

Natives' actions consolidated

By Chantelle MacDonald
St. John's

The federal Minister of Indian Affairs and Northern Development has won a bid to consolidate three actions in New Brunswick's Court of Queen's Bench by trustees of the Bouctouche First Nation Land Claim Trust Agreement.

Trustees Donna Simon, Barbara Babineau and Jeffrey LeBlanc first started an action against band members William Sanipass, Gilbert Sanipass and Jacqueline Ward, alleging that the defendants used positions of power in the band to transfer and withdraw monies from settlement bank accounts established for the \$3,025,000 settlement paid by the minister to the band in 1992. The trustees alleged that the defendants breached the trust placed in them by virtue of their positions of power and that trust funds were misapplied and misappropriated.

The trustees also started an action against the Royal Bank of Canada for permitting withdrawals and transfers allegedly made by William Sanipass, Gilbert Sanipass and Jacqueline Ward. The trustees alleged that the bank dealt with and knowingly assisted others to make the impugned transactions, making it responsible for the losses.

A third action alleges that the minister participated in all of the illegal activities and was negligent or breached his fiduciary duties.

Both the minister and the bank have filed defences, but the original action was never served on the three defendants and the trustees have now abandoned it.

The minister's motion to have them joined as third parties was strongly objected to by the plaintiff trustees. While the trustees had no real objection to consolidation of the minister's and bank's actions, they said the third-party proceedings were out of time.

Despite the fact that the time limit for serving the third-party

notice was long past, Justice George Rideout found that the three defendants would not be prejudiced by becoming third parties rather than defendants and allowed the Minister to issue Third Party Notices against them.

As to whether or not the remaining two actions should be consolidated, the bank's only objection to the consolidation was if it could not have its own solicitor and conduct its own defence, a concern which arose out of a 1995 precedent, *Frigault v. DeYoung*, [1995] N.B.J. No. 606.

In *Frigault*, Queen's Bench Justice Paul Godin ruled that in a consolidated action, individual defendants must be represented by one solicitor of record only.

Finding that the proceedings were well-suited to a consolidation because "the proceedings have a question of law or fact in common and the relief claimed arises out of the same transaction or occurrence or series of transactions or occurrences," Justice Rideout ruled that the bank and minister could be represented by counsel of choice.

"I believe the *Frigault* decision can be distinguished from the case at bar," he wrote. "In *Frigault* it was the Defendants who were the same and had the same interest. Consequently they should be limited to one lawyer. In the case before me it is just the opposite. It is the Plaintiffs who are the same and have the same interest. Therefore, there is nothing to preclude the Defendants, in the case before me, from having their individual lawyers. If the Plaintiff had started one action against all Defendants, there is nothing in the Rules to prevent each Defendant having their own lawyer.

"I can see no reason why this would not be the same in a consolidated action such as the one before the Court," he said.

No costs were awarded.

Reasons: *Simon v. Canada (Minister of Indian Affairs and Northern Development)*, [2004] N.B.J. No. 351.

CASE COMMENTARY

Mediator compelled to give evidence

By Lynn Bevan

In July, 2004, Justice Sidney Lederman of the Ontario Superior Court concluded in *Rudd v. Trossacs Investments Inc.* ([2004] O.J. No. 2918) that a mediator can be examined on his knowledge and understanding of whether a defendant was a party to a settlement agreement that was reached at a mediation.

The order came following a motion made by the plaintiffs in a multi-party lawsuit for rectification of written Minutes of Settlement.

The plaintiffs brought the motion to establish that one of the defendants, Morris Kaiser, had been inadvertently left out of the Minutes of Settlement. The defendants opposed the motion, arguing that Kaiser was not a party.

This motion came as a result of Kaiser attempting to enforce an order of costs in a summary judgment motion heard before, but decided after, the mediation.

The mediation took place in January 2004, over two days. Four of the five plaintiffs reached a settlement with the defendants.

Of significance is that the mediator handwrote the Minutes, "with input from counsel, with the names of the defendants inserted by counsel for the defendants by cutting and applying the names from the title of proceedings to the signature page."

Kaiser's name, although found in the title, was omitted from the signature page. Counsel for the defendants signed on behalf of the defendants, and counsel for the plaintiffs did not notice that Kaiser's name was not listed.

About three weeks later, the fifth plaintiff agreed to the same terms as the other four, meaning that each plaintiff agreed to pay \$32,000 to the defendants. The parties exchanged releases and obtained an Order that dismissed the action and counterclaim, per the Minutes.

Again, counsel for the plaintiffs said that he did not notice that Kaiser's name was missing from both the Order and the Releases, as he had reviewed each of the documents against the Minutes only.

About three months prior to the mediation, in September, 2003, Kaiser had brought a summary judgment motion which was consented to by the plaintiffs. The judge hearing the motion ordered costs but the plaintiffs disputed the amount. The judge reserved her decision, and released the decision three weeks after the Order dismissing the actions had been taken out.

The judge on this motion, Justice Susan Himel, had not been told of the settlement. Kaiser tried to enforce the order for \$21,000 costs and the plaintiffs submitted that he could not, as the settlement reached at the mediation had been one of all claims.

Justice Lederman addressed both privilege and confidentiality at mediation sessions.

First, he considered privilege for settlement discussions, meaning the communications that occur at mediation in an attempt to resolve the dispute. This privilege has been codified in the court's Rule 24.1.14, which requires: "All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice discussions." The judge also reviewed the Ontario Court of Appeal's decision in *Rogacki v. Belz*, 67 O.R. (3d) 330, which interpreted Rule 24.1.14.

Justice Lederman applied *Rogacki* as holding that without-prejudice discussions "are not admissible in evidence unless they result in a concluded resolution of the dispute" (emphasis added by Lederman, J.).

He concluded that the Court of Appeal had implied that mediation privilege is not absolute, and applies only where the mediation fails to resolve the litigation, but not where it is resolved. If settlement discussions result in an agreement, the communications (at the mediation) may be tendered in proof of a settlement where the existence or interpretation of the agreement is in issue, as it was on this motion.

Justice Lederman then reviewed the mediation agreement that the parties had signed. It included the provision that neither the mediator's notes nor his recollections could be subpoenaed in "this or any other proceeding." They had also agreed that all communications and documents shall not be used in any proceeding.

Again, the judge found that, once a settlement is achieved but its interpretation is in issue, "disclosure of mediation discussions may be necessary to ensure substantive justice." However, the disclosure is to be limited and provided only if the mediator's evidence would be useful. The judge noted that the mediator had drafted the Minutes, with counsels' input, and "therefore, is in a position to provide important information as to whether the Minutes of settlements as executed are inconsistent with any prior oral agreement of settlement among the parties."

The order for disclosure was



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limited to whether or not Kaiser was a party to the settlement.

This case raises several practice issues for both mediators and litigation counsel.

First, many mediators have mediation agreements similar to the mediator in the *Rudd* decision. This decision makes it clear that the mediator may be called on where the terms or existence of a settlement are later in issue. This would be so even if the mediation is not court-mandated, as the judge in *Rudd* notes that Rule 24.1.14 codifies the common law.

Second, the judge found it significant that the mediator had drafted the Minutes of Settlement (with input from counsel, the significance of which is not noted in the case) since, before ordering that the mediator could be examined, the judge had to consider whether the mediator could shed light on the issue of whether the settlement included Kaiser.

Many mediators do not draft Minutes, leaving that job to counsel, and this case reinforces that practice. With unrepresented parties, not drafting Minutes would be even more important, to avoid a claim that the mediator has provided legal advice.

Third, many mediators have a provision in their mediation agreement about what they will do with their notes from the mediation. An example might be that the mediator advises, and the parties agree, that he or she will destroy all notes within a month of the final mediation session.

This motion was heard five months after the settlement was reached, meaning that for many mediators, only the mediator's memory would be available at the examination.

Lynn Bevan is a Toronto-based lawyer, investigator and mediator, and co-founder of *ADRWeb.ca*, a web-based database that allows lawyers to search for the availability of qualified mediators and arbitrators.

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