Court of King's Bench of Alberta

Citation: Piikani Nation v Raymond James Ltd, 2023 ABKB 710

Date: 20231221
Docket: 0601 13081
Registry: Calgary

Between:

Piikani Nation

Plaintiffs

- and -

Raymond James Ltd.,
Liliana Kostic, Janet Potts, and Dexter Junior Smith

Defendants

- and -

CIBC Trust Corporation and CIBC World Markets Inc.

Third Party Defendants

Corrected judgment: A corrigendum was issued on December 21, 2023; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
on Fiat for Summary Dismissal Application
of the
Honourable Justice Robert A. Graesser

Introduction

[1] Ms. Kostic seeks a fiat to bring a summary dismissal application against the Plaintiff. She alleges a number of bases for the applications as set out in her letter of October 2, 2023.

[2] The background to this fiat application is detailed in a lengthy letter to me from Mr. Zinner dated September 5, 2023 (4 pages, 350 pages of attachments).

[3] Ms. Kostic sought a fiat for save harmless and striking relief from then-case management Justice Nation on August 21, 2019. Her letter attached a draft notice of application. Justice Nation requested follow-up materials. At a case management meeting on September 6, 2019 scheduling was discussed, and scheduling issues were adjourned.

[4] During my case management of the various matters transferred to me by Acting Associate Chief Justice Jeffrey, I have made it clear that I intended to follow the fiat process adopted by ACJ Rooke during his case management. From my perspective, this and other matters have stalled for a number of reasons, and all of them need to be marshalled to trial. To do that, it remains necessary to screen applications from all parties to ensure that they are appropriate for summary proceedings, have a reasonable chance of success, and will contribute to the determination of the real issues in dispute.

[5] At the case management conference before me on September 7, 2023, I directed Ms Kostic to file a fiat request, which was contained in Mr. Zinner's letter of October 2.

[6] Ms. Kostic objects to having to go through this process as she says in Mr. Zinner's letter to me of November 30 that she "feels aggrieved that she has to jump through what she characterizes as fiery hoops again to have her application heard", referring to the application she filed in 2019 and was apparently to be heard that year. It was not heard by the judge who was case managing the matter at that time. That was then. This is now. I have a mandate to move the matter along to trial. In any event, the application Ms. Kostic proposes is substantially different from the one put forward in 2019.

[7] As noted in ***Piikani v Raymond James***, 2018 ABCA 234, there is flexibility in case management. The Court of Appeal stated at para 25:

> There is no rule that once a case management judge directs that a particular procedure will be followed, he cannot vary that procedure, adopt a different procedure, vary a litigation plan, or alter time limits and other procedural directions. For example, R. 4.7 and 13.5 specifically provide that time stipulations in orders can be changed; such time limits do not operate like a limitation period, or create an issue estoppel: ***Cornelson v Alliance Pipeline Ltd.***, 2013 ABCA 378 at para. 2.

Fiat Application

[8] Ms. Kostic believes that this Action has no merit as against her, and she seeks to have it dismissed summarily on a number of bases. Any one of these, she argues, is capable of terminating the entire lawsuit against her.

1. Rule 4.33

[9] Ms. Kostic says that more than 3 years has passed without a significant advance in the action.

[10] She submits that the last step that may be seen to have advanced the action was taken by her in 2014 when she successfully applied to have the fraud allegations against her dismissed. That narrowed the issues. She says that some questioning took place in March 2019, but undertaking responses ordered to be delivered in March 2020 did not arrive. "Purported responses" by someone other than a Councillor were delivered on January 30, 2023. Ms. Kostic says that the undertaking responses did not "advance the action functionally".

2. Rule 4.31

[11] Ms. Kostic notes that the action was commenced against her on November 15, 2006. She says that the action has not advanced to the point that a litigant acting reasonably would have attained in 17 years. She notes that while a trial was scheduled for October 2021, it was cancelled at the Plaintiff's request without any reasonable explanation.

[12] She says that the Plaintiffs willfully and woefully breached two litigation plans along the way. Ms. Kostic notes that ACJ Rooke, who was case managing the litigation, granted her leave to seek enhanced costs and damages for breaches of the litigation plans.

3. Rule 7.3(1)(b)

[13] Ms. Kostic says that there is no actionable cause of action against her for a number of reasons:

1. The Nation has suffered no losses. Under Ms. Kostic's management, the Piikani portfolio increased over $10,000,000;
2. There is no cause of action against Ms. Kostic as she was at all material times a disclosed agent of a disclosed principal. She says that Raymond James Limited managed the investment accounts and is vicariously liable for her. She claims that she was an agent of RJL acting within the scope of her duties and that she has no liability for performance or non-performance of a contract between her principal and the contracting party. She cites ***Barnett v Rademaker et al***, 2004 BCSC 1060 to support that position;
3. The claim against her is barred by provisions of the Terms and Condition Booklet forming part of the account opening agreements between Piikani and RJL which give indemnity to RJL and its employees for them acting in the course and scope of the authority granted to them by Piikani. She notes that similar terms apply to the period when she was working for CIBC Wood Gundy;
4. The allegations against her are baseless as there is no evidence that Kostic engaged in any of the wrongdoing alleged against her;
5. The *Limitations Act* bars claims about the purchase of non-qualifying investments. Any such investments were purchased while Ms. Kostic worked for Wood Gundy and were transferred in specie to RJL more than 2 years before the statement of claim was filed in November 2006;

4. Rule 3.68(1)

(a) Ms. Kostic alleges that the claim against her has been made by the wrong party. She says that the Piikani Nation has no standing to bring an action in its own behalf, and that this is an incurable nullity. She cites ***Papaschase First Nation v***

McLeod, 2021 ABQB 415 and ***Lower Nicola First Nation v The Council***, 2012 FC 103;

(b) She says that the commencement of the action was not properly authorized as there was no resolution authorizing this action at a duly called meeting of council. She says that there has been no Band Council Resolution to continue this action since 2015, or to authorize the filing of any amended statement of claim. She cites ***Rath and Company v Stoney First Nation***, 2013 ABQB 255, ***Rough v Cold Lake First Nations***, 2016 ABQB 153; ***Transalta Utilities Corporation v Young Estate***, 1997 ABCA 349, and ***Myskiw v Wynn***, 1977 ALATASCAD (CanLII);

(c) Ms. Kostic says that the Court of Kings Bench has no jurisdiction to hear this action because the Nation is seeking remedies arising from decisions made by the then-elected Chief and Council. She says that they were a Federal Board under the Federal Court Act. Any complaints about breaches of duty by a federal board, their decisions, invalid Band Council Resolutions and Ms. Kostic's participation fall within the exclusive jurisdiction of the Federal Court; and

(d) Ms. Kostic says the action should be dismissed because the Plaintiff has not particularized their claim in accordance with a demand for particulars served on them on November 1, 2018.

[14] A draft 20-page application was submitted that includes a number of other proposed applications, including:

1. Preserving the filing of a fourth amended statement of defence if required and amended third party claims;
2. Filing an amended third-party notice and amended notice to Co-Defendant against RJL;
3. Filing amended third party claims against CIBC Wood Gundy/CIBC World Markets and CIBC Trust;
4. Filing an amended third-party claim against Piikani Chief and Council;
5. Dismissing the claim against her because of litigation misconduct and delay; and
6. Dismissing the claim against her for misconduct or abuse of process.

[15] In the draft application, Ms. Kostic seeks some 29 heads of relief including a "wide public apology" and a large number of declarations.

Response

[16] Mr. Hawkes filed a response on behalf of the Nation to the fiat request on October 13. His response opposes any fiats being granted. He submits that the fiat requests are for matters for which fiat requests were denied by previous case management judges ACJ Rooke and Nation J. Mr. Hawkes describes the applications sought by Ms. Kostic as being hopeless and an abuse of process.

[17] He appended a chart detailing the various things done in the action since 2006.

[18] I will not reproduce the entire chart here and will only refer to the last 4 years or so, going back to the questioning by Ms. Kostic of a Nation Councillor, Brian Jackson, in July 2019.

July 3, 2019	Order pronounced June 5, 2019, re questioning of Brian Jackson restrictions and guidelines, filed	Court (Rooke, ACJ.)	Relief granted
July 11, 2019	Questioning of Brian Jackson	Piikani (JSS)	
Aug 21 2019	Application by L Kostic re: Third Party Claim to Alger, Thornton et al, filed	L Kostic	Denied by Order of Nation, J., Oct 24, 2019
Aug 21 2019	Affidavit of L Kostic (in support of Third-Party Claim to Alger et al), filed	L Kostic	
Oct 24 2019	Order of Justice Nation re: Kostic contempt and adding GT parties	Court (Nation, J.)	L. Kostic still in contempt; therefore her application to add parties is denied with prejudice
Nov 13 2019	Application by Piikani Nation re Kostic contempt, filed	Piikani (JSS)	
Nov 15 2019	Affidavit of L Kostic opposing application for contempt, filed	L Kostic	
Nov 15 2019	Application of L Kostic for continued questioning of Brian Jackson, filed	L Kostic	Granted by Order of Nation, J., Dec 9, 2019 (written questions only to be served by Jan 30, 2020)
Nov 15 2019	Affidavit of L Kostic in support of application for questioning of Brian Jackson, filed	L Kostic	
Nov 15 2019	Application of L Kostic re: Demand for Particulars of Piikani Nation, filed	L Kostic	
Nov 15 2019	Affidavit of L Kostic to support Demand for Particulars of Piikani Nation, filed	L Kostic	

Nov 22 2019	Brief of Piikani to be heard December 9, 2019 re Kostic contempt and B Jackson Questioning	Piikani (JSS)	
Nov 28 2019	Affidavit of Brian Jackson re his Questioning, filed	Brian Jackson	
Nov 29 2019	Response Brief of Piikani to be heard December 9, 2019	Piikani (JSS)	
Nov 29 2019	Brief of Law of L Kostic filed November 29 2019 in opposition to contempt application to be heard December 9, 2019	L Kostic	
Nov 29 2019	Brief of Law of L Kostic better and further particulars to be heard December 9, 2019	L Kostic	
Nov 29 2019	Brief of Law of L Kostic for continued questioning of Brian Jackson to be heard December 9, 2019	L Kostic	
Nov 29 2019	Supplemental Affidavit of L Kostic	L Kostic	
Dec 6 2019	Cross Application by L Kostic to strike Piikani contempt application	L Kostic	
UNFILED	Second Supplemental Affidavit of L Kostic supporting application for Particulars, continued questioning of Brian Jackson and opposing contempt unfiled, sworn December 5, 2019	L Kostic	
Dec 6 2019	Reply Brief of L Kostic re Contempt and Particulars	L Kostic	
Dec 6, 2019	Cross-Examination of G. Zinner	Piikani (JSS)	
Dec 9 2019	Case Management Conference		
Jan 3 2020	Transcript of Questioning on May 2, 2019 Affidavit of G Zinner, held December 6, 2019, filed	Piikani (JSS)	

Jan 20 2020	Intervenor Application and Affidavit of Janet Potts (Action No. 1901-0310AC), filed	Janet Potts	
Jan 28 2020	Undertaking Responses of Brian Jackson from his Questioning on July 11, 2019, served	Brian Jackson (Willier)	
Jan 31 2020	Written Questions addressed to Brian Jackson, Mario Fruci, Joseph Lyons and	L. Kostic	
	Doane Crow Shoe (193 pages of single-spaced written questions), served		
Feb 28 2020	Substantial objections (9 pages) to Written Questions directed to Brian Jackson on Jan 31, 2020, served	Piikani (JSS)	
Mar 6 2020	Order granted December 9, 2019 (Brian Jackson Questioning, interrogatories, etc), filed	Court (Nation, J.)	Relief granted
Mar 1 2021	Demand for Particulars from L Kostic to Piikani Nation, served	L Kostic	
Mar 1 2021	Notice to Admit from Kostic to Piikani Nation, served	L Kostic	
Mar 19 2021	Responses to Kostic's Demand for Particulars and Notices to Admit, served	Piikani (JSS)	
Jan 30 2023	Substantial Responses to Written Questions addressed to Doane Crow Shoe on Jan 31, 2020, served	Piikani (JSS)	
Feb 13 2023	Request for Leave to file save harmless application by L Kostic (Zinner), served	L Kostic	
Feb 23 2023	Letter from G. Zinner on behalf of L Kostic asking for leave to be granted for save harmless application because other parties have not responded	L Kostic (Zinner)	

Mar 31 2023	Raymond James reply to leave request from Kostic (save harmless)	RJ (McLeod Law)	
Mar 31 2023	Piikani reply to leave request from Kostic (save harmless)	Piikani (JSS)	
Apr 4 2023	Letter from King's Bench appointing Justice Graesser as Case Management Judge	Court	
May 15 2023	Letter from Zinner (on behalf of Kostic) in response to RJ and Piikani's reply to Kostic leave request (save harmless)	Kostic (Zinner)	
Jun 30 2023	Letter from Blakes re CIBC client sur-reply to Justice Graesser re Kostic leave application (save harmless)	CIBC parties (Blakes)	

The Nation cites a number of cases in support of its position:

(a) ***Hryniak v Mauldin***, 2014 SCC 7;

(b) ***Flock v Flock Estate***, 2017 ABCA 67;

(c) ***Matthews v Lawrence***, 2021 ABQB 776;

(d) ***Protection of the Holy Virgin Mary Orthodox Convent at Bluffton v Oustinow Estate***, 2023 ABKB 462;

(e) ***Ursa Ventures Ltd v Edmonton (City)*** 2016 ABCA 135;

(f) ***McCarthy v Schindeler***, 2017 ABQB 511;

(g) ***Piikani Nation v Raymond James Ltd***, 2017 ABQB 681;

(h) ***Wavel Ventures Corp v Constantini***, 1996 ABCA 415;

(i) ***864503 Alberta Inc v Genco Place Properties Ltd***, 2019 ABCA 80;

(j) ***British Columbia (Workers' Compensation Board) v Figliola,*** [2011] 3 SCR 422; and

(k) ***Piikani Nation v Kostic,*** 2018 ABCA 234.

Analysis

5. Rule 4.33

[19] This action was case managed by ACJ Rooke starting in 2013. He appointed Nation J to take over management of this action in August 2019. Case management was transferred to De Wit J (as he then was) by order of ACJ Rooke in September 2022, and then to me by order of Acting ACJ Jeffrey in April 2023. The chronology provided by the Nation does not include all of the many case management meetings over the years.

[20] Mr. Jackson provided undertaking responses on January 28, 2020. Ms. Kostic filed a number of written questions of Mr. Jackson, Dane Crow Shoe and others on January 31, 2020.

[21] The Nation filed lengthy objections to the questions on February 28, 2020. Ms. Kostic then filed a demand for particulars and a notice to admit facts on March 19, 2021.

[22] The next step noted was the Nation providing answers to the questions of Mr. Crow Shoe on January 30, 2023.

[23] One of the obvious issues is whether or not providing answers to written questions 2 years and 364 days after the questions were asked is something that "significantly advances the action".

[24] ***Flock v Flock Estate*** quotes extensively from ***Ro-Dar Consulting Ltd v Verbeek Sand & Gravel Inc***, 2016 ABCA 123 ("**Ro-Dar**"), stating at paras 17 -

> [17] The chambers judge did not have the benefit of the ***Ro-Dar*** decision from this Court, which confirms the following:
>
> 1. Whether an action has been "significantly advanced" involves an assessment and measurement of the effect of what happened in the action during the period of alleged delay, measured in light of the facts and the objectives of the *Alberta Rules of Court*. The chambers judge's conclusion on that issue is entitled to deference: ***Ro-Dar*** at para 11.
>
> 2. The functional approach set out in ***Phillips v Sowan***, 2007 ABCA 101 as approved in the most recent amendments to rule 4.33, means the drop dead rule now clearly requires a functional approach, without overemphasizing formalistic steps that might have been taken. The *obiter* statement in ***Morasch v Alberta***, 2000 ABCA 24 at para 6, that anything required by the rules is deemed or presumed to advance the action, does not correctly state the law: ***Ro-Dar*** at para 14. Even a step mandated by the *Rules* requires the court to analyze that step using the functional approach to determine whether that step significantly advances the action: ***Ursa Ventures Ltd v Edmonton (City)*** at para 35.
>
> 3. Rule 4.33(1)(d), now rule 4.33(2)(d), confirms that any three-year period of inactivity will require dismissal of the action, subject only to an exception where the moving party has participated in steps after the expiry of the three years to the extent that it would be unjust to dismiss the action. This wording of the rule entrenches the interpretation placed on the rule in ***Trout Lake Store Inc v Canadian Imperial Bank of Commerce***, 2003 ABCA 259 at para 33: ***Ro-Dar*** at para 17.
>
> In addition to the principles affirmed in ***Ro-Dar***, the following additional principles relating to the interpretation of rule 4.33 maintain effect:

4. The plaintiff bears the ultimate responsibility for prosecuting its claim in a timely manner: ***XS Technologies***, 2016 ABCA 165 at para 7; see also ***Lethbridge Motors Co v American Motors (Canada) Ltd*** (1987), 1987 ABCA 150 (CanLII), 79 AR 321 (CA) at para 19. A defendant, while never required to actively move the plaintiff's action along, cannot purposively obstruct, stall or delay the action: ***Janstar Homes Ltd v Elbow Valley West,*** 2016 ABCA 417 at para 26.

5. The rule is mandatory and does not allow for the exercise of discretion: ***Morasch*** at para 5.

6. "If a party, therefore, does nothing to enforce its right under Rule [4.33] on a timely basis, and the opposing party continues to take meaningful steps outside the [three year gap], it may reach a stage where the right to an automatic dismissal is lost": ***Trout Lake*** at para 31.

7. The rule does not exclude the consideration of things done by the complaining party. A step by either party will be taken into account in deciding whether a thing has been done in three years to materially advance the action: ***Volk v 331323 Alberta Ltd***, 1998 ABCA 54, 212 AR 64; see also ***Jondreau v Maclean***, 2006 ABQB 265 at para 13.

8. The relevant period of delay must be determined by looking back from *the date the application was filed*, not heard: ***Steparyk v Alberta***, 2014 ABQB 367 at para 5.

9. The question of prejudice to the applying party from the delay is irrelevant. No inquiry into that issue is necessary: ***Volk v 331323 Alta Ltd*** at para 16; see also ***St Jean Estate v Edmonton (City)***, 2014 ABQB 47 at para 13. "The absence or presence of prejudice to another party is not a consideration . . . Similarly, the sterling reputation of the litigant, the strength of his action or defence, and the justification for the delay are all irrelevant . . . Of course, although mandatory, a [rule 4.33] dismissal is not automatic. A party must apply to the court to trigger the dismissal": ***Morasch*** at para 5.

10. The purpose behind the exception stipulated in rule 4.33(1)(d) "is to enshrine in the rules the ability of the Court to dismiss drop dead applications where defendants have actively participated in an action to an extent and degree that could lead a plaintiff to fairly assume that the defendant has waived the delay": ***Krieter v Alberta***, 2014 ABQB 349 at para 50; see also ***St Jean Estate***.

11. An agreement to excuse time may be oral, but it cannot be implied, and under rule 4.33(1)(a) must be "express"; so, conduct

> alone or occasional discussion of settlement, does not suffice. An exchange of correspondence will suffice if it is clear and precise enough; parties, start of period, and essential terms must be spelled out: ***Bugg v Beau Canada Exploration Ltd,*** 2006 ABCA 201 at paras 9, 17-18; ***525812 Alberta Ltd v Purewal,*** 2004 ABQB 938 per Slatter J (as he then was) at paras 13-17.

[25] The parties do not appear to disagree that this lawsuit, and many of the other related actions being case managed, stalled to some extent during the period after March, 2020. As pointed out by Counsel, a 75-day period following March 20, 2020 has been recognized as a COVID-19 delay period, which stopped the clock for that amount of time.

[26] It was Ms. Kostic who appears to have tried to get things going again in March 2021 when she served a demand for particulars and notice to admit on the Nation. There was no apparent activity on the merits of this lawsuit from the time the Nation replied to the demand for particulars later that month until the fall of 2022 when ACJ Rooke transferred case management of his matters in September, 2022. The order listing the various actions was not completed until November, and until then, there was some confusion as to whether this lawsuit and its companion lawsuit Kostic v Piikani Nation, 0801 05039 were transferred to Justice De Wit or if they remained with Justice Nation.

[27] In any event, Ms. Kostic began to pursue indemnification and save harmless relief against the Nation in this action and several others in late 2022. It appears from Mr. Zinner's letter to Justice De Wit on February 13, 2023 that Justice DeWit directed that an application be prepared. Mr. Zinner's "Request for Leave to File Application" of February 13 comprises some 423 pages and includes a draft Notice of Application in this action, as well as Ms. Kostic's affidavit in this action.

[28] Following my assumption of case management, it was clear in correspondence from Mr. Zinner and Ms. Kostic that the save harmless relief application was one of the most pressing concerns for Ms. Kostic, at least until she decided to prioritize this summary dismissal application during the summer of 2023.

[29] The chronology provided by Mr. Hawkes and the actions taken by Ms. Kostic demonstrate that this action has from late 2022 been very active as Ms. Kostic continues to seek relief in it. Indemnification is of significant interest to Ms. Kostic as she seeks to have indemnification and save harmless relief apply to other claims against her.

[30] ***Ro-Dar*** makes it clear that it is not just the conduct of the plaintiff that must be considered in a Rule 4.33 application. The defendant's conduct is also relevant.

[31] I do not think that Ms. Kostic has demonstrated that she has a reasonable prospect of success in having this action dismissed against her under Rule 4.33.

[32] It is unclear what effect dismissal of the action would have in relation to Ms. Kostic's indemnification proceedings. Dismissal of the action against her would remove her from the action entirely, as there is no counterclaim and no further basis for any third-party relief. In any event, I do not have to consider that as a result of my conclusion above.

[33] As an alternative basis for not granting a fiat to bring an application under Rule 4.33 is the unique nature of the conglomeration of cases that have been under case management for over

a decade. As I recently noted in ***Kostic v Thom***, 2023 ABKB 642, this is only one of 31 actions that have been consolidated for case management purposes.

[34] Case management has many benefits for complex litigation and litigation where the litigants and counsel are unable to appropriately manage the litigation themselves. Court resources are not unlimited and must be employed in a manner that provides roughly equal access to justice to all litigants. Case management does not create a "preferred litigant" class. Instead, it provides a single judge to deal with all applications until trial. There is considerable efficiency created by the accumulated knowledge the case management judge acquires. Applications that might take a full day with a judge unfamiliar with the litigation may be accomplished in an hour.

[35] One drawback is that a case management judge has only so much time. Case management is usually conducted by the judge outside normal sitting time and a case management judge's ordinary sitting time is not reduced by case management responsibilities. As a result, there may be delays in being able to schedule matters with the case management judge. That has clearly occurred in this matter.

[36] There is case authority that indicates that being in case management does not exempt a lawsuit from Rule 4.33. The Foundational Rules make management of the litigation the responsibility of the parties. The case management judge does not take over that responsibility, or assume it. The case management judge is a resource. The case management judge's time must also be used wisely.

[37] Here, there are what I would describe as six very active lawsuits involving Ms. Kostic and the termination of her relationship with the Piikani Nation: this lawsuit, which seeks damages from Ms. Kostic and RJL arising out of their management of the Nation's trust accounts; Action 0801-05039 ("Action 0801"), which is Ms. Kostic's damages claim against the Nation for terminating her management contract; Action 1501-11111, which is Ms. Kostic's claim against Jefferey Thom and Miller Thomson arising out of their representation of her in this lawsuit; Action 1901-04657 which is Ms. Kostic's claim against Scott Venturo Rudakoff for their representation of her in this lawsuit; Action 2101-06345, which is Bridgepoint Financial Corporation's lawsuit against Ms. Kostic seeking recovery of litigation financing provided to Ms. Kostic for this lawsuit; and Action 1701-06258, which is AIG's claim against Ms. Kostic for the return of defence costs paid for her for their defence of this action on her behalf.

[38] In connection with this lawsuit, Ms. Kostic has over the years attempted to involve Piikani Investment Corporation, various accounting firms and law firms who acted for Piikani Investment Corporation in relation to this lawsuit. She has commenced separate actions against CIBC World Markets (successor to Wood Gundy and CIBC Wood Gundy) for indemnification.

[39] There are also a myriad of related proceedings in the Federal Court of Canada. In June 2020, Ms. Kostic sued the Nation, Piikani Investment Corporation and a host of other defendants raising issues common to Actions 0601 and 0801. Most recently, in April 2022, Ms. Kostic sued the Nation, CIBC Trust, CIBC World Markets and others, again raising issues common to Actions 0601 and 0801, amongst others. Decisions in these actions have led to proceedings in the Federal Court of Appeal, and at least one leave to appeal application to the Supreme Court of Canada.

[40] Many proceedings have been delayed as a result of applications and appeals from decisions on some of the applications. For example, applications in the Kostic v Scott Venturo Rudakoff action are presently on hold awaiting a decision on a leave to appeal application to the Supreme Court of Canada from a Federal Court of Appeal decision.

[41] All of the underlying decisions have come through case management, including case management in the Federal Court. I repeat this background to show that the matters under case management are intertwined. Many have common issues. The eventual outcomes of some depend on the outcome of others.

[42] Essentially, this action 0601 is the foundational lawsuit that has spawned virtually all of the others. I do not go so far as to say that any step in any of the other related lawsuits should be considered to be a step in all of them, but I will say that you cannot look at this lawsuit in isolation from the others. Where there are overlapping issues and common parties, it is very difficult to separate them. What happens in one affects what may happen in another. Steps forward in one may well assist in others.

[43] For example, in her argument in support of this fiat application, Ms. Kostic refers to a trial set by Justice Nation in her case management proceedings. Part of a litigation plan had Justice Nation schedule two weeks in November 2021 for trial. That was cancelled for various reasons. Ms. Kostic referred to the cancellation in the context of the Nation delaying matters. The trial was not to be held in this action, however, but rather in the companion lawsuit Kostic v Piikani, where Ms. Kostic seeks damages from the Nation for breach of the contract that is in issue in this lawsuit.

[44] Scheduling a damage assessment in Action 0801 has led to consideration of the overlap in damage claims between or amongst the various parties Ms. Kostic seeks damages from. In case management, she has advised that her application for *de bene esse* evidence of her doctor in Kostic v Thom and Miller Thomson may have implications for other defendants, and they may want to participate in that application.

[45] The most recent Supreme Court of Canada decision in this action, 2022 CanLII 689 (SCC), denied Ms. Kostic application for leave to appeal from the Court of Appeal's decisions at 2021 ABCA 31 and 2020 ABCA 41 and 2020 ABCA 116 and 2021 ABCA 31. Those appeals and the subsequent leave to appeal application arose from Ms. Kostic's failed attempt in 2019 to add a number of parties to this lawsuit, amongst many other unsuccessful applications by Ms. Kostic.

[46] That decision, dated January 13, 2022, appears to have put to an end Ms. Kostic's attempts to add Bruce Alger, Grant Thornton Limited, and Caron & Partners, who were involved in the insolvency and bankruptcy proceedings for Piikani Investment Corporation.

[47] Item 4 of the ***Ro-Dar*** factors quoted above says the defendant "cannot purposively obstruct, stall or delay the action". There is no doubt that Ms. Kostic has, since parting ways with RJC in the defence of this action, taken extraordinary and relentless measures to attempt to defeat the Nation's claim against her. Ironically, those measures have also delayed her attempt to get compensated under the same contract the Nation is suing her on.

[48] Ultimately, I am of the view that Ms. Kostic's attempt to isolate this lawsuit from the other related lawsuits is bound to fail for a number of reasons. I do not think ***Ro-Dar*** and subsequent cases create a finite list of relevant considerations for Rule 4.33 applications. To the

list cited in ***Ro-Dar***, I would add that any delays in an action resulting from the unavailability of court time with a case management judge should be considered, and may in appropriate circumstances be deducted from the overall delay period (as in a ***Jordan***[1] application on section 11(b) *Charter* applications in criminal matters). Additionally, proceedings in related lawsuits, whether they have been consolidated, ordered to be tried together, or case managed together, should also be considered.

[49] It would be artificial and manifestly unfair to use an individual-action time clock in a matter such as this.

[50] Another factor in delays in this matter has been the transition of case management from ACJ Rooke to Justice De Wit and then to me. This has resulted in a large number of pending applications in this and other lawsuits being case managed together not being scheduled. I do not think it is appropriate to charge any of the time delayed by Court scheduling and the availability of the case management judge to hear matters against any of the parties themselves, and any such time should be deducted from any calculation of delay.

[51] I do not see that Ms. Kostic has any reasonable prospect of success in having this lawsuit dismissed for delay. If anything, it is the Nation that has been delayed by Ms. Kostic's applications and appeals from decisions unfavourable to her.

[52] Responding to written questions is analogous to answering undertakings give on questioning. There is ample case law holding that compliance with undertaking responses by the Plaintiff is a step in the action. See for example ***Ravvin Ghitter***, 2008 ABCA 208. Michalyshyn J held in ***Khalon v Khalon***, 2021 ABQB 683 that ***Ravvin*** remains good law under the "new" 2010 *Rules of Court* although it does not necessarily apply to all undertaking responses. An examination of the undertaking and its connection with the issues in the pleadings is necessary to determine if the answer was relevant to a live issue.

[53] I need not conduct any specific analysis because of my conclusions above, however I am of the view that such an analysis would show that the responses to Ms. Kostic's questions were relevant to issues in the lawsuit. Presumably Ms. Kostic would not have asked them if she thought they were irrelevant, and counsel for the Nation would not have answered them if they were irrelevant. In my view, spending more time on this application would be a waste of time and an unnecessary delay in the matter.

[54] I have no doubt that any Rule 4.33 application on any of the grounds raised by Ms. Kostic are bound to fail.

6. Rule 4.31

[55] This action is inextricably tied to Ms. Kostic's claim against the Nation in Action 0801. A key issue in that action is whether the Nation had the right to terminate their contractual relationship with Ms. Kostic. She seeks significant pecuniary and non-pecuniary general damages from the Nation as a result of the termination of their agreement with her. Indeed, one of her allegations against Mr. Thom is that he was negligent in not counter claiming against the Nation in this action, which forced her to hire Mr. Klym to commence Action 0801.

[56] I appreciate Ms. Kostic's allegations that because of this action, she has been unable to work in the investment business since 2007, and that her health has suffered. But the types of

[1] ***R v Jordan***, 2016 SCC

prejudice contemplated by Rule 4.31 are related to procedural prejudice, such as the death or disappearance of key witnesses. I do not see that prejudice is likely to be made out in the circumstances of all of these interconnected lawsuits. Much of the delay in this litigation has resulted from the myriad of lawsuits and applications brought by Ms. Kostic, her applications for rehearings, and her appeals from decisions unfavourable to her.

[57] The prejudice she alleges because of the presence of this litigation against her is addressed in her various claims and counterclaims.

[58] As with her proposed Rule 4.33 application, an application under this Rule is bound to fail.

7. Rule 7.3(1)(b)

[59] Ms. Kostic says that there is no actionable cause of action against her for a number of reasons:

a. The Nation has suffered no losses

[60] Ms. Kostic says that under her management, the Piikani portfolio increased over $10,000,000. That may be the case, but that does not answer the claims made against her. I have no idea what comparable-sized portfolios over the same period of time might reasonably have been expected to earn.

[61] In any event, I do not think that the damage issue is as simple as suggested by Ms. Kostic.

[62] The Statement of Claim in this action alleges various financial losses, including losses on "offending investments" disposed of, accrued and unrealized losses on those investments "still current", paying fees higher than those typically charged, the Defendants receiving unauthorized and improper commissions, fees, bonuses and other compensation, and loss of investment opportunity.

[63] The prayer for relief in the action seeks general, punitive and exemplary damages.

[64] I do not see that summary dismissal this is an appropriate forum to resolve these issues. It seems to me that the evidence to determine this issue is the same evidence as will be lead at trial, and I see no advantage hiving the Nation's damage claim off the liability part of the action.

[65] It is impossible to consider or assess the Nation's damages (if any) without considering Ms. Kostic's conduct leading to the termination, and whether any damages or costs ought to be awarded to them regardless of any gains on the portfolio.

b. There is no cause of action against Ms. Kostic as she was at all material times a disclosed agent of a disclosed principal

[66] Ms. Kostic says that RJL managed the investment accounts and is vicariously liable for her. She claims that she was an agent of RJL acting within the scope of her duties and that she has no liability for performance or non-performance of a contract between her principal and the contracting party. She cites ***Barnett v Rademaker et al***, 2004 BCSC 1060 to support her position.

[67] The legal principles that Ms. Kostic relies on above related to an agent's liability for performance of the contract. The principles do not shelter an agent from the consequences of their personal negligence or breach of duty. A disclosed agent is not liable to the contracting

party for breaches of contract by the agent's principal and an agent is not responsible for the principal's negligence unless the agent has been negligent in some way themself.

[68] This is to be contrasted with the position an undisclosed agent is in. Where the agent's principal is not known to the contracting party, the agent is personally responsible to the contracting party for the principal's breaches. An undisclosed agent cannot say "I have no responsibility because I was acting as agent for X".

[69] "Vicarious liability" means that the principal is liable along with the negligent agent for the agent's negligence. It does not mean that the agent does not have separate liability and responsibly for their own actions.

[70] These principals do not help Ms. Kostic in this litigation, and any application based on these arguments is bound to fail.

c. The claim against her is barred by provisions of the Terms and Condition Booklet forming part of the account opening agreements between Piikani and RJL which give indemnity to RJL and its employees for them acting in the course and scope of the authority granted to them by Piikani.

[71] The Terms and Conditions booklet provides in paragraph 14:

> 14. That every transaction indicated or referred to in any notice, statement, confirmation or other communication and every statement of account shall be deemed as authorized and correct and as ratified and confirmed by the Client unless Raymond James Ltd. actually receives from the Client written notice to the contrary within 10 days from the time such notice, statement, confirmation or other communication is forwarded to the Client by Prepaid mail at the Client's address appearing on the front of this form or to some other address communicated to Raymond James Ltd. And that any and all written notices and communications sent by Raymond James Ltd. to the Client shall be deemed to have been received if sent by mail or any means of prepaid, transmitted or recorded communication, or if delivered to the Client at the address provided or at some other address communicated to Raymond James Ltd.

[72] Exculpatory and "deeming" provisions like the above are not absolute. They may be overcome by bad faith, breach of fiduciary duty, or negligence and are highly fact specific. A clause like this may assist in a defence of a claim based on whether or not a transaction has been authorized, but not other issues raised by the Client. The interpretation and application of this clause will require extensive evidence and such a process is not suitable for a summary procedure.

[73] The wording of the indemnity provided in the RJL Investment Management Agreement with the Nation is as follows:

> **Indemnification by the Investment Advisor**
>
> The Investment Advisor agrees that It will Indemnify and hold the Piikani Nation, its successors, directors, and officers harmless from and defend them against all expenses including legal fees, Judgements, fines and amounts paid in any settlement arising out of any threatened or actual legal action (excluding an action in the Piikani Nation's own right) arising out this Business Agreement with respect to

> (a) a breach of the Investment Advisor's representations and warranties contained in Section 5.1 of this Agreement…
>
> **Indemnification by Piikani Nation**
>
> Piikani Nation agrees that it will Indemnify and hold the Investment Advisor, its successors, directors, officers and employees harmless from and defend them against all expenses including legal fees, judgements, fines and amounts paid In any settlement arising out of any threatened or actual legal action (excluding an action in the Investment Advisor's own right) arising out of this Business Agreement with respect to:
>
> (a) a breach of the Piikani Nation's representations and warranties contained in Section 5.1 of this Agreement; and.
>
> (b) any material breach of the terms of this Agreement by the Piikani Nation.

[74] These indemnity obligations on the part of the Nation are not absolute or conclusive. They are triggered by a breach of the Nation's obligations under the various agreements between it, RJL and Ms. Kostic. They are limited to claims against RJL and Ms. Kostic other than those arising from breach of trust or other acts of gross negligence or improper behaviour. Those are things alleged against them by the Nation.

[75] This argument fails on its face. Indemnification is provided only for a "material breach" by the Nation of any of the "terms of this Agreement by the Piikani Nation". That completely ignores the basis of the claims against RJL and Ms. Kostic as discussed above: that they invested in unauthorized investments, charged higher than appropriate fees, received unauthorized commissions and compensation, and other breaches of their contractual obligations. These allegations by the Nation are the essence of their claims against RJL and Ms. Kostic. They will require significant evidence from all sides will be necessary to determine this issue. This is not a matter for summary proceedings.

[76] The RJL agreement also provides:

> 19. Indemnity regarding agents and attorneys
>
> You will indemnify and hold us harmless from any and all losses, liabilities, costs, expenses (including legal fees) resulting from us action in accordance with any authority granted by you to an agent under a trading authorization or an attorney under a power of attorney to transact on your accounts.
>
> 22. Indemnification
>
> As tenants you jointly and severally (in Quebec solitarily) agree to indemnify and hold us harmless from any and all losses, liabilities, cost and expenses (including legal fees) resulting from our acting in accordance with the authority referred to in section 21.

[77] These indemnity provisions reference RJL and its employees "acting in accordance with any authority granted to (them)" by the Nation.

[78] Again, the essence of the Nation's claims against RJL and Ms. Kostic is that they were not acting in accordance with the authority they had because they did not act in good faith, were negligent, and acted in breach of their fiduciary duties.

[79] As with the other indemnity claims, these issues will require evidence from both sides, and likely expert evidence on the duty of care owed by investment dealers and advisors. This is not a suitable area for summary proceedings.

[80] The CIBC Wood Gundy agreement provides in section 1.14 “Good Faith”:

> (a) CIBC Wood Gundy shall act at all times in respect of my Account in good faith that neither CIBC Wood Gundy not its directors, officers, employees or agents shall be responsible for any losses or any failure to obtain investment gains from th operation of the Account.
>
> (b) The information and recommendation given by CIBC Wood Gundy or any of it representatives, officers, directors or agents as to values, prospects or any other matter relating Securities or other property is based on sources CIBC Wood Gundy believes reliable but are statement of opinion only and CIBC Wood Gundy does not guarantee their accuracy and assumes no responsibility of any kind for such information and recommendations.
>
> (c) CIBC Wood Gundy will not be liable to me for errors or omissions I connection with or inn the handling of orders, relating to the purchase, sale, execution or expiration of a Security or any other matter relating to a Security or the Account, unless caused by CIBC Wood Gundy’s gross negligence or willful misconduct.
>
> (d) CIBC Wood Gundy shall not be liable for any loss, claim damages, liability of expense caused directly or indirectly by government regulatory or self-regulatory restrictions or regulations, exchange or market rulings, suspension of trading, war, strikes, equipment malfunction or other conditions or events (whether similar or dissimilar to the above) beyond CIBC Wood Gundy’s control.

[81] To the extent that these are relevant to the Nation’s claims and RJL’s and Ms. Kostic’s defence, the failure to make gains by themselves are not actionable. That does not protect either RJL or Ms. Kostic from liability for negligence or breaches of their duties of good faith.

[82] Other claims are limited to “errors or omissions” other than those resulting from gross negligence or wilful misconduct. The Nation’s claims include breach of fiduciary duty which is arguably gross negligence or wilful misconduct.

[83] Again, it will take a trial with evidence from both sides to make findings on these issues. The facts and circumstances alleged by both sides are complex and highly contested, and wholly unsuitable for summary proceedings.

[84] These provisions have already been considered by the Alberta Court of Appeal in a different context, and that Court determined that the scope of indemnification, if any, would have to be determined at trial. See ***Kostic v CIBC Trust Corporation***, 2018 ABCA 355. Leave to appeal to the Supreme Court of Canada was dismissed at 2019 CanLII 37469 (SCC).

d. The allegations against her are baseless as there is no evidence that Kostic engaged in any of the wrongdoing alleged against her

[85] Suggesting that a Court could properly come to that conclusion on a summary dismissal application is entirely fanciful. This will result in extensive review and analysis of the evidence.

Some relevant and material evidence may have been discovered during questioning, but the evidence at trial is not limited to what was learned during questioning. There may well be other witnesses, including expert witnesses, who will give evidence at trial without having been previously questioned.

[86] In a case as complex as this one, I cannot see that a summary procedure exploring the strength of the Piikani Nation's case and Ms. Kostic's defence would be anything other than a waste of time and would undoubtedly require viva voce evidence. This type of application is not the sort of situation that falls within the principles enunciated in ***Hryniak v Mauldin***, 2014 SCC 7 and the myriad of cases following it.

e. The *Limitations Act* bars claims about the purchase of non-qualifying investments.

[87] Ms. Kostic claims that any such investments were purchased while Ms. Kostic worked for Wood Gundy and were transferred *in specie* to RJL more than 2 years before the statement of claim was filed in November 2006. As such, claims based on those investments are outside the window for being sued on.

[88] In reality, the case is far more complex and involves much more than the investments purchased through Wood Gundy before RJL became involved in 2004. The Statement of Claim includes claims relating to pledging assets of the Piikani Trust in 2005 and describes transactions during the period December 2004 to February 2007.

[89] The allegations include that Ms. Kostic and RJL failed to fulfill monthly reporting obligations, they failed to invest in authorized securities and mutual funds, they failed to provide material information with respect to commissions and other payments received by them, and they failed to ensure proper liquidity of the trusts.

[90] That may be a defence available to RJL, but Ms. Kostic had ongoing obligations under her management contract with the Nation. Limitation periods in the context of ongoing contractual relationships are complex and will require a significant evidentiary basis to be decided. This is far too complex a situation to be appropriate for summary determination.

[91] There was one constant through this period: Ms. Kostic. She was appointed Investment Advisor to the Piikani Trusts in November 2002. The agreement appointing her was amended when she moved to RJL in November 2004. This argument may to be of assistance to RJL, but limitations issues in relation to ongoing contracts and relationships are more complicated. This is a situation where Ms. Kostic has more exposure than does RJL.

[92] In any event, an investment advisor's responsibilities do not end when they have purchased an investment for their client.

[93] There are no limitations issues that have been raised that are appropriate to be dealt with summarily.

f. The claim against her has been made by the wrong party

[94] Ms. Kostic maintains that the "Piikani Nation" has no standing to bring an action in its own behalf, and that this is an incurable nullity. She cites ***Papaschase First Nation v McLeod,*** 2021 ABQB 415 and ***Lower Nicola First Nation v The Council***, 2012 FC 103.

[95] ***Papaschase First Nation v McLeod*** considered who had authority to represent the Papaschase First Nation. As noted by Justice Bercov at para 14, an Indian Band is a juridical

person that can sue and be sued in its own name. The dispute in that case was the authority the co-plaintiff, Chief Calvin Bruneau, had to commence the action. Bercov J noted at para 17, Papaschase First Nation was a society under the *Societies Act*, RSA 2000, c S-14 and not an Indian band under the *Indian Act*, RSC 1985, c I-5.

[96] Here, the Piikani Nation is the entity recognized under the *Indian Act*. It appears that Ms. Kostic believes that the proper plaintiff is "The Chief and Council of the Piikani Nation", as she describes the defendant in her action Kostic v Piikani.

[97] In my view, this is a distinction without a difference. There is no prospect that this 17-year-old action can properly be dismissed on the basis that the Plaintiff is misdescribed.

[98] The *Rules of Court* contain provisions for correcting misnomers and I expect that Rule 3.62 can easily be applied to cure any deficiency in the description of the Plaintiff here.

[99] That Rule states:

> **3.62(1)** A party may amend the party's pleading, including an amendment to add, remove, substitute or correct the name of a party, as follows:
>
> (a) before pleadings close, any number of times without the Court's permission;
>
> (b) after pleadings close,
>
> (i) for the addition, removal, substitution or correction of the name of a party, with the Court's prior permission in accordance with rule 3.74, or
>
> (ii) for any other amendment, with the Court's prior permission in accordance with rule 3.65;

[100] Where an application needs to be made, the amendment is generally permitted unless there has been prejudice to the other party. Here, there can be absolutely no confusion as to who the claimant is. For a good case interpreting Rule 3.65 see ***Anglin v Resler***, 2022 ABKB 231.

[101] This ground is interconnected with the next issue – the validity of the Band Council Resolution approving the commencement of this action.

g. The commencement of the action was not properly authorized as there was no resolution authorizing this action at a duly called meeting of Council

[102] Ms. Kostic says that there has been no Band Council Resolution ("BCR") to continue this action since 2015, or to authorize the filing of any amended statement of claim. She cites ***Rath and Company v Stoney First Nation***, 2013 ABQB 255, ***Rough v Cold Lake First Nations***, 2016 ABQB 153; ***Transalta Utilities Corporation v Young Estate***, 1997 ABCA 349, and ***Myskiw v Wynn***, 1977 ALTASCAD (CanLII).

[103] I dealt with a similar argument in ***Mikisew Cree First Nation v Rath & Company***, 2023 ABKB 3212. I noted there that the issue, whether Rath & Company had been properly retained by the Nation under a Band Council Resolution, was not adequately addressed by the affidavit evidence in the application and I dismissed the application, but without deciding the validity of the BCR in question.

[104] I do not see this as a straightforward issue as this action was initially commenced on the Nation's behalf by PIC, a corporation wholly owned by the Nation. There are BCRs concerning

the Nation's claims against RJL and Ms. Kostic, but not going back to 2006 when this lawsuit was started. Any determination of this issue will require consideration of all BCRs concerning this litigation and that may require testimony from some or all of the various Chiefs and Council Members who were involved in them.

[105] Additionally, Ms. Kostic raises issues over the scope of matters requiring a BCR. She says that BCRs are required to amend pleadings and that existing actions need to be re-authorized by a CR from new Councils when they are elected.

[106] An application dealing with these issues would undoubtedly be hotly contested, it would likely require substantial evidence and consume considerable time. Any decision would likely be appealed because of the potential consequences of a decision on when BCRs are required in litigation.

[107] These factors make this issue wholly unsuitable for summary proceedings, and they should be dealt with at trial on a full evidentiary record.

[108] An issue I raised with Ms. Zinner and counsel for the Nation while preparing this decision was whether Ms. Kostic had status to raise this issue as she was not a member of the Piikani Nation. I wrote to counsel on November 14, 2023. Ms. Kostic responded on November 15, and Mr. Zinner responded on her behalf with a lengthy submission on November 30. Mr Hawkes responded for the Nation on November 30 as well.

[109] Kostic says that she has been adopted into the Piikani Nation and has status for that reason, along with the fact that as someone affected by a BCR she should be entitled to challenge it. Mr. Zinner cited a number of cases involving challenges to BCRs, although none of them had been brought by someone other than a member of the Nation entitled to vote or by the Nation itself.

[110] This is another issue that is best left for trial. In the context of case managing this lawsuit, I am mindful that after 17 years of pre-trial proceedings, it is time to get this matter concluded. If this were a discrete legal issue or one where the facts were not in dispute it might be possible to use summary proceedings. There are numerous BCRs relevant to this matter

h. The Court of Kings Bench has no jurisdiction over this matter

[111] Ms. Kostic says that the Court of Kings Bench has no jurisdiction to hear this action because the Nation is seeking remedies arising from decisions made by the then-elected Chief and Council. She says that the Chief and Council were a Federal Board under the Federal Court Act. Any complaints about breaches of duty by a federal board, their decisions, invalid Band Council Resolutions and Ms. Kostic's participation fall within the exclusive jurisdiction of the Federal Court.

[112] She cites ***Dakota Plains First Nation v Smoke***, 2022 FC 911 in support of her argument.

[113] That case recognizes that decisions of a Chief and Council may be reviewed by judicial review in the Federal Court. It does not establish a principle that it has "exclusive jurisdiction" over everything go do with a Band Council Resolution. The reference to "exclusive jurisdiction" in that case was part of the Applicant's submissions, not the Court's decision.

[114] The notion of exclusivity comes from Section 18 of the *Federal Court Act*, RSC 1985, C F-7:

> **18 (1)** Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> > **(a)** to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and
> >
> > **(b)** to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[115] Section 28 merely lists Federal Boards subject to s 18.

Judicial review is a potential remedy to challenge a Council decision on the basis that it did not have the power to make such a decision, or that Council breached any duties of procedural fairness in coming to a decision. That does not mean that all decisions of a Council are subject to judicial review, or that judicial review.

Peace Hills Trust Co. v. Moccasin, 2005 FC 1364 (CanLII) distinguishes between a band exercising powers under the Indian Act and "commercial matters". The Court stated at para 59:

> [59] The jurisprudence of this Court has consistently recognized that an Indian band council exercising power conferred by the *Indian Act*, *supra* is a "federal board", within the meaning of section 2 of the *Federal Courts Act*, *supra*. In this regard, I refer to *Frank v. Bottle*, [1994] 2 C.N.L.R. 45 (1993), 65 F.T.R. 89 (T.D.); *Bigstone v. Big Eagle*, [1993] 1 C.N.L.R. 25 (1992), 52 F.T.R. 109 (T.D.); *Jock v. Canada (Minister of Indian and Northern Affairs)*, 1991 CanLII 13610 (FC), [1991] 2 F.C. 355; and *Gabriel v. Canatonquin*, 1980 CanLII 4125 (FCA), [1980] 2 F.C. 792.

[116] The Court held at para 62:

> [62] In the circumstances prevailing here, I conclude that the impugned BCR is not amenable to judicial review since it is unrelated to the exercise of statutory authority pursuant to the *Indian Act*, *supra* or otherwise lies within statutory jurisdiction of the Court. It is a matter arising from contract and to the extent that the Applicant seeks a remedy, that remedy is not available by way of judicial review.

[117] No authority was cited for the proposition that contractual matters involving an Indian Band could only be litigated in Federal Court and as far as I can tell none exists.

[118] It is noteworthy that the Terms and Conditions of the agreement between the Nation and Raymond James Limited provides in paragraph 3:

> 3. Any dispute arising between Raymond James Limited and the Client shall be exclusively within the jurisdiction of the Courts of the Province in which Raymond James Ltd. accepts this agreement.

[119] Ms. Kostic relies on this agreement as a defence and for indemnity purposes. It is likely that it is the Federal Court that has no jurisdiction over these matters having regard to the contractual choice of forum clause.

[120] This ground for summary dismissal is hopeless and frivolous.

The Nation's failure to particularize their claim

[121] Ms. Kostic says the action should be dismissed because the Plaintiff has not particularized their claim in accordance with a demand for particulars served on them on November 1, 2018.

[122] I consider this to be an argument with no chance of success. A claim will only be dismissed for failing to follow the *Rules of Court* in exceptional circumstances. If a party has breached a Court order requiring the performance of a particular step, striking the claim or defence is a possible remedy for civil contempt. Disagreements over the completeness of a reply to demand for particulars are matters which may well be addressed by way of an application. Here, any remedy for alleged non-compliance is premature, as the issue has not been pursued in case management, which is the appropriate forum to resolve something like this.

Conclusion

[123] I will not grant a fiat for any of the intended summary dismissal applications.

[124] Ms. Kostic's proposed applications under Rules 4.33 and 4.31 have no merit and no reasonable chance of success.

[125] Ms. Kostic's proposed applications under Rule 7.3(1)(b) are not appropriate for summary proceedings. The intent of summary dismissal is to promote expedience and economy and shorten proceedings where a fair decision is likely to result from a summary process which is less expensive and more expedient than trial.

[126] I note that Ms. Kostic's draft notice of application says she will rely on a number of materials in support of her summary dismissal application:

(a) her affidavit filed with the draft notice;

(b) her affidavit of December 16, 2020;

(c) her supplemental affidavit(s);

(d) the affidavit of Brian Jackson;

(e) the joint affidavit of Rick Yellowhorn and Rod North Peigan;

(f) the affidavit of Janet Potts;

(g) pleadings and proceedings and affidavits in related actions; and

(h) Discovery transcripts of Doane Crow Shoe, Brian Jacson, CIBC, RJL, and undertaking responses.

[127] It is obvious that what Ms. Kostic is really looking for is a trial. The extent of the materials she seeks to rely on is voluminous and would take days to prevent. Preparation for any summary proceeding would undoubtedly involve extensive cross-examination on these various

affidavits. Numerous pre-hearing applications would be necessary to permit Ms. Kostic to use materials from other lawsuits, as well as to read in discovery transcripts from anyone other then the officers of the parties.

[128] This is clearly not an application that is suitable for summary proceedings. Frankly, it will be far easier and more expedient to have this matter set for trial.

[129] The issue as to whether or not the Nation has suffered any damages is complex and not something that is amenable to an exchange of affidavits. It will require a careful analysis of the various claims as some of the claimed misconduct on Ms. Kostic's part may be compensable regardless of how well the portfolio performed. Breach of fiduciary duty may attract general damages as well as exemplary and even punitive damages in appropriate cases. This will require a significant evidentiary foundation and there would be no economy trying to deal with this issue summarily.

[130] The "disclosed agent" argument deals only with claims in contract, and not in tort or for breach of fiduciary duty. It is not an answer to the whole of the claims against Ms. Kostic.

[131] The account opening documents do not shelter RJL or Ms. Kostic for claims in negligence or breach of fiduciary duty. The terms of the agreement are not a full answer to the Nations claims. This is a heavily fact-dependent area and this is not an issue suitable to be determined on a summary basis.

[132] Ms. Kostic's submission that the Nation has proven no basis for the claims against her is premature and an issue to be determined at trial. This goes to the essence of the claims against Ms. Kostic and cannot conceivably be adjudicated efficiently or in any timely manner on affidavit evidence and cross-examinations on those affidavits. These are issues that can only effectively be determined following a trial.

[133] Limitation issues as described by Ms. Kostic are overly simplistic. This action involves multiple transaction over a number of years. The relationship between the parties and their communications will be key to determining limitation issues, if there are indeed any arguable ones. Again, summary proceedings are not appropriate to determine if there are limitation issues, and if any claims are barred.

[134] I do not see that Ms. Kostic's allegation that the action against her has been brought by the wrong party has any possible chance of success. Any misnomer, if there has been one, is easily cured especially in the context of it only having been raised 17 years into the action.

[135] The issue of whether the action has been properly authorized by Band Council Resolutions is again something that is not in the pleadings. There are significant factual issues concerning the BCRs relevant to this action, as well as Ms. Kostic's status with the Nation as well as her status to challenge the BCRs. These arguments will likely require *viva voce* evidence from a majority of the Band Council members at the relevant times. This is not an issue that is reasonably amendable to summary proceedings.

[136] Ms. Kostic's argument that Band Council is a Federal Board and as such anything arising out of a Band Council decision can only be dealt with in Federal Court has no chance of success. There is authority that some decisions of a Band Council can be judicially reviewed. That does not mean that every decision or action is amenable to judicial review, or that the Courts of the Provinces where First Nations are located do not have jurisdiction to deal with contractual, commercial, and other civil litigation matters. There is no authority for Ms. Kostic's position.

[137] Failure to give particulars when demanded is not a basis to summarily dismiss a complex action. This application has no chance of success and would be a complete waste of the court's time.

Observations

[138] I want to make it clear that none of my comments or decisions above go to the merits of the Nation's claims or Ms. Kostic's defences. Commenting on the merits of procedural matters, or of purely technical defences does not mean that grounds to terminate the relationships between the Nation and Ms. Kostic and RJL existed, or that the Nation has sought any loss for which it should be compensated, or whether the Defendants have valid and meritorious defences.

[139] The role of the case management judge is not to pre-judge the case on its merits; it is to assist the parties identify the real issues in dispute and try to manage an efficient and effective process to have the issues resolved.

[140] It is clear this lawsuit desperately needs a trial. Summary proceedings are not always the shortest way to a decision or resolution. Here, the numerous applications and appeals from applications have bogged down the progress of the litigation. Unnecessary applications and appeals from unsuccessful applications if they are allowed to proceed will only add to the already surprising delays to date. I do not know if questioning is complete, but for possible applications to compel answers to refused questions. I do not know if undertakings have been complied with, or whether compliance is still required. These are issues that can in most instances be resolved expeditiously.

[141] I do not see that Ms. Kostic is significantly prejudiced by requiring this matter to proceed to trial. There is no obvious shortcut here, and none of the proposed bases for summary dismissal have enough possibility of success to warrant the delay inherent in hearing and deciding them, and then waiting for the appeal processes to run their course. Ms. Kostic will have a full opportunity to argue these issues at trial.

[142] The only potential exception to this is Ms. Kostic's proposed application under Rule 4.33. I recognize that my decision on the fiat application on this issue may give the appearance of a decision following full argument following a full application. My role as case manager is as a gatekeeper and I wanted to fully explain my conclusion that Ms. Kostic's applications relating to delay have no merit and should not proceed.

[143] I intend to set this case for trial by Court Order to commence at the earliest reasonable date. So that I may be able to assess the length of time to schedule the trial for, and when to schedule it, I require the parties to provide me with the following:

1. Confirmation as to the completeness of questioning and undertaking responses; if they are not complete, the parties must identify what further questioning is required and what undertakings are still outstanding. I will set a schedule for those steps to be taken.
2. Confirmation as to the completeness of record production; if it is not complete, the parties must identify what further records need to be produced and why such records are relevant and material to issues at trial. I will then set a schedule for those steps to be taken.

3. A witness list for any lay witnesses the parties intend to call;
4. A list of any expert witnesses the parties intend to call; I assume by this stage the parties have identified the expert witnesses they require for the purpose of presenting their cases and responding to the other party's anticipated evidence. If experts have not already been identified and reports have not been exchanged, they I will set a schedule for those processes;
5. The length of time each party expects to use for presentation of their case, including any reply;
6. The length of time each party expects to use for cross-examination of any opposing party's witnesses;
7. A list of any judges who should not preside at trial and the reason for any requested recusal, recognizing that case management judges should not hear the trial (that would automatically exclude me and Justice Nation; ACJ Rooke is retired and Justice De Wit is now on the Court of Appeal). Other judges who have had some involvement should not be presiding, including Justice Jeffrey, Justice Anderson, and Justice Feasby; and
8. Times during 2025 when they are not available for trial.

[144] Since the earliest the trial of this action could be set will be early 2025, that will should give ample time to deal with any of the matters identified by the parties, as well as for trial preparation issues such as document management. I would not expect the parties to spend time trying to work out agreed facts as the time involved in doing so would likely exceed any savings resulting from any agreements made.

[145] The trial will involve not just the Nation and Ms. Kostic, as RJL continues to be a Defendant and CIBC World Markets is a third party. I would ask them to provide the same information within the same time frame.

[146] I have no information as to the status of the other Defendants, Janet Potts, and Dexter Junior Smith. I would ask counsel to advise me as to the role they expect Ms. Potts and Mr. Smith to play in the trial, and to contact them if necessary.

[147] I ask the parties to provide this information by January 15, 2024, although if that deadline is too soon for any party for any reason, please let me know. That is a target date unilaterally picked by me, but it is subject to change for any valid reason by any party.

Heard by way of written submissions.
Dated at the City of Calgary, Alberta this 19th day of December, 2023.

Robert A. Graesser
J.C.K.B.A.

Appearances:

Gabor Zinner
Zinner Law Office
Limited retainer counsel
for the Applicant Liliana Kostic

Liliana Kostic
Self-Respondent Litigant

Robert Hawkes, KC
JSS Barristers
for the Applicant Piikani Nation

Shane King
Macleod Law LLP
for the Defendant Raymond James Ltd
(did not participate in application)

Ken Mills
Blake, Cassel & Graydon LLP
for the Third-Party CIBC Trust Corporation
(did not participate in application)

Corrigendum of the Memorandum of Decision
of
The Honourable Justice Robert A. Graesser

Paragraph 48 - Rule 5.33 has been amended to Rule 4.33.
Paragraph 124 – Rules 5.33 and 5.31 have been amended to Rule 4.33 and 4.31.