

In the Court of Appeal of Alberta

Citation: 1985 Sawridge Trust v Alberta (Public Trustee), 2019 ABCA 244

Date: 20190613
Docket: 1803-0076-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 Streckf**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 31st day of August, 2017
Filed on the 6th day of October, 2017
(2017 ABQB 530, Docket: 1103 14112)

Memorandum of Judgment

The Court:

I. Introduction

[1] This is a companion appeal to *1985 Sawridge Trust v Alberta (Public Trustee)*, 2019 ABCA 243 [Sawridge #10]. Like *Sawridge #10*, this appeal concerns a costs award against lawyer Priscilla Kennedy, though it stems from a different interlocutory decision of the case management judge.

[2] In *Sawridge #10* (at paragraphs 4-24) we provided significant background to this action (Advice and Direction Action) that will not be replicated in this decision.

[3] In *Sawridge #10*, this Panel concluded that the case management judge erred in awarding costs against Ms. Kennedy for her conduct in representing Maurice Stoney and his brothers and sisters on their application to be added as intervenors or parties to the Advice and Direction Action on the basis that they were beneficiaries of the 1985 Sawridge Trust. That application was dismissed by the case management judge in *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436, [2017] AJ No 725 (QL) [Sawridge #6]. In a subsequent court-initiated proceeding, the case management judge awarded costs against Ms. Kennedy (*1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 530, [2017] AJ No 897 (QL) [Sawridge #7]). We concluded the case management judge erred in so doing [Sawridge #10].

[4] This is an appeal of a different costs decision of the case management judge wherein he awarded solicitor-client costs against Ms. Kennedy because of the submissions she made opposing a declaration that her client was a vexatious litigant (*1985 Sawridge Trust v Stoney*, 2018 ABQB 213, [2018] AJ No 337 [Sawridge #9]). The case management judge's reasons for declaring Mr. Stoney a vexatious litigant can be found at *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 548, [2017] AJ No 937 [Sawridge #8].

[5] The question on appeal is whether the case management judge erred in awarding costs against Ms. Kennedy in *Sawridge #9* for her involvement in *Sawridge #8*.

II. Background

A. *Sawridge #8*

[6] *Sawridge #8* was yet another court-initiated proceeding in the Advice and Direction Action, this time to determine whether Mr. Stoney should face court access restrictions. The case management judge concluded that court access restrictions were necessary because Mr. Stoney had engaged in collateral attacks, hopeless proceedings and "busybody" litigation.

[7] In *Sawridge #8*, Ms. Kennedy made many of the same arguments she had previously made to explain why Mr. Stoney took the position that he ought to be considered a member of the Sawridge First Nation (SFN) and thereby a potential beneficiary of the trust. The case management judge had found these arguments to be collateral attacks of previous federal courts decisions in *Sawridge #6*. Ms. Kennedy acknowledged in her written submissions opposing the court access restrictions that the arguments she was making had been dismissed in earlier federal courts decisions, but indicated that her reason for making them again was to explain why Mr. Stoney made those arguments. Ms. Kennedy argued that her explanation of the arguments, previously made and rejected, were simply made in an effort to persuade the case management judge that court access restrictions were inappropriate.

[8] Ms. Kennedy argued that her submissions in *Sawridge #6* had not been collateral attacks because “seeking to determine whether or not you qualify as a beneficiary under [the] [t]rust ... is a matter where the issue of membership... has not been settled by the courts.” The case management judge in *Sawridge #8* rejected this submission. He said that if Mr. Stoney wished to challenge the findings of collateral attack in *Sawridge #6*, he should have done so through an appeal or an application to re-open the matter pursuant to the *Alberta Rules of Court*, Alta Reg 124/2010. The case management judge found that Mr. Stoney’s submissions at the vexatious litigant proceeding were relevant to whether Mr. Stoney was likely in the future to re-argue issues that had been determined conclusively by Canadian courts. The case management judge found that Mr. Stoney was likely to continue arguing these decided issues and accordingly restricted his access to the courts.

[9] With respect to the court’s suggestion that Mr. Stoney may have engaged in “busybody” litigation, Ms. Kennedy argued that the *Sawridge #6* application was brought by Mr. Stoney on a representative basis on behalf of his “brothers and sisters” relying on a procedure analogous to that permitted by the *Federal Court Rules*, SOR/98-106 in Federal Court. As a result, she submitted, Mr. Stoney’s application was not a “busybody” proceeding and that she had proper authority to act for the group. The case management judge rejected these submissions, coming to the same conclusion he came to in *Sawridge #7*—that Ms. Kennedy was not authorized to act for the “brothers and sisters” in *Sawridge #6*.

B. *Sawridge #9*

[10] The purpose of the *Sawridge #9* application was to address the issue of costs from *Sawridge #7* and *Sawridge #8*, but it is only the costs decision relating to *Sawridge #8* that is the subject of this particular appeal.

[11] In *Sawridge #9*, SFN and the Trustees were accorded party status. SFN and the Trustees argued that *Sawridge #8* was an extension of, and arose from, the *Sawridge #6* application; and further, the findings of misconduct in *Sawridge #7* and *Sawridge #8* were consistent with the same findings of misconduct in *Sawridge #6*. As a result, their submission was that solicitor and own

client full indemnity costs were appropriate, jointly and severally against Ms. Kennedy and Mr. Stoney.

[12] Ms. Kennedy took the position that a distinction should be made between *Sawridge #6*, which attracted an enhanced costs award, and the subsequent proceedings. She argued that costs relating to *Sawridge #8* must be assessed on their own merits. She noted that the participation of SFN and the Trustees in the court access proceedings, although permitted, was not necessary. She argued that the suggestion that they were “successful” parties misapprehended the nature of that proceeding (i.e., whether Mr. Stoney should be the subject of litigation restrictions in Alberta), which had been directed by the court on its own motion.

[13] The case management judge concluded that Ms. Kennedy’s submissions in *Sawridge #8* were a collateral attack on the result in *Sawridge #6* and constituted a notorious and serious form of litigation abuse. He ordered solicitor-client costs against Ms. Kennedy and Mr. Stoney on a joint and several basis for their part in *Sawridge #8*.

III. Analysis

[14] The applicable standard of review for this appeal is discussed by this panel in *Sawridge #10* at paragraphs 32-34. The criteria to be established to ground an award of costs against a lawyer personally are legal criteria, which must be applied correctly. Once established, deference is to be afforded to the trial judge’s ultimate decisions as to whether to award costs pursuant to Rule 10.50 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[15] In our view, the case management judge erred in finding that Ms. Kennedy’s submissions in *Sawridge #8* met the criteria set out in *Quebec (Director of Criminal and Penal Prosecutions) v Jodoin*, 2017 SCC 26, [2017] 1 SCR 478 that would amount to the sort of serious misconduct under Rule 10.50 deserving of a costs award against her personally.

[16] *Sawridge #8* was a vexatious litigant application. It had nothing to do with assessing the merits of previously decided questions about whether Mr. Stoney is or ought to be considered a member of SFN. The reason Ms. Kennedy reiterated the previously made arguments was to explain why Mr. Stoney brought his application for party or intervenor status in the action. Such explanation, if accepted, could reasonably have constituted a defence to the vexatious litigant declaration.

[17] For this reason, we have difficulties accepting the case management judge’s conclusion that Ms. Kennedy engaged in collateral attacks of *Sawridge #6* that constituted “a notorious and serious form of litigation abuse.” Ms. Kennedy acknowledged in her submissions for *Sawridge #8* that the arguments she was making with respect to SFN membership had been previously dismissed in earlier decisions, but noted the reason she was making them was to set the context for her argument that Mr. Stoney should not face court access restrictions.

Page: 4

[18] On the other hand, what we do find concerning are suggestions in Ms. Kennedy's submissions for *Sawridge #8* that previous findings of the case management judge, like the finding of collateral attack in *Sawridge #6*, were incorrect. The case management judge was right to disregard such submissions. Nonetheless, there was never any doubt about the purpose of *Sawridge #8*. Ms. Kennedy's questionable assertions do not, in our view, meet the *Jodoin* criteria that could justify a costs sanction in the circumstances.

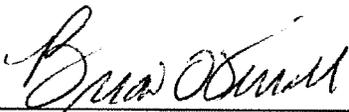
[19] We note that two other arguments raised by the parties—namely, Mr. Stoney not having an opportunity to speak at the hearing for *Sawridge #9*, and whether there was a basis to the assertion that *Sawridge #6* was representative action—are not particularly relevant to our assessment of whether Ms. Kennedy's submissions on behalf of Mr. Stoney in the vexatious litigant application amounted to serious misconduct worthy of a costs sanction.

[20] The appeal is allowed. We set aside the award granted as against Ms. Kennedy in *Sawridge #9*.

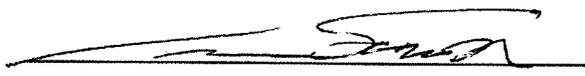
Appeal heard on October 1, 2018

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





O'Ferrall J.A.



Schutz J.A.



Strekaf J.A.

Page: 5

Appearances:

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June 12, 2019

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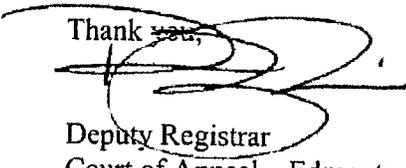
Re: *Priscilla Kennedy (A) v. Roland Twinn (R) and others*
Appeal No. 1703-0239AC & 1803-0076AC

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.



COURT OF APPEAL OF ALBERTA

REPORT OF CIVIL APPEAL

Style of Cause: Priscilla Kennedy (A) v. Roland Twinn (R) and others	Appeal No.: 1803-0076AC
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Trial Court Information

Trial Court No.: 1103 14112
Heard by: Mr. Justice D.R.G. Thomas
at: QB Edmonton - Civil, Alberta
on: March 20, 2018
Citation Number: 2018 ABQB 213

Action Taken in Court of Appeal

Date Appeal Filed: April 12, 2018
Place of Hearing: Edmonton, Alberta
Appeal Heard and Reserved on: October 1, 2018
By: Mr. Justice B.K. O'Ferrall, Madam Justice F.L. Schutz, Madam Justice J. Strekaf
Result of Appeal: Judgment Rendered - June 13, 2019 - Appeal is Allowed
Court of Appeal Citation Number: 2019 ABCA 244

Certificate

I certify that the information set out above is correct. Dated June 13, 2019, at Edmonton, Alberta.



Deputy Registrar, Court of Appeal

rZ