2011 CarswellBC 993, 2011 BCSC 525

Clayton v. Lower Nicola Indian Band

Veronica Gail Clayton also known as Teri Clayton, Plaintiff and Lower Nicola Indian Band, Aaron Sam and Yvonne Basil, Defendants and Don Moses, Third Party

British Columbia Supreme Court [In Chambers]

R.M. Blair J.

Heard: April 15-20, 2011
Judgment: April 26, 2011
Docket: Kelowna S-S-86527

Counsel: B. Hardwick, for Plaintiff (appearing only on April 15, 2011)

R.W. Grant, for Defendant, Lower Nicola Indian Band

No one for Defendant, Aaron Sam and the now deceased, Yvonne Basil

D.E. Gruber, for Third Party

Subject: Civil Practice and Procedure; Public; Torts

Civil practice and procedure.

Professions and occupations.

***R.M. Blair J.*:**

1 The third party, Don Moses, seeks an order that the third party notice filed by the defendant, the Lower Nicola Indian Band ("LNIB"), be struck out or set aside on the basis that it fails to disclose a reasonable claim or is otherwise an abuse of this court's process as it involves the judicial review of decisions by Mr. Moses which can only be heard by the Federal Court. In the alternative, Mr. Moses seeks an order removing the law firm of Heenan Blaikie as solicitors for the LNIB in respect to the third party claim against him.

2 By way of preliminary comments, I note that this one-day Chambers application commenced on April 15, 2011. The application did not finish on schedule and counsel required another half day on April 21, 2011 to complete their submissions. Counsel, at the commencement of the application, advised that an examination for

discovery of Mr. Moses was scheduled for April 28, 2011 and that it would assist the parties if I delivered my reasons for judgment prior to the date set for the discovery of Mr. Moses. Counsel noted that the discovery would only proceed as scheduled pursuant to a previous court direction if I denied both the application to dismiss the third party notice and the application to remove Heenan Blaikie as solicitors for the LNIB with respect to the third party claim.

3 These reasons respond to the application brought by Mr. Moses, but they do so with brevity, the result of having to assist counsel in pursuing this action within court directed time constraints. Were a greater period available in which to consider the applications, I anticipate that these reasons would have been longer, more reflective perhaps of the comprehensive submissions articulated by counsel, the considerable amount of affidavit material filed, and the approximately fifty authorities which counsel delivered in support of their respective positions. Although these reasons are brief in the overall context of the applications, I have considered all the material filed and my conclusions would have been the same regardless of the length of these reasons.

Conclusion

4 In the result, for the reasons which follow, I dismiss the applications brought by Mr. Moses to strike the third party claim and direct that the judicial review of the decisions made by Mr. Moses be heard by the Federal Court, and to remove Heenan Blaikie as solicitors for the LNIB with respect to the third party claim.

Background

5 The LNIB and the plaintiff, Veronica Clayton, on January 14, 2008, entered into a contract which named Ms. Clayton as the LNIB's executive director a position she occupied until on or about January 8, 2010 when the LNIB terminated her employment contract. On March 2, 2010, Ms. Clayton commenced an action for wrongful dismissal and defamation against the LNIB, Mr. Sam and Ms. Basil. The LNIB says Ms. Clayton was dismissed for just cause.

6 The LNIB is governed by a band council consisting of a chief and seven councillors. The third party, Mr. Moses, was the chief from 2007 to October 1, 2010, and the defendants, Aaron Sam and the now deceased Yvonne Basil were councillors in 2009. After by-elections in October 2009, the band council appeared divided into two factions, with one faction of five members, including Mr. Sam, and Ms. Basil opposed to Mr. Moses and the other faction including Mr. Moses, Connie Joe and Harold Joe.

7 The development of the factions led to considerable discord within the band's council as exemplified in how the band dealt with Ms. Clayton's dismissal. The councillors opposing Mr. Moses terminated Ms. Clayton's employment and they also took action to suspend Mr. Moses resulting in a Federal Court action which led in June 2010 to the reinstatement of Mr. Moses as chief.

8 Following his reinstatement, Mr. Moses entered into discussions with Ms. Clayton in an effort to resolve her action against the LNIB and he ascertained that she required $100,000 to settle. Mr. Moses attempted to convene a council meeting in August and September 2010 to pass a resolution providing for the resolution of Ms. Clayton's claim by entering into a settlement agreement which provided that the LNIB would pay her $100,000. The five councillors opposed to Mr. Moses declined to attend the meetings which Mr. Moses attempted to convene and he, therefore, lacked the quorum of five members of the band council required to address the settlement resolution. Mr. Moses, purporting to act within the Band's Chief and Council Policy & Guidelines, unilaterally reduced the quorum from five to three members of the band council and with councillors Connie Joe and

Harold Joe, together with himself, Mr. Moses on September 30, 2010 attained his quorum of three which purported to pass the band council resolution approving the settlement agreement with Ms. Clayton.

9 On the following day, October 1, 2010, his last day as chief, Mr. Moses, acting on behalf of the LNIB, entered into the settlement agreement with Ms. Clayton which required the LNIB to pay her $100,000. Following Mr. Moses' departure from office, the LNIB refused to be bound by the separation agreement and Ms. Clayton subsequently amended her claim to sue upon the agreement. On December 17, 2010, the LNIB filed the third party notice against Mr. Moses claiming that he lacked the authority to enter into the settlement agreement with Ms. Clayton on behalf of the LNIB, that he breached his fiduciary duty in attempting to bind the LNIB to the settlement agreement, and sought indemnification and damages from Mr. Moses.

Application by Mr. Moses that LNIB's Third Party Notice be heard in Federal Court

10 In its third party notice under the heading relief sought, the LNIB seeks:

1) an order that it is entitled to contribution and indemnity from Mr. Moses for any judgment, damages, awards, liquidated sum or costs which the LNIB is required to pay Ms. Clayton under the terms of the purported settlement agreement executed by Mr. Moses;

2) damages for breach of fiduciary duty;

3) indemnification for all actual legal fees and disbursement incurred by the LNIB in defending the action brought by Ms. Clayton to enforce the purported settlement agreement or alternatively costs of the third party proceedings;

4) post-judgment interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c.79; and

5) such further and other relief as to this court seems just.

11 In its third party notice, the LNIB asserts that the grounds for its claim against Mr. Moses are that:

1) the LNIB's Chief and Council Policy and Guidelines provides that a quorum of the council shall be five members in good standing;

2) Mr. Moses lacked the authority to reduce the quorum from five members of the LNIB to three members;

3) the LNIB chief and council did not authorize Mr. Moses to make any settlement offer or enter into any settlement agreement with the plaintiff, Ms. Clayton;

4) Mr. Moses did not have authority, actual, ostensible or apparent, to enter into the purported settlement agreement with the plaintiff, Ms. Clayton, on behalf of the LNIB; and

5) if the court finds Mr. Moses did have ostensible or apparent authority to enter into the purported settlement agreement with the plaintiff, Ms. Clayton, on behalf of the LNIB, then Mr. Moses:

(a) exceeded his authority in entering the agreement; and

(b) breached his fiduciary duty to the LNIB in doing so.

12 Mr. Moses asserts that the third party claim is flawed as it challenges his exercise of jurisdiction or powers and should have been brought before the Federal Court for judicial review to first determine the legality of his decisions. Further, Mr. Moses asserts that the third party claim constitutes an impermissible collateral attack and must be struck as an abuse of process pursuant to Rule 9-5(1)(d) of the *Supreme Court Civil Rules.*

13 Mr. Moses submits that the *Federal Courts Act*, R.S.C.1985, c. F-7 at s.18 gives the Federal Court exclusive jurisdiction to review the decisions of "any federal board, commission or other tribunal". Mr. Moses says that as the chief of an Indian Band he is considered to be a federal board, commission or other tribunal, a position consistent with the decision in *Whitefish v. Saskatchewan (Ministry of Indian Affairs and Northern Development*, [1985] S.J. No. 464 (QL). Hrabinsky J. found in *Whitefish* that the chief of an Indian Band was a person exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, namely the *Indian Act*, R.S.C. 1985, c. I-5 and that the matter, therefore, fell within the exclusive original jurisdiction of the Federal Court.

14 Counsel for the LNIB expressed doubt that the chief of an Indian Band falls within the description of federal board, commission or other tribunal, but did not pursue the matter. I am content that for the purposes of this application Mr. Moses comes within the description of federal board, commission or other tribunal as used in s.18 of the *Federal Courts Act*

15 As I understand his position, Mr. Moses submits that the third party claim amounts to a collateral attack and an abuse of process as the LNIB is attempting to use Ms. Clayton's civil action brought in provincial superior court to collaterally challenge decisions he made as a federal board, commission or other tribunal and that a challenge to these particular decisions had to be pursued first by way of a review by the Federal Court: *Stephen v. HMTQ*, 2008 BCSC 1656. Mr. Moses submits that the Supreme Court of British Columbia, a provincial superior court, can only entertain LNIB's claim for damages after the Federal Court on judicial review quashes the decisions made by Mr. Moses.

16 The LNIB disputed Mr. Moses' submission that the Federal Court had exclusive jurisdiction to review the decisions he made as chief as referred to in the third-party claim, and that the LNIB could only seek damages from him in the Supreme Court of British Columbia if after judicial review the Federal Court quashed his decisions. The LNIB relied in its response to the position taken by Mr. Moses on the decision in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62. I will devote considerable attention in the reasons to that case as I conclude it has a significant effect on the application brought by Mr. Moses.

17 *TeleZone Inc.* claimed it was wronged by the decision of the Minister of Industry Canada to reject TeleZone's application for a licence to provide telecommunications services. *TeleZone* sought compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses of $250 million, pleading breach of contract, negligence, and, in the alternative, unjust enrichment arising out of monies it had thrown away on the application to obtain the licence.

18 The Attorney General of Canada (the "Crown") applied to strike TeleZone's action in the Ontario Superior Court asserting that TeleZone first had to bring an action in Federal Court because its action involved an attack on a decision made by Industry Canada, a federal administrative board or tribunal. The Crown submitted that pursuant to s. 18 of the *Federal Courts Act*, TeleZone had to apply for a judicial review by the Federal Court of Industry Canada's decision and obtain an order from the Federal Court overturning Industry Canada's decision. The Crown submitted that only after obtaining a Federal Court order quashing Industry Canada's de-

cision could TeleZone, bring an action in the Ontario Superior Court for damages against Industry Canada, the second action being required as the Federal Court had no jurisdiction to award the damages sought by TeleZone.

19 The Crown's submission was consistent with what is referred to as the "*Grenier* Principle" founded on the decision in *Canada v. Grenier*, 2005 FCA 348in which the Federal Court of Appeal held that under s. 18 of the *Federal Court Act* the Federal Court had exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals, and that unless and until a claimant such as TeleZone obtained from the Federal Court an order quashing the minister's decision it could not proceed with a claim for compensation in a provincial superior court as to do so would amount to an impermissible collateral attack on the minister's order.

20 Morawetz J. in the Ontario Superior Court dismissed the Crown's application, a decision upheld by the Ontario Court of Appeal in *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892in which it dismissed the Crown's appeal, affirming Morawetz J.'s decision that TeleZone's claims could proceed in the Superior Court of Justice. Those decisions led to the Crown's appeal to the Supreme Court of Canada in which the Crown again submitted that *TeleZone* first had to obtain an order from the Federal Court quashing the decision of the Minister of Industry Canada and that TeleZone's claim amounted to an impermissible collateral attack on the minister's order due to the Federal Court's exclusive jurisdiction over judicial review of decisions such as that reached by the Minister of Industry Canada. As noted by LNIB's counsel, the Crown's position in *TeleZone* reflects that advanced by Mr. Moses in the application before this court.

21 The Supreme Court of Canada in *TeleZone* expressly overruled the decision in *Grenier* when it dismissed the Crown's appeal. Binnie J., writing for the court, concluded at para. 81 that:

> The Superior Court of Ontario has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the Federal Courts Act to prevent the Ontario Superior Court from adjudicating this claim.

22 Binnie J., at para. 3, expressed the court's concern about the bottleneck effect on private law claims for damages arising from government decisions which were being held back by the *Grenier* Principle. He wrote:

> [3] The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. The *Grenier* principle would shield the Crown from private law damages involving any of these people or entities in respect of losses caused by unlawful government decision making without first passing through the Federal Court. Such a bottleneck was manifestly not the intention of Parliament when it enacted the judicial review provisions of the Federal Courts Act.
>
> [4] The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts "in all cases in which relief is claimed against the Crown" as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the "lawfulness" of the government decision said to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim

pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction — not concurrent, i.e., subordinate to the Federal Court's decision on judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.

[5] The Ontario Court of Appeal rejected the Attorney General's position, and in my respectful opinion, it was correct to do so. *Grenier* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.

23 Binnie J. later in his reasons referred to the situation created by the *Grenier* Principle, writing in his analysis:

[18]This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

[19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[23] I do not interpret Parliament's intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.

24 Binnie J., at para. 24, wrote that judicial review was directed at the legality, reasonableness, and fairness of procedures employed and actions taken by government decision makers with a view to enforcing the rule of law with the overall objective of good governance. He described these public purposes as fundamentally different from those underlying contract and tort cases primarily designed to right private wrongs with compensation or other relief. He noted at para. 26 that the process of the *Federal Courts Act* in judicial reviews involves a summary procedure with a 30-day time limit, no pre-hearing discovery, no *viva voce* evidence and the Federal Court cannot order damages. I take from his conclusions that a procedure effective for judicial review is not necessarily effective for a claimant seeking compensation as a result of a government decision. At para. 56, Binnie J. also noted that the grant of relief on a judicial review is discretionary and can be denied even if the applicant establishes valid grounds for the court's intervention. The approach differs in a common law action for damages

where, if the elements of the claim are established, compensation ought generally to follow as a matter of course.

25 At para. 27, Binnie J. addressed the question of whether there was a practical benefit to the litigant found in the *Grenier* Principle in situations such as that encountered by *TeleZone* or the LNIB. He wrote:

> [27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision, to undergo the Grenier two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was ultra vires, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a collateral attack on the ministerial order under the Radiocommunication Act that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

26 Binnie J., at para. 42, wrote that any derogation from the jurisdiction of the provincial superior courts in favour of the Federal Court or otherwise required clear and explicit statutory language to this effect and concluded that no such language was found in the applicable statutes.

27 At paras. 63 to 67 inclusive, Binnie J. concluded that in *TeleZone* there were three reasons why the Crown's collateral attack argument ought not succeed in the circumstances:

> 1) the doctrine of collateral attack may be raised by the Attorney General in the provincial superior court as a defence if it is deemed to be appropriate, but the availability of the defence argument does not justify inserting the Federal Court into every claim for damages predicated on an allegation that the government's decision that caused the loss was invalid or unlawful;
>
> 2) the specific object of TeleZone's action was not to invalidate or render inoperative the government's decision, but to recover damages for losses suffered as a result of the Minister's decision; and
>
> 3) a collateral attack is implicated in situations where a claimant asserting a civil claim for damages needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based.

28 Binnie J. in his conclusions stated:

> [76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.
>
> [77] In the U.K., a similar position has been expressed by the House of Lords in *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624, *per* Lord Bridge, at pp. 628-29:
>
> > [W]here a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or

> defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

29 He continued at para. 78

> [78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.
>
> **I. Application to the Facts**
>
> [79] TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was not done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.
>
> [80] To the extent that TeleZone's claim can be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), I conclude, for the reasons discussed, that the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negates any inference the Crown seeks to draw that Parliament intended the detour to the Federal Court advocated by *Grenier*. The TeleZone claim as pleaded is dominated by private law considerations. In a different case, on different facts, the Attorney General is free to raise "collateral attack" as a defence and the superior court will consider and deal with it.

30 I have considered the decision in *TeleZone* and concluded that it is applicable to the situation in the instant case. The LNIB has responded to Ms. Clayton's claim brought against it in this superior provincial court by filing a third party claim against Mr. Moses who, as chief of an Indian Band, comes within the description of federal board, commission or other tribunal as used in s.18 of the *Federal Courts Act.*

31 LNIB's claim involves private law considerations in which it seeks compensation and indemnification from Mr. Moses for any damages awarded Ms. Clayton in her action against the LNIB. I do not find it to be a collateral attack as asserted by Mr. Moses. As in *TeleZone*, the LNIB does not seek to set aside or quash decisions made by Mr. Moses in entering the settlement agreement with Ms. Clayton in 2010, rather LNIB's claim against Mr. Moses is founded on the LNIB's allegation that in entering into the settlement agreement Mr. Moses acted without apparent or actual authority and breached his fiduciary duty to the LNIB for which if Ms. Clayton is successful in her claim against the LNIB, the latter looks to Mr. Moses for indemnification and compensation.

32 The circumstances also lend themselves to having this action heard in it is entirety by the British Columbia Supreme Court, given what appears to be an inevitable evidentiary overlap between Ms. Clayton's action against the LNIB and the latter's claims against Mr. Moses.

33 I am not satisfied that Mr. Moses has established that the third party claim is in its essential character a claim for judicial review with only a thin pretence to a private wrong. I find that the LNIB has pleaded a reasonable private cause of action for damages and should be permitted to "get on with it" to use Binnie J.'s expression found in para. 78 of *TeleZone.*

34 I conclude that in applying the reasoning and conclusions expressed in *TeleZone*, that the Supreme Court of British Columbia has the jurisdiction to hear the LNIB's third party claim against Mr. Moses.

Application to Strike the Third Party Notice

35 In his notice of application, Mr. Moses seeks an order pursuant to Rule 9-5(1)(a)(b) and (d) of the *Supreme Court Civil Rules* that the third party notice and the claim of the LNIB be struck out or set aside as it fails to disclose a reasonable claim, or is unnecessary, scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court.

36 In his initial argument, Mr. Moses dealt only with Rule 9-5(1)(d) in addressing his position that the third party claim was a matter which lay within the exclusive jurisdiction of the Federal Court, an assertion that I have rejected. In his reply argument, Mr. Moses submitted that given the concessions found in LNIB's argument that it was unnecessary to argue the questions raised under Rule 9-5(1)(a) and (b).

37 Given that Mr. Moses did not withdraw his application for relief under Rule 9-5(1)(a) and (b), I feel bound to at least address the assertions brought by Mr. Moses under Rule 9-5(1)(a) and (b). In order to accede to this part of the application brought by Mr. Moses, I must be satisfied that it is plain and obvious that the claims found in the third party notice cannot succeed. That is, I must be satisfied that the outcome of the claim at trial is "beyond reasonable doubt", and does not disclose a question to be tried on the basis of the pleadings as they stand or as they might be amended (*Kripps v. Touche Ross & Co., 15 B.C.A.C. 184* at p.4), or do not disclose a reasonable cause of action.

38 The LNIB claims compensation and indemnification from Mr. Moses if in the result Ms. Clayton is successful in her claim against the LNIB based on the settlement agreement she entered into with Mr. Moses, the latter purportedly acting on behalf of the LNIB. The LNIB asserts that its claim against Mr. Moses arises from a breach by Mr. Moses of his fiduciary obligation to the LNIB.

39 Given the pleadings as they stand, I am unable to say that it is plain and obvious that the claims brought by the LNIB against Mr. Moses cannot succeed or, put another way, the outcome of the claim at trial is beyond reasonable doubt.

40 I dismiss the application brought by Mr. Moses to strike the third party claim pursuant to Rule 9-5(1) (a) and (b) of the Supreme Court Civil Rules.

Application that Heenan Blaikie be Removed as Solicitors for the LNIB

41 Mr. Moses also applies for an order removing the law firm of Heenan Blaikie as solicitors of record in respect of the third party claim, asserting that during his tenure as chief of the LNIB he dealt with and gave in-

structions to Dean Crawford, a lawyer with Heenan Blaikie which in or about March 2010 had been retained by the LNIB to act in connection with the action commenced by Ms. Clayton.

42 Mr. Moses asserts that it is wrong for Heenan Blaikie to act against him in the third party claim as it was he who communicated with Mr. Crawford with instructions regarding Ms. Clayton's claim between March and October 2010, and that at no point did Mr. Crawford advise him that he was in jeopardy of being sued by the LNIB. Had Mr. Crawford so advised him, Mr. Moses attests that he would have acted differently and would not likely have shared his information and opinions with Mr. Crawford as he did.

43 However, as Mr. Crawford noted, he was unaware that Mr. Moses was going to execute the settlement agreement with Ms. Clayton on October 1, 2010, which gave rise to the LNIB's third party claim against Mr. Moses. October 1st was also Mr. Moses' last day as chief, and I am unaware of evidence suggesting that Mr. Crawford and Mr. Moses were in contact on or after October 1, 2010.

44 In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, the court, in determining whether a conflict of interest existed as a result of a previous solicitor client relationship, had to ascertain whether the lawyer received confidential information attributable to the solicitor client relationship relative to the matter at hand and is there a risk that the confidential information will be used to the client's prejudice.

45 In the situation involving Mr. Moses and Mr. Crawford, the initial question is whether there was any solicitor client relationship between those individuals or whether Mr. Moses occupied the position described as a "near client" of Heenan Blaikie. Mr. Crawford deposed that the LNIB in March 2010 retained Heenan Blaikie to act on it is behalf and that upon being retained he took instruction from the LNIB's chief and council. At no time did Mr. Crawford consider that he had been retained by Mr. Moses, although he communicated by email and occasionally by telephone with Mr. Moses, but never in fact met with Mr. Moses in person.

46 Mr. Crawford ensured that when communicating with Mr. Moses he advised the band councillors of those communications, particularly when the communications dealt with a subject he knew required the involvement and approval of the whole council.

47 In *CLS Catering Services Ltd. v. Mahil*, 2010 BCSC 1441, the defendant Mahil sought to have Borden Ladner Gervais ("BLG") precluded from representing CLS for whom Mr. Mahil formerly worked as its controller. Mr. Mahil asserted that BLG had represented him in his personal business, and during his involvement with BLG in its capacity as the solicitors for CLS he developed a near-client relationship with lawyers with BLG to whom he had confided personal information. Madam Justice Bruce held that Mr. Mahil could not expect lawyers with BLG to keep information he had given them from their client, the plaintiff CLS, adopting the reasoning of Neilson J., as she then was, in *Milverton Capital Corp. v. Thermo Tech Technologies Inc.*, 2002 BCSC 773.

48 *Milverton Capital Corp.* involved applications brought in two actions for a declaration that the law firm, Clark, Wilson, be restrained from acting for parties in the actions because of a conflict of interest. Neilson J. wrote:

> 55] ... acting as a solicitor for a corporation necessarily involves taking instructions from its representatives. Where, as here, the instructing representative is a director or officer of the corporation, he owes a fiduciary duty to the company. Similarly, the corporate solicitors stand in a fiduciary relationship to their client. In these circumstances, Mr. Branconnier could have little reasonable expectation that his communications to Clark, Wilson in the course of corporate matters would be kept confidential from the Thermo Tech Group:

Gainers Inc. v. Pocklington (1995), 125 D.L.R. (4th) 50 (Alta.C.A.) at pp. 58-60, leave to appeal dismissed (1995), 130 D.L.R. (4th) vii.

49 Neilson J. concluded that in cases where corporate solicitors have developed a close relationship with an instructing corporate representative, it may be wrong to permit the solicitors to use confidential information disclosed by that individual against him. She wrote:

> [58] As well, in *Gainers Inc. v. Pocklington, supra*, at p. 57 Coté J.A. observed:
>
> > ... sometimes a company shareholder might seek legal advice about his personal position and his shareholding from the same law firm which also acts for the company. That can pose serious dangers of a conflict for the law firm.

50 Coté J.A. continued at p. 58 to make it clear that a fact-specific inquiry is required in such circumstances, to ensure that the corporate solicitors did not develop such a close relationship with an instructing corporate representative that it would be wrong to permit the solicitors to use confidences from that individual against him.

51 Neilson J. found the onus to prove a near-client relationship lay with the client, stating:

> [60] In considering the facts here in the context of these authorities, the onus is on Mr. Branconnier to establish that a solicitor/client relationship or a relationship as a "near client" based on confidential communications, developed between him and Clark, Wilson in the course of his dealings with them as a representative of the Thermo Tech Group.

52 I have reviewed the material describing the relationship between Mr. Moses and Mr. Crawford and conclude that their relationship did not include a solicitor client relationship. Although Mr. Moses dealt with Mr. Crawford from time to time, he did so as the band chief and, therefore, a member of the band council. His position required that he deal with Mr. Crawford as counsel for the LNIB, although on the evidence Mr. Moses did not necessarily concur with the advice proffered, stating in his affidavit sworn March 3, 2011 that he disagreed with the advice provided by Heenan Blaikie with respect to Ms. Clayton's claim. I am unable to find that Mr. Moses was part of the "team" formulating LNIB's approach to Ms. Clayton's claim. Mr. Moses is no neophyte when it comes to the legal system, this instant action being just the latest in a number of litigation matters which over the years required him to retain solicitors to act on his behalf. Nor am I able to find that Mr. Moses shared any confidential information with Mr. Crawford.

53 Further, I find that Mr. Moses has failed to establish that he had a near-client relationship between himself and Mr. Crawford or other legal counsel forming part of the Heenan Blaikie law firm. The contact between Messrs. Moses and Crawford was relatively short-term covering just part of 2010, it was indirect in the sense that there was no personal meetings between them, and that at no time do they appear to have had any discussions of a personal nature. I conclude their relationship was so limited as to render it impossible to conclude there existed a near-client relationship between Mr. Crawford and Mr. Moses as asserted by Mr. Moses.

54 I dismiss the application brought by Mr. Moses to remove Heenan Blaikie as counsel with respect to the LNIB's third party claim.

Conclusions

55 I dismiss the applications brought by Mr. Moses to strike the third party notice and to remove Heenan Blaikie as counsel for the LNIB with respect to the third party claim.

Costs

56 The LNIB has been successful in this application and barring further submissions from counsel to be brought within 60 days of the filing of these reasons, the LNIB will have it is costs pursuant to Appendix B Scale B of the *Supreme Court Civil Rules*.

END OF DOCUMENT