney's siblings.[3] As a result, he ordered costs against Ms. Kennedy on the basis of her "busybody" litigation.

ii. Analysis

[81] The appellant's position is that the *Sawridge #6* application was in fact a representative motion pursuant to Rule 2.6 of the *Rules of Court*, a scenario which was not considered by the case management judge. Rule 2.6(1) states the following:

> Representative Actions
>
> (1) If numerous persons have a common interest in the subject of an intended claim, one or more of those persons may make or be the subject of a claim or may be authorized by the Court to defend on behalf of or for the benefit of all.

[82] The appellant argues that, because the *Sawridge #6* application was representative in nature, the case management judge's conclusion that Ms. Kennedy did not have instructions or a legal basis to file the application on behalf of the Mr. Stoney's siblings is incorrect; in a representative proceeding it is the representative who retains counsel and, in this case, Mr. Stoney was the representative for the group. There was no issue as to Mr. Stoney's retaining of Ms. Kennedy. The affidavits provided by the family members, in her view, demonstrated family endorsement of Mr. Stoney's representative status.

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[3] We note that in *Morin*, and other similar cases in which a lawyer's instructions to act are called into question, it is usually another party to the action or the client who calls a lawyer's authority to act into question. In this case, it was the case management judge himself who did so.

[83] The SFN respondent points out that *Sawridge #6* was not framed as a representative action, and that no mention of Rule 2.6 was made in the application or in any of the written submissions. Further, the respondent notes that the pleading specifically identified and named each of the 10 persons seeking to be added as parties or intervenors, which suggests it was not a representative action at all.

[84] We agree that on the face of it, the pleading for *Sawridge #6* does not look much like a Rule 2.6(1) representative action. The application had the following title:

> APPLICATION TO BE ADDED as a Party or Intervener by Maurice Felix Stoney and his brothers and sisters

[85] The most relevant parts of the body of the pleading are paragraphs 1 and 2, which state:

> 1. Applicants
>
> Maurice Stoney and his 10 living brothers and sisters.
>
> 2. Issue to be determined
>
> (a) 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.

[86] In fact, there is little in the pleading itself to suggest the application was intended to be a representative action under Rule 2.6(1).[4] The only detail in it that gives some pause in this respect is the use of the words "brothers and sisters" in the title and in paragraph 1 instead of the reciting of all the individuals names. The case management judge noted that this detail was an "unusual" way to frame the pleading (*Sawridge #6* at para 8).

[87] With that said, the language of the pleading or the proper characterization of *Sawridge #6* is not dispositive of the issue at hand. In the context of an assessment as to whether costs were properly awarded against the appellant, the focus must remain on the appellant's conduct, and in that respect, the record suggests that Ms. Kennedy, rightly or wrongly, considered *Sawridge #6* to have been brought on a representative basis.

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[4] Certainly, if the *Sawridge #6* application was intended to be a representative action, it did not follow "the usual practice of setting out in the style of cause that [the representative] is suing in a representative capacity" (*Goodfellow v Knight* (1977), 5 AR 573) at para 6, 2 Alta LR (2d) 17 (CA). *Goodfellow* considered former Rule 42, the predecessor to current Rule 2.6, which was very similar to Rule 2.6.

[88] The following excerpt from the cross-examination of Mr. Stoney on his affidavit in support of the *Sawridge #6* application (filed September 23, 2016) supports the appellant's argument that she understood it to be a representative action (66/9-67/5):

Respondent's counsel:	Sir, earlier, you had indicated that you were bringing this application and representing your brothers and sisters in doing so. Can you tell me, are any of them incapacitated and unable to represent themselves in this litigation, in this application?
Mr. Stoney:	I won't answer that.
Ms. Kennedy:	I'm going to tell you that I have done a number of actions in QB and in the Federal Court as representative actions where one brother or sister acts for the entire family, and that is the standard method of proceeding, and that is the method of proceeding that's been used since 1997.
Respondent's counsel:	So is the answer that they are incapacitated or this is the choice?
Ms. Kennedy:	This is the choice.
Respondent's counsel:	And this is a representative action?
Ms. Kennedy:	Yes. On behalf of a family, yes. That's the way you go. Each of them have exactly the same characteristics. They're all members of the same family. They all have the same interest.

(emphasis added)

[89] Later, when Ms. Kennedy was directed by the case management judge in the *Sawridge #6* decision to provide proof that she had authority to act for Mr. Stoney's "brothers and sisters", the language of the three affidavits filed suggested that the application was representative in nature. In particular, the affiants collectively indicated that Mr. Stoney was "authorized" to represent Bill, Gail, and "his brothers and sisters." They did not say that Ms. Kennedy was representing the siblings individually. The language of the three affidavits was consistent with what Ms. Kennedy had stated to opposing counsel at the cross-examination of Mr. Stoney, namely that Mr. Stoney was representing his siblings.

[90] If the appellant is right that *Sawridge #6* amounted to a representative claim under Rule 2.6(1), then her argument that she was acting with the requisite authority may have merit. Unfortunately, we have no consideration from the case management judge, either in *Sawridge #6* or *Sawridge #7*, as to whether *Sawridge #6* could have or ought to have been considered a

representative action.[5] To be fair to the case management judge, it does not appear the parties expressly brought this rule to his attention.

[91] If Ms. Kennedy's intention was in fact to bring a representative action, we ask ourselves why she never took some simple steps during the *Sawridge #6* proceeding to amend the pleading or at least clarify it to the case management judge. Without wishing to speculate on this point, we simply point out that it is unclear how Ms. Kennedy would have known her authority to act was being challenged during the written submission process for *Sawridge #6* because none of the parties had made this allegation. It was only upon the *Sawridge #6* decision being issued that it became evident that Ms. Kennedy's authority to act for the siblings was being challenged. It is that challenge that gives particular significance to the issue in this appeal about whether *Sawridge #6* was brought on an individual versus representative basis.

[92] At the end of the day, the record does not establish that Ms. Kennedy was engaging in misconduct by attempting to bring *Sawridge #6* on behalf of Mr. Stoney's "brothers and sisters." What appears more likely is that she made a number of mistakes in bringing the application. Those mistakes, individually or together, may have been negligent. However, our view is that any such mistakes did not constitute "gross neglect or inaccuracy" (*Jodoin* at para 27) that could justify a costs sanction against her personally, nor can we conclude they constituted serious misconduct for the purpose of Rule 10.50.

[93] Assume for a moment that Ms. Kennedy had included the word "representative" or "Rule 2.6(1)" somewhere on the *Sawridge #6* pleading. Had she done so, would the case management judge have questioned whether the "10 living brothers and sisters" had authorized Mr. Stoney for the representative claim? Perhaps. But whether the siblings had authorized Mr. Stoney to represent them in a representative proceeding is a different question than whether a lawyer was authorized to act for her client, which is what the *Morin* decision speaks to. We offer this hypothetical simply to illustrate that the severe consequences to Ms. Kennedy may have resulted simply from an arguably defective pleading.

[94] In considering this ground of appeal, we put little weight on the submissions of Ms. Kennedy's counsel at the *Sawridge #7* hearing. Counsel had little to say about the issue of the nature of the *Sawridge #6* application (i.e., individual versus representative), except that there had

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[5] The case management judge did state in *Sawridge #7* at paragraph 136 that "[t]his is not a class action scenario where Maurice Stoney is a representative applicant." However, that statement occurs during his assessment as to whether Mr. Stoney had been appointed as litigation representative under Rules 2.11-2.21. Moreover, a "class action" situation under Rule 2.6(2), which requires a certification order, is distinct from a representative claim under Rule 2.6(1) (see *Lameman v Canada (Attorney General)*, 2007 ABCA 180 at para 2, [2007] 10 WWR 79), neither of which rule was referred to by the case management judge. A representative action (under Rule 2.6(1)) is good unless and until it is set aside (*Lameman* at para 2).

been insufficient time to allow for all of Mr. Stoney's family members to be contacted in order to obtain additional evidence with respect to representative nature of the *Sawridge #6* application.

[95] In short, we are not persuaded that Ms. Kennedy's conduct warrants a costs sanction against her personally. In our view, the case management judge erred by so concluding.

[96] We also point out, with respect to both of the bases upon which the case management judge awarded costs against Ms. Kennedy, that none of the factors (summarized at paragraph 30 of this decision) found by the case management judge to be aggravating has affected our decision.

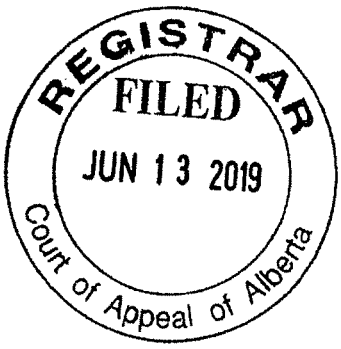
iii. Conclusion

[97] The appeal is allowed, and the award of costs against Ms. Kennedy personally is hereby set aside.

[98] Because we have determined there was no basis for awarding costs against the appellant, it is unnecessary to consider the issue of the magnitude of costs awarded by the case management judge beyond noting that solicitor and own client costs are only justified in the most exceptional circumstances. As stated in *Tiger Calcium* at paragraph 14: "[t]here are few circumstances when it would ever be appropriate to require an opposing party to cover costs which go beyond the reasonable fees and disbursement required to defend or prosecute an action."

Appeal heard on October 1, 2018

Memorandum filed at Edmonton, Alberta
this 13th day of June, 2019



O'Ferrall J.A.

Schutz J.A.

Strekaf J.A.

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