

CANADA / JUDGMENT

Blueberry River First Nation v. Laird

2020 BCSC 1615

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1615 Blueberry River First Nation v. Laird

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blueberry River First Nation v. Laird,

2020 BCSC 1615

Date: 20201030

Docket: S22853

Registry: Fort St. John

Between:

Blueberry River First Nation and Deloitte Wealth Management Services LLP

as Trustee of the Blueberry Trust

Plaintiffs

And

David Laird also carrying on business as Woodbridge Professional

Services Group, Joseph Apsassin, Russell Apsassin, Malcolm Apsassin,

Patrick Chipesia, Nig Creek Contracting Ltd., Jane Doe, John Doe,

ABC Corp. and XYZ Corp.

Defendants

And

Blueberry River First Nation

Third Party

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

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Places and Dates of Trial:

Fort St. John, B.C.

February 18-21, 25-28, March 2-6, 9-13, and September 14-18, 2020

Vancouver, B.C.

September 21-25, 2020

Place and Date of Judgment:

Fort St. John, B.C.

October 30, 2020

Table of Contents

Introduction. 5

The Plaintiffs and the Blueberry Trust. 5

The Apsassin Defendants. 9

Joseph Apsassin. 9

Malcolm Apsassin. 10

Patrick Chipesia. 10

The Defendant David Laird.	13
The Claims against the Apsassin Defendants.	14
Further Facts Relevant to the Claims against the Apsassin Defendants.	15
The Chief and Council's December 2009-December 2011 Term of Governance.	15
Blueberry River Enterprises LP.	16
Other Dealings with Industry.	17
Financial Issues.	17
Social and Health Issues.	20
Governance Issues.	20
Conclusion.	21
The BTS Board's December 2009-December 2011 Term..	21
Evidence of the Removal of Family Representatives.	22
Communications from Lawyers over Alleged or Potential Breaches of Trust	25
The October 12, 2011 BTS Resolution to Reimburse \$1 Million.	31
Chief and Council's December 2011-December 2013 Term of Governance.	32
Working with Industry.	33
Expectations of Future Revenue from Claims.	35
Managing the Nation's Finances.	35
Social, Health and Housing Issues.	37
Conclusion.	38
The December 2011-December 2013 Term of Governance for the BTS board.	38
Introduction.	38
The Impugned Trust Resolutions.	39
The December 2013-December 2015 Governance Period for the Nation and BTS.	40
Meeting with Merli de Guzman.	41
Ms. Sterritt Hired as Band Administrator	42
BC Hydro Site C Agreement Not Signed.	43
Significant Funds for the Band In Future.	44

The December 2013-December 2015 Term for the Board of Directors of the BTS.	44
\$1 Million Obtained from the Trust	44
Commencing this Lawsuit	45
Cidel Appointed.	46
December 2015 and After	46
The Legal Analysis of the Claims against the Apsassin Defendants.	47
Knowing Assistance.	47
Facts Relevant to Knowing Assistance, and Further Related Legal Analysis.	50
Further Case Authority Addressing Knowing Assistance.	64
Notice to Admit	66
"Evenhandedness" Argument	67
The Plaintiffs' Other Claims against the Apsassin Defendants.	69
Nig Creek.	69
Breach of Fiduciary Duty.	69
Claim of Negligent Governance.	77
An Argument by the Apsassin Defendants that the Plaintiffs Have Suffered No Loss.	81
Conclusion.	81
The Claims against David Laird.	82
Overview.	82
Further Facts Regarding David Laird.	85
Legal Analysis.	89
Breach of Fiduciary Duty.	89
Knowing Assistance.	90
Knowing Receipt	91
Negligence and Breach of Contract	92
Conclusion.	93

Introduction

- [1] The Plaintiff First Nation, and the present trustee of the Trust for the First Nation's members, sue members of two past governments of the First Nation, who were also directors of the trustee of the Trust. Against those Defendants, the Plaintiffs allege a breach of fiduciary duty, breach of trust and negligence. In essence, the central dispute is to do with the transfer of approximately \$11 million from the Trust to the First Nation and related entities, in a number of transfers over a four-year period in 2009-2013.
- [2] The Plaintiffs also sue David Laird, and his partnership with his wife, Woodbridge Professional Services Group. David Laird served as the Band administrator. Against him, the Plaintiffs allege breach of contract, negligence, breach of fiduciary duty, knowing assistance and knowing receipt.

The Plaintiffs and the Blueberry Trust

- [3] The Blueberry River First Nation ("BRFN", "Band", "First Nation" or "Nation") is a "band" as defined in s. 2(1) of the Indian Act, R.S.C. 1985, c. I-5 [Indian Act].
- [4] The BRFN includes approximately 500 members, about half of whom live on the BRFN reserve. The reserve is located about an hour and a half by car north of Fort St. John, in northeast British Columbia.
- [5] In *Blueberry River Indian Band v. Canada* (Department of Indian Affairs and Northern Development), 2001 FCA 67, Rothstein J.A., as he then was, described a "band" as follows, at paras. 15 and 16:
- [15] The definition of "band" does not constitute an Indian Band as a legal entity. Rather, I take it from the definition of "band", and other provisions of the Indian Act, that in relation to rights to an Indian reserve, a band is a distinct population of Indians for whose use and benefit, in common, a reserve has been set aside by the Crown. This interpretation was adopted by Macfarlane J.A. in *Oregon Jack Creek Indian Band Chief v. CNR* (1989), 34 B.C.L.R. (2d) 344, at 349-350 (C.A.):

The members of a band do not constitute a legal entity. The alleged wrong is not to a legal entity (the band) but to the members of the band who are entitled to the use and benefit of the land and the fisheries. For the action to be derivative the band would have to be regarded as a legal entity, like a corporation, and the members of the band would have to be regarded as akin to shareholders. In *Amodu Tijani v. Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 (P.C.), Lord Haldane cautioned against construing aboriginal title in terms which are appropriate only to traditional legal concepts. . . .

- [16] However, it does not follow that because an Indian band is not a legal entity, rights accruing to the band are the rights of its members or their descendants in their individual capacities. The definition of "band" uses the term "in common" in relation to the interest that the members of the band have in the reserve. The term "in common" connotes a communal, as

opposed to a private, interest in the reserve, by the members of the band. In other words, an individual member of a band has an interest in association with, but not independent of, the interest of the other members of the band. Again, in *Oregon Jack*, this is succinctly described by Macfarlane J.A. at 348:

It is common ground that the rights being asserted are communal in nature. In *Joe v. Findlay*, 26 B.C.L.R. 376, [1981] 3 W.W.R. 60, 122 D.L.R. (3d) 377 at 379, this court held that the statutory right of use and benefit of reserve lands was a collective right in common conferred upon and accruing to the band members as a body and not to the band members individually.

- [6] The Blueberry Trust ("Trust") is referred to in the style of cause in this proceeding. Deloitte Wealth Management Services LLP ("Deloitte") is named as the trustee. Deloitte was made trustee by order of this Court on September 22, 2016. Deloitte replaced a company named Cidel Trust Company ("Cidel") as the trustee. Cidel had been appointed trustee by this Court's order made on December 10, 2015. No explanation was given of why Cidel or Deloitte became the trustee of the Trust. Plaintiffs' counsel had no knowledge of their appointments when they were made, or for sometime afterward, although the appointments were made sometime after this action was started. Deloitte and Cidel played no part in the trial, and no evidence was led of any steps they took, or are taking, as trustee.
- [7] The trustee prior to Cidel, and at all the material times, was the Blueberry Trust Society ("BTS"). Until recent amendments of the notice of civil claim, the two Plaintiffs were the BRFN and the BTS. The BTS served as the trustee of the Trust from the date the Trust was created, on June 28, 2007, until the appointment of Cidel in December 2015. The key time period in this dispute is December 2009-December 2013.
- [8] The Trust, and predecessor trusts, were established to hold and manage \$76 million the BRFN received in 1998 from its claim against Canada for damages arising out of the surrender of reserve land in 1945, and Canada's disposition of the underlying mineral rights. That money had been managed in several earlier trusts up to the time the Trust was established in 2007, but the complex history of trust arrangements before 2007 is not important to the resolution of the present claims.
- [9] The Trust Bylaws in place at the relevant times provided that the Chief and Council elected to govern the Band also served as the directors of the BTS, while the BTS itself was the trustee.
- [10] The best recollections of the witnesses at trial was that a lawyer, Merrill Shepard, had prepared the Declaration of Trust and the Constitution and Bylaws of the BTS. The documents produced at trial showed that Mr. Shepard assisted the BTS board of directors with Trust administration matters until at least 2010.

- [11] Mr. Shepard did not testify at trial, nor was his file produced by the Plaintiffs, but the decision to place the Chief and Council at the core of the decision-making over the Trust presumably reflects a choice to align the administration of the Trust closely with the objectives and priorities of the governing Council of the day.
- [12] That structure has benefits, but also builds in conflicting interests for decision makers. In an article, published in 2008, by Ontario lawyer, Nancy Kleer, entitled, Key Considerations for Developing Trust Agreements for Aboriginal Beneficiaries (Olthuis, Kleer, Townshend, Barristers & Solicitors, Toronto, Ont.), the author's observation about the relevant considerations was as follows:

When the beneficiaries of a trust are one or more aboriginal communities and their members, there is of course a desire that some or all of the trustees will be members of the community (including possible representation for off-reserve members), given their affiliation with and understanding of their community. This is especially so when trust property will be used to fund different proposals that come from the community or (as may be permitted) that come from other parties who may make proposals that are for the benefit of the community although the applicant may not be a community member.

As known by any community trustee who has administered a large trust which includes discretion as to how funds will be handled for the benefit of his or her community, the community trustee is often placed in the position of making tough and sometimes quite unpopular decisions about whether a proposal should or should not be funded from the trust. Conflicts with elected Councils, or with other aboriginal leaders who are not entirely satisfied with how the trust is being administered, or who are dissatisfied with decisions made by the trustees if the trustees are not "at the pleasure" of the elected Council, are not uncommon. In some cases, this tension could reduce over time as the role of the trust (separate from the role of Chief and Council) comes to be better understood, but it is to be expected that this will take time or that some level of tension may always remain.

The developers of the trust need to be realistic about the possibilities for this kind of tension. Because they best know their community, they should aim to make decisions about how best to ensure the trustees can function at doing their job - managing the trust property in accordance with the terms of the trust agreement. This might lead to a decision that the community trustees should include, as a majority or even be comprised entirely of persons appointed by elected Council. Alternatively, the settlors might decide that the Council should have a trustee representative, but not a majority voice, amongst the community trustees. In other cases, it may be the desire to completely separate the functions of Council from that of the Trust. If that is the case, it is wise to consider building into the trust the requirement for meetings with Council, to ensure as far as possible that decisions of the trust and the Council are well-integrated for the best interest of the community.

[Emphasis added.]

- [13] Whether, and if so, how Mr. Shepard considered such matters is unknown, but the result of the Trust's structure was that the Chief and Council were placed at the centre of the decision-making in relation to the Trust, rather than non-governing community members or a professional trustee.
- [14] An unusual aspect of the present action is that the money the Plaintiffs now claim from the Defendants, approximately \$11 million, was money which left the Trust and passed to the Plaintiff Band, and related entities, for the purposes and benefit of the Band's members, who are the Trust's intended beneficiaries. Treating the Trust interest as a Plaintiff interest, which it is given that the present trustee is a Plaintiff, the Plaintiffs' primary claim nets to zero, at least in the sense that the \$11 million in issue left one Plaintiff (the Trust interest) and went to the other Plaintiff, the Band and related entities. Yet the trustee has never sued the Band for the return of the money.

The Apsassin Defendants

- [15] There are two groups of Defendants.
- [16] One group, the Apsassin Defendants, includes a former Band Chief, Joe Apsassin, and former Band Councillors, the late Russell Apsassin, Malcolm Apsassin and Patrick Chipesia. (The Defendant Nig Creek Contracting Ltd. is a company owned and controlled by Mr. Chipesia. There is a small claim against that company, which will be addressed toward the end of these reasons.)

Joseph Apsassin

- [17] Joseph Apsassin is 69 years old. He left school after grade five (which was the highest available grade at the time in the on-reserve school). Joseph and his brothers were taught by their father, Edward Apsassin, to work hard and be self-sufficient, as their father was concerned that one day, the Canadian government might abandon its obligations to indigenous people. Taking that advice to heart, Joseph Apsassin went to work after leaving school and, in addition to hunting and trapping with his father and grandfather, worked as a labourer for local farmers. Later, he worked as a contract labourer for oil companies and in other industries, and over time purchased heavy equipment (a hoe, an excavator and a bobcat) that he operated himself or rented out.
- [18] When the BRFN became designated in 1977 as its own Band, following the division of the Fort St. John Band into the Doig River First Nation and the BRFN, Joseph Apsassin became the BRFN's first Chief. Since then, he has served as either Chief or a Councillor many times.

- [19] It was when Joseph Apsassin was Chief in the 1980s that the original claim against Canada was filed that led, in 1995, to the successful judgment (on liability) from the Supreme Court of Canada (*Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344). That judgment was the foundation of the 1998 settlement. The monies were paid into trusts and eventually funded the Blueberry Trust when it was formed in 2007.

Malcolm Apsassin

- [20] Malcolm Apsassin is 63 years old. He remained in school through grade nine, and later took a course in business management in the late 1980s. He worked in forestry, and in the oil and gas industries, and throughout his life, he has also hunted and trapped. He also served in the Nation's government as Chief from December 2001 to December 2003, and then as a Councillor between December 2009 and December 2011, and again between December 2011 and December 2013.
- [21] When he became a Councillor in December 2009, Malcolm Apsassin automatically became a director of the BTS, but he chose to resign from that role in September 2010. His reason for resigning was because at that time he wanted to focus on his duties as a Councillor. When he was re-elected as a Councillor in December 2011, he was again, automatically, made a member of the board of the BTS, and he served in both roles until December 2013.

Patrick Chipesia

- [22] Patrick Chipesia is 48 years old. His father is Joseph Apsassin, and his mother is Kathy Chipesia.
- [23] Mr. Chipesia attended school until part-way through grade 11, and then began working in forestry, and in the oil and gas industries. He later took some additional schooling in silviculture at Northern Lights College in Chetwyn.
- [24] In December 2007, Mr. Chipesia was elected as a Band Councillor. That term of the Nation's government was led by the late Chief Norman Yahey. The other Councillors were Marvin Yahey, Sherry Dominic and Sandra Apsassin.
- [25] In December 2009, Mr. Chipesia was again elected Councillor, serving on Council with Chief Joseph Apsassin and fellow Councillors Sherry Dominic, Randy Yahey, and Malcolm Apsassin.
- [26] As a member of Council, Mr. Chipesia was automatically a member of the BTS board of directors, but in September 2010, he chose to resign from the board and serve as a Councillor only.

[27] In the December 2011 election, Mr. Chipesia was not re-elected to Council. In early 2012, he was hired to serve as the manager of a property owned by the Trust, Pink Mountain, and in addition, he worked in the lands department for the Nation. In those capacities he worked out of the Nation's administrative offices on the reserve.

[28] In January 2014, Mr. Chipesia's employment with the BRFN was terminated, and in January 2015 he began working for Petronas Canada as an oil and gas operator, where he continues to work today.

[29] Russell Apsassin died in May of 2019.

[30] Below is a chart showing the Chief and Council for three successive governments of the BRFN. It can be seen that the Defendants were some, but not all, of the Council members during the two terms from December 2009 to December 2013.

First Nation's Government (2-year terms)

(Defendants in bold type)

Elected December 2009

Elected December 2011

Elected December 2013

Chief: Joe Apsassin

Councillors:

Sherry Dominic

Randy Yahey

Malcolm Apsassin

Patrick Chipesia

Chief: Joe Apsassin

Councillors:

Russell Apsassin

Lisa Hotte

Malcolm Apsassin

Wayne Yahey

Chief: Marvin Yahey

Councillors:

Norma Pyle

Wayne Yahey

Lisa Hotte

Sherry Dominic

The Chief and Councillors were automatically directors of the Trustee, BTS.

- [31] The Chief and Council elected in December 2013 initiated this litigation. It was they, and not the forensic auditors, who selected who would be sued, or not sued, and which period (December 2009-December 2013) would be examined to formulate the claim. (The only qualification is that one of the forensic auditors testified that the claim period should end in December 2013 because that was when the Chief and Council were elected who initiated the litigation.)
- [32] The action was commenced, but not served, five months before the Band members were asked to vote on whether a civil action should be considered. The vote was 62-62, including the votes by the Chief and Council elected in December 2013. When the Band members voted, the claims against the present Defendants, and several others against whom the claims were eventually dropped, painted a darker case against them than is found in the present pleading. Misappropriation of funds, fraud and self-dealing were alleged. The claim by the time of trial (second amended notice of civil claim, or "2nd FANOC") was in its fourth iteration. No satisfactory explanation was given as to why some councillors were sued and others not sued from the 2009-2013 terms. Nor was it made clear why that four-year period alone was investigated when significant funds flowed from the Trust to the Band both before December 2009 and after December 2013 on the same basis now complained of in the 2nd FANOC for the 2009-2013 period.
- [33] The BRFN is comprised of people originating from two distinct language groups, the Cree language group on the one hand, and the Dene-zaa, or "Beaver" language group on the other. Within the BRFN, there are differing narratives as to why this is so. The narratives were summarized in a June 1, 2016 Community Mediation Report as follows:

Perhaps one of the most pressing challenges is the extent of the pervasive division that is prevalent within the community. The division is generally characterized by members as being between the two main family and cultural groups, the Yaheys, who are of Beaver descent (Dene-zaa), and the Apsassins who are of Cree descent. The family narrative of the community as told by the Yaheys is that the Apsassin family was given permission to stay for a year near the location of the current community of BRFN. This coincided with the Department of Indian and Northern Affairs formation of bands in the region. INAC inadvertently included the Apsassin Cree family as being a part of the Dene-zaa. Alternatively, the Cree descendants claim that the area was part of their traditional migration route and [that they] are legitimate members of BRFN and signatories of Treaty 8.

- [34] From the circumstances set out above, the Apsassin Defendants apprehend that the claims against them in this action are politically motivated, and not based on bona fide legal grievances.
- [35] On the other side, the current leadership of the Band points to the value of the Trust dropping substantially while the Apsassin Defendants were the Chief or on Council, which in itself raised flags of suspicion about possible breaches of fiduciary duty and other wrongs.
- [36] Whichever of those two perspectives is closer to reality, the legal analysis below will focus on the claims as they are pleaded, based on the facts as they are found.

The Defendant David Laird

- [37] David Laird was the Band administrator for the BRFN from March 2011 until his retirement from that position in December 2013. As such, he was the senior staff member at the Band, akin to a city manager at a municipality.
- [38] Mr. Laird had previously served as the community services manager at the BRFN from January 2007 to April 2009. He had kept in touch with the Band between 2009 and his return in 2011.
- [39] Mr. Laird has worked for first nations throughout much of British Columbia since 1988. He obtained his BA in history in 1969 from the University of British Columbia. He has numerous certifications as an educator. Today, he is 76.
- [40] After Mr. Laird left his work at the BRFN in December 2013, Marvin Yahey, the newly-elected Chief at that time, asked him to come back to work for the Band. When Mr. Laird returned in early 2014, to meet with the new Council and senior staff, he was asked if he would come back as acting Band administrator. He had only 10 weeks available in his work schedule in 2014, and he agreed to serve as acting Band administrator for that period.
- [41] Mr. Laird is a partner, with his wife, Brita Laird, in the Defendant Woodbridge Professional Services Group ("Woodbridge"). Ms. Laird also worked for the BRFN, in nursing and in other health-related capacities. The Plaintiff Band and the then Plaintiff BTS sued her in this action. There was no basis for any claim against her, and the Plaintiffs eventually discontinued the suit against her.

The Claims against the Apsassin Defendants

- [42] The main claims remaining in the 2nd FANOCOC against the Apsassin Defendants are breach of trust and breach of fiduciary duty. Those are the claims referred to in the introduction to the Plaintiffs' closing submissions. However, other legal questions also need to be addressed. Principal among those is whether these Defendants knowingly assisted the trustee, BTS, in allegedly breaching the Trust, fraudulently or dishonestly. Of less significance, but still necessary to consider, is whether Mr. Chipesia's company, Nig Creek Contracting Ltd., knowingly received Trust funds paid in breach of trust. Whether the

Apsassin Defendants were negligent as governors, in their roles as Chief and Council managing the First Nation's affairs, is also alleged and must be considered. There are, in addition, some smaller issues considered briefly toward the end of these reasons.

- [43] The breach of trust claim against the Apsassin Defendants has no direct application to those Defendants on the facts of this case because they were not the trustees. The trustee under the Declaration of Trust was the former Plaintiff, the BTS. As the first recital in the Declaration of Trust provides:

WHEREAS, at the direction of the Chief and Council of the Blueberry River First Nations, the Blueberry Trust Society has been established for the purposes of acting as Trustee of the Blueberry Trust for the benefit of the members of the Blueberry River First Nations

- [44] The Apsassin Defendants were the directors of the BTS trustee. They were not themselves the trustees. In the result, the central question in this case is whether the Apsassin Defendants knowingly assisted the BTS to fraudulently or dishonestly breach the trust. The first step is to determine whether the BTS itself fraudulently or dishonestly breached the Trust. The second question is whether the Apsassin Defendants knowingly assisted the BTS to do so. That question must be resolved in accordance with the governing legal analysis, found in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 [Air Canada], and related authorities.
- [45] Before turning to that legal analysis, I summarize the facts of the Apsassin Defendants' time in office as Chief and Council and as directors of the BTS.

Further Facts Relevant to the Claims against the Apsassin Defendants

The Chief and Council's December 2009-December 2011 Term of Governance

- [46] In December 2009, the Nation held an election as required under the Indian Act. Joseph Apsassin was elected Chief, and Randy Yahey, Malcolm Apsassin, Sherry Dominic and Patrick Chipesia were elected as councillors.
- [47] As members of Chief and Council, those individuals automatically became members of the BTS board of directors.
- [48] Little or no evidence was adduced by the Plaintiffs as to what any of the Apsassin Defendants personally did or did not do during the December 2009-December 2011 term, as distinct from what the Chief and Council as a whole did or did not do, acting together as a governing body.
- [49] Apart from Randy Yahey, who died before trial, all members of the December 2009-December 2011 Council testified at trial (Joseph Apsassin, Malcolm Apsassin, Patrick Chipesia and Sherry Dominic), and all of them said that they worked co-operatively to govern the Band. No one was excluded from meetings. There is no documentary evidence that calls into question that evidence.

- [50] Ms. Dominic is also a member of the current Council. She did not give evidence that any of the Apsassin Defendants did anything in particular that caused Council as a whole to do anything differently than it otherwise might have.
- [51] All members of the December 2009-December 2011 Council who testified explained that meetings were regularly held, usually in the council room, and minutes of the meetings were kept. Most often, Danielle Talbot kept the minutes, but if she was not available, someone else performed that task. Agendas were prepared and circulated in advance for the meetings, along with binders of the materials the Chief and Council were asked to consider.
- [52] Unfortunately, most of the agendas, binders and minutes that were before the Chief and Council for either of the impugned terms were not available at trial. All that is known is that agendas, minutes and meeting materials were created for each meeting of Chief and Council and of the BTS board, and that the minutes were taken and filed.
- [53] The absence of those materials has meant that the Defendants have had to defend their actions ten years ago without having many of the key decision-making documents to reference.

Blueberry River Enterprises LP

- [54] One of the initiatives of the December 2009-December 2011 government was the formation of the Nation-owned company, Blueberry River Enterprises LP ("BRE"). BRE was to serve as a primary point of contact between the Nation and industries who wanted to work with Band members and their companies. When the Nation negotiated accommodation agreements with industry participants, for example, it negotiated commitments to contract with BRE. In addition, BRE independently pursued and secured jobs. Internally, BRE was tasked with distributing the work fairly among the Band members and companies that had the capacity and skills to do the work, and to distribute training opportunities to members who were interested in developing skills. As the Nation was the sole shareholder of BRE, profits that BRE made could be paid out by dividend to the Nation for the benefit of all members.
- [55] Patrick Chipesia testified that during the December 2009-December 2011 term, he believed BRE was succeeding in its mandate, and had the potential to generate a strong revenue stream for the Nation and its members.
- [56] Malcolm Apsassin testified that he believed BRE had potential to provide employment for those members of the Nation who wanted to work in the oil and gas, and forestry industries. In addition, he believed that the Nation would receive significant funds through its 100% ownership of the shares of BRE. Malcolm Apsassin recalled that one of the major projects that could provide work for BRE was the Site C dam.
- [57] Joseph Apsassin did not have specific recollections of how BRE was functioning, but shared the view that BRE had potential, and was expected to be successful.

Other Dealings with Industry

- [58] Bringing industry dollars into the Nation was important to the December 2009-December 2011 Chief and Council, whether through work opportunities for BRE, joint ventures between the Nation and outside companies, or impact benefit agreements whereby the Nation would receive a stream of revenues as accommodation for work taking place on its traditional lands.

Financial Issues

- [59] The Nation's fiscal year-end was March 31, and each year the Nation's finances were audited. The audited financial statements were used by the Nation for managing its finances, and were submitted to Indigenous Services Canada ("ISC") so that it could review and consider the health of the Nation's finances in relation to the programs ISC was funding, and also more generally.
- [60] Because the Band's elections in 2009 were held in December, the first opportunity for the new Chief and Council to see a new consolidated audited statement regarding the Nation's finances was in mid-2010. It was then submitted to ISC. It then took ISC several months to review the financial statement and provide its comments to the Nation.
- [61] Internally, the Chief and Council reviewed the audited financial statements, and met with the auditors to discuss them. A general meeting of the Nation's members was also held, in which the auditors presented the audit results to the membership and answered questions.
- [62] Ms. Merli de Guzman, beginning in 2007, was a funding services officer at ISC. As such, she managed funding agreements between Canada and various first nations. In 2008, the BRFN file came to her desk at ISC, as one of 12-15 first nations for whom she had responsibility.
- [63] Ms. de Guzman testified for the Plaintiffs as one of approximately 13 witnesses they called. Most witnesses in the trial, on both sides, appeared in their testimony to remember and address the facts as best they could, given the passage of time and the absence of many records. Ms. de Guzman today is employed full time by the Band, as its director of operations. In my view, Ms. de Guzman, as a witness, appeared to be an advocate for the Plaintiffs, and against the Defendants. I cannot to give her testimony the weight I otherwise might because it appears to be overly selective and biased.
- [64] One of the challenges for the Band from ISC's funding protocols was that extensive reporting by the Band was needed in order for funding to continue. If the administrative reports were not submitted as required, some ISC funding was "frozen" until the reports were provided. In the December 2009-December 2011 period, many of the Nation's programs were already on the "freeze list", and some had been for lengthy periods.

- [65] All of the members of the two Councils in 2009-2013 testified that they considered financial issues within the Nation as they arose, particularly when such matters were brought before them for consideration and decisions, usually by the Band administrator. It was not the Chief and Council's direct responsibility to complete the reports for ISC, that was a task for the Nation's administrative staff to complete. The Chief and Council's role was to address financial issues from a governance perspective, as required.
- [66] Documents in evidence showed the December 2009-December 2011 Chief and Council taking a number of steps to address the Nation's financial procedures and financial issues that were of concern at the time. It needs to be remembered that when the Chief and Council took office in January 2010, there were no monthly or quarterly financial statements being generated. The first financial statements they received were only available near the end of July 2010. ISC's input was not received until the fall of 2010. It should be remembered as well that throughout 2010, Chief and Council were also having difficulty retaining a Band administrator. Nevertheless, there were several positive developments:
- (a) For the period up to January 2011, an activity report by the financial controller sets out several changes and improvements in administration and in the finance department;
 - (b) In January 2011, the finance department began preparing and filing bank reconciliations on a monthly basis;
 - (c) In March 2011, David Laird was hired as Band administrator, and Chief and Council agreed with his advice that hiring a competent director of finance was a priority;
 - (d) In July 2011, accountant Gordon Ferguson's suggestions as to how to improve financial controls were received and began to be implemented;
 - (e) In August 2011, financial and accounting consultant Cecil Cheveldave was retained;
 - (f) In October 2011, Ron Paracuelles was hired by the Chief and Council as the director of finance;
 - (g) In November 2011, Chief and Council received Mr. Cheveldave's Financial Administration Capacity Review Report;
 - (h) Chief and Council supported the efforts of Mr. Laird and Mr. Paracuelles to implement Mr. Cheveldave's recommendations.
- [67] Chief and Council did not have the skills to reform the financial department themselves. All they could do was obtain skilled advice, try to retain skilled employees, and support the reform proposals that were recommended. That is what they did. It was not an easy task, in part because it is difficult to retain skilled employees to work for the Nation due, at least in part, to the isolation of the reserve. In the circumstances, they generally took appropriate steps, and improved the financial department's performance while maintaining what they believed was an appropriate balance as between curbing overspending and maintaining needed social and health support programs.

Social and Health Issues

- [68] Financial matters were not, of course, all that the Chief and Council had to deal with. Of significant importance were the many health and social issues that members of the Nation faced, and in some cases, struggled with. Drug addition, domestic violence, mental health and the health and safety of the Nation's children were all important issues for the Chief and Council to address.
- [69] As Mr. Laird explained, the health and wellbeing of the members was a priority for the December 2009-December 2011 Chief and Council, and they emphasized that in their first meetings with him. In addition to supporting the health department, school, and working with the RCMP in relation to gang issues, they retained Totten and Associates, in September 2011, to deliver workshops to the members and provide consulting services, and supported implementing Mr. Totten's October 2011 Action Plan to Address Social Challenges.

Governance Issues

- [70] The Chief and Council also took positive steps toward improving governance by retaining a former Chief, and Calgary lawyer, Linda Chipesia, to prepare a Governance Manual, which was completed in November 2011.

Conclusion

- [71] To summarize, in relation to the claim of negligent governance of the Nation as against Joseph Apsassin, Malcolm Apsassin and Patrick Chipesia for the governance term of December 2009-December 2011, the record does not distinguish between their role as individual members of Chief and Council, and the conduct of the Chief and Council as a whole. The evidence elicited at trial, including from Sherry Dominic, the Plaintiffs' witness who was a councillor during that period, showed a governing group that worked together, did its best to address the many issues and challenges that the Nation faced during that time, and performed its duties satisfactorily.

The BTS Board's December 2009-December 2011 Term

- [72] A further issue is the performance of Joseph Apsassin, Malcolm Apsassin and Patrick Chipesia on the BTS board of directors between December 2009 and December 2011.
- [73] In accordance with the Trust Bylaws, following the December 2009 Council election, the BTS board automatically included the newly-elected Chief and Council. The BTS board of directors at that time also included five additional people, sometimes referred to as the "Family Representatives". The Family Representatives included Lisa Hotte, Barbara Chipesia, Frances Wolf, Marianne Adekat and Georgina Yahey.

- [74] In a letter dated June 11, 2010, the Family Representatives were notified that they had not been properly appointed to the BTS board, and as a result, their appointments were terminated. The advice pursuant to which the letter was drafted was from lawyer Roger Smith, and the letter was drafted by him. The Family Representatives did not contest this notification, nor is the correctness of the legal advice put in issue here. Chief and Council did not re-appoint new Family Representatives at that time, nor did any subsequent Chief and Council, including the Chief and Council that was voted into office in December 2013, and commenced this lawsuit.
- [75] The Plaintiffs' allegations in relation to the conduct of Joseph Apsassin, Malcolm Apsassin and Patrick Chipesia on the December 2009-December 2011 BTS board centre on three concerns.
- [76] First, the Plaintiffs allege, or at least imply, that the reason new Family Representatives were not appointed after June of 2010 was in furtherance of a scheme conceived and executed by the Apsassin Defendants to have unfettered access to the Trust funds, both for the remainder of the December 2009-December 2011 governance term, and also for the December 2011-December 2013 governance term.
- [77] Second, the Plaintiffs point to correspondence from lawyers in the December 2009-December 2011 period as "notice" to the Apsassin Defendants that certain expenditures or conduct by the trustee would constitute a breach of trust. That "notice" allegation feeds into the Plaintiffs' allegation that the subsequent BTS board, elected in December 2011, caused additional breaches of trust by authorizing the BTS to allow various transfers of the Trust money.
- [78] Third, the Plaintiffs say that an October 12, 2011 payment from the Trust to the Nation of \$1 million was in breach of the Trust rules.
- [79] The facts in relation to those three concerns are discussed below.

Evidence of the Removal of Family Representatives

- [80] As noted above, the Trust was formed on June 28, 2007. The terms of the BTS Bylaws provided that members of Chief and Council were automatically BTS board members, and they could appoint up to three additional directors to the board.
- [81] Between June 2007 and June 2011, despite these provisions in the Bylaw, five additional directors were appointed to the BTS board, sometimes referred to as Family Representatives. Although not formalized in the BTS Bylaws, or elsewhere, some witnesses said that the idea was for the family directors to serve as a conduit for information to flow between their extended families and the BTS board, as well as to dilute the influence of the Chief and Council on the BTS board. There were differing opinions offered in the testimony as to whether the latter objective was achievable through the Family Representatives. Some witnesses pointed out that the Chief and Council could simply appoint people who would

generally support the initiatives and direction of Chief and Council, so that there would be, in practice, no dilution of the Chief and Council's influence.

- [82] The evidence also showed that the presence of the Family Representatives did not have the effect of stopping the expenditure of Trust funds in ways that some people later alleged was in breach of the Trust Declaration. For example, it was a BTS board, including Family Representatives, who took the position that the portion of the Trust funds being held for the Nation's minors would not receive interest. That position was later found to be contrary to trust principles and this Court directed interest payments be made (Blueberry Interim Trust (Re), 2011 BCSC 769). In addition, distributions of Trust monies in 2008, and the making of a large loan in 2008 for the purpose of constructing the Community Administration Facility, were events that occurred with Family Representatives on the BTS board, and which have been asserted by lawyers Merrill Shepard and Karl Stephan to have been contrary to the terms of the Trust Declaration.
- [83] When the new Chief and Council took office in December 2009, Joseph Apsassin's diary records that there was a meeting the next day among the BTS board members, and another on the following day. Over the course of the next year and a half, the BTS board carried on its work, although Ms. Dominic recalled that Family Representatives Lisa Hotte and Barbara Chipesia sometimes made the BTS board's work challenging due to their propensity to question everything.
- [84] Ms. Dominic's recollections are not surprising. Ms. Chipesia, from the documentary evidence, had a propensity to advance, and distribute widely, serious but unfounded allegations about professional advisors and the BTS board members, past and present. (Ms. Chipesia was subpoenaed to be a witness for the Plaintiffs, but did not appear at trial, and no request was made in Court to compel her to attend.)
- [85] Ms. Hotte also proved to be a challenging workmate on the BTS board. In the course of testifying, Ms. Hotte, not infrequently, did not respond to straightforward questions, and instead portrayed herself as a perennial outsider, having grown up "outside of the Band". Ms. Hotte was quick to attack, and slow to work constructively to get anything done.
- [86] In any event, as it turned out, a legal issue arose which caused the make-up of the BTS board to be changed. In late 2010, lawyer Roger Smith was introduced to Chief and Council through the BRFN's negotiating consultant, Shakir Alwarid. In early 2011, Mr. Smith was asked to review the structure of the Trust and provide advice to the BTS board.
- [87] He advised that the Family Representatives did not in fact have any authority to continue functioning as BTS board members. Mr. Smith drafted the language of the letters to the Family Representatives, which explained that their continued role as Family Representatives was inconsistent with Article 5.4 of the BTS Bylaws, and therefore they were being notified that unless reappointed, they were no longer directors on the BTS board.

- [88] The Plaintiffs sought to show that Joseph Apsassin wrote a disrespectful and disparaging letter to Ms. Chipesia. The letter was typewritten and unsigned. It was shown to several of the Plaintiffs' witnesses and not recognized, until Marianne Adekat said that she thought she recognized it. In cross-examination, however, she acknowledged that Joseph Apsassin did not have word processing skills and could not have typed such a letter, nor did it sound like his use of language. She acknowledged she had not seen a signature on the letter. The language used in Joseph Apsassin's diaries strongly suggests that he did not author the letter, and he testified that he did not send it. (Ms. Chipesia, as noted above, did not attend the trial.)
- [89] In cross-examination, it was put to each of the three Apsassin Defendants that the reason the Family Representatives were discharged was to enable the Apsassin Defendants to take control of the Trust funds, without oversight. This was denied by each of them. I accept their denials.

Communications from Lawyers over Alleged or Potential Breaches of Trust

- [90] The documentary evidence shows that when the new BTS board took over in December 2009, a concern arose, expressed by lawyer Merrill Shepard, that the previous BTS boards had breached the Trust Declaration, perhaps on more than one occasion.
- [91] As noted earlier, Mr. Shepard was the lawyer who had drafted the Trust Declaration and BTS Bylaws that were put in place in late June 2007.
- [92] On September 3, 2008, the Chief and Council at the time, led by Chief Norman Yahey (with Marvin Yahey and Sherry Dominic serving as councillors), had embarked on a project to construct a new Community Administration Building, but were having difficulty securing third-party financing. That was delaying construction. Accordingly, a request was made of the Trust, and approved by the BTS board at the time, for a loan of up to \$7 million to be made to the Nation for the purposes of constructing the facility.
- [93] Also, the BTS board approved a distribution of \$2,000 to each Band member in December 2008, and \$1,000 to each Band member in January 2009, despite advice from Mr. Shepard that a distribution could not be made.
- [94] In July 2009, that is, about five months before the Apsassin Defendants were on the BTS board, Mr. Shepard wrote two memoranda to the BTS board.
- [95] The first memorandum addressed whether interest was required to accrue in relation to distributions that were allocated to Band members who were under 19 at the time distributions were made. Those minors had their distribution amounts held in Trust until they turned 19, but those trust amounts were not generating interest for them. The Public Guardian and Trustee of BC took the position that interest should accrue for the minors and was to be held in trust along with the principal amounts; Mr. Shepard was adamant that interest should not accrue. He advised the BTS board that:

The Trust Agreements are all completely clear that no interest is to be paid, so it would have been a breach of trust to pay the interest.

Furthermore, the decisions by three different Chiefs and four different Councils, backed by eight referenda, to create trusts that provided for no interest for the minors were clearly justified on the basis that the minors would benefit more from their interest being spent on community benefits while they were minors than they would from receiving the interest at the age of 19.

[96] The second July 2009 memorandum from Mr. Shepard provided very complicated tax and financial advice as to how to structure and record the Trust's assets and income, along with an outline of fiduciary duties of trustees, and other information. The complexity of some of this advice is seen, for example, in this paragraph from the second July 2009 memorandum:

Blueberry First Nations Holdings (BFNH) owns the Pink Mountain Ranch in trust for the BEBAT. BEBAT acquired the beneficial ownership of the Ranch from Blueberry and Blueberry is entitled under the Trust to obtain that ownership back when the Trust terminates. In these circumstances, rental income from Pink Mountain Ranch that is received by BFNH as trustee for BEBAT will be attributed to Blueberry which is exempt from tax as a public body performing a function of government. At the same time Newco [operating the guiding and outfitting business] will be able to deduct the rent it pays to BFNH from its income and therefore reduce the tax it pays.

[97] There are several similar passages in the memorandum. The reality was that the legal advice was expressed in the language of trust and tax law, about concepts that were foreign, understandably, to the members of the BTS board. The Board had to administer the Trust funds in the best interests of the Nation and its members, present and future, within the evolving social, political and cultural context of the community, and in light of the needs and ambitions of its various individual members. However, in fulfilling that mandate, the BTS board was not operating with the legal lexicon of trusts and tax law through which Mr. Shepard was endeavouring to communicate and advocate.

[98] It appears from the evidence that Mr. Shepard wrote another memorandum to the BTS board in October 2009, still before the Apsassin Defendants were elected, but no copy of that memorandum was available at trial. The October 2009 memorandum was referred to in a letter Mr. Shepard wrote to the new BTS board (now including the Apsassin Defendants) on February 15, 2010. The letter was terse. Mr. Shepard referred to his October 2009 memorandum and his concerns that there may have been breaches of the Trust Declaration by the BTS board in 2008. His advice does not seem to acknowledge that the BTS board that made those decisions was from a previous Council, nor that the Trust documentation he had authored might be less than a model of clarity.

[99] Instead, his letter placed the blame, for what he suspected were past breaches, squarely on the BTS board, and suggested that the solution was for a battery of additional lawyers and professional advisors to be retained. Specifically, he suggested that a new lawyer be retained to conduct an independent review of the Trust and trust activities (notwithstanding the Trust

had only been operating for two and a half years), that more lawyers and financial advisors be retained to advise on future expenditures, and that each of the Board members consider retaining independent lawyers to represent their own personal interests.

- [100] While none of the witnesses remembered that letter specifically, or the discussions with Mr. Shepard that preceded it, the letter recounts that one of the BTS board members had suggested that fewer legal and professional advisors might be preferable. In response to that suggestion, Mr. Shepard said the reverse was true, and that "the problem" was not too much reliance on professionals, but too little.
- [101] The letter did not address the fact that the Trust Declaration, that Mr. Shepard drafted and recommended, placed the BTS board members in the position of being decision makers over the Trust funds, while they were also members of the Council. Either of two options might have been better employed: maintain the complex framework for how Trust monies could be spent, and have it administered by a professional trustee, or use a simplified framework that untrained people could understand, and have the Nation's members administer it. Neither of those approaches was used. Instead, the structure was employed for the Trust appointing untrained people to administer it, even though its complexity made that administration extremely difficult. The resulting administrative problems were evident from the time of the Trust's inception to when it was eventually restructured by Court order in 2015 to have it administered by a professional trustee (first Cidel, and now Deloitte).
- [102] In any event, in response to Mr. Shepard's advice in January 2010, the BTS board members did not individually retain lawyers, but they did take Mr. Shepard's advice to hire another lawyer to conduct the independent review that Mr. Shepard said required "urgent and immediate action". That lawyer was Karl Stephan from Ratcliff & Company.
- [103] From the documentary record, Mr. Stephan began working on his independent review in the spring of 2010 and had completed a draft opinion by July 13, 2010, which he emailed to the BTS board and appears to have discussed with the board in a board meeting. (The July 13, 2010 document is not marked "draft", but the later version, referred to below, dated September 16, 2010, is marked "draft".) It isn't clear whether Mr. Stephan was waiting for more information to finalize the letter, but by the end of August, the BTS board needed to make some decisions on several matters, and held a meeting to do so.
- [104] According to Joseph Apsassin's diary, at the August 30, 2010 meeting, the BTS board unanimously voted to pay \$80,000 for the school start-up program, \$180,000 for elders' pensions, and \$87,000 for BTS bills. The note indicates all BTS directors, not only the Apsassin Defendants, were in favour of the resolution.

- [105] It seems that information about the August 30 meeting was subsequently communicated to Mr. Stephan, who then emailed the Board members and expressed his concern that the BTS board was passing resolutions when his final report had not been circulated. It is not clear why the review had not been concluded given the length of time between the July draft and the version of the report that was circulated on September 16, 2010, and marked "draft". Neither Mr. Stephan, nor any of the lawyers, was called to testify.
- [106] On September 16, 2010, Mr. Stephan's revised draft review report about the Trust expenditures in 2008-2009 was circulated, and it appears he attended a meeting with the BTS board to discuss it. In the letter, Mr. Stephan stated there had been "no evidence of misappropriation of funds" but that there were several instances where the terms of the Trust had not been complied with. First, it was noted that two distributions had been made, when for some reason, the funds were paid from the Trust as opposed to the EBA trust, which he said was authorized to make such distributions. Whether this was a clerical error or a substantive one is not clear. Second, community benefit payments had been made from the capital of the Trust as opposed to income, apparently totalling \$5,434,615 in overpayments in the previous two terms of Council. Third, Mr. Stephan said that reporting obligations for the community benefit payments had not been satisfied. Lastly, he stated that it was uncertain as to whether the loan for the community administration building was permitted under the terms of the Trust Declaration.
- [107] Mr. Stephan then considered whether those events caused any loss to any beneficiaries. He determined that if there was any loss from the distributions, or payments of community benefits, it would be difficult to quantify. As for the loan for the community facility, if the loan was paid back with interest, Mr. Stephan said there would arguably be no loss. To remedy the concerns he identified, Mr. Stephan recommended that funds from other trusts or settlements of claims be used to repay the distributions and overpayment of community benefits. With respect to the loan, he advised that it should be paid back, or, because he saw uncertainty as to whether the loan was permitted by the Trust Declaration, he said it could be converted into an equity investment in the facility. None of the witnesses recalled the meeting with Mr. Stephan that followed circulation of the September version of the letter.
- [108] What then appears to have occurred is that Mr. Stephan's review was forwarded to another lawyer at Ratcliff & Company, named James Tate, who also worked with the Nation on its treaty claims. Mr. Tate set out his advice in an email to Joseph Apsassin dated October 22, 2010, with the following points:

It appears that the depletion of the trust is related to member distributions, various programs and a loan for the building. There is no evidence (based on Roy Kraus's information [the MNP accountant for the Nation]) of any personal impropriety with respect to the trust. While certain legal steps were not taken to obtain the funding, and there is an outstanding question as to the building loan, ultimately the beneficiaries of these actions were the Band, and the members. This means that at the end of the day, barring some discovery of theft from the trust, there is no later recovery available for the Band.

Having a forensic audit, or further review will cost Blueberry a significant amount of money at a time when the Band is strapped. The money for the review would likely have to be paid from the Band, as opposed to the Trust, unless the trustees authorize this step.

Karl's plan is to get the trust set up with the Administrative Trustee, which will ensure the future protection of the trust based on the need to take the appropriate steps to obtain funds.

[109] In the result, in reviewing the input of the lawyers, after Mr. Sheppard's somewhat alarmist communication in January 2010, the BTS board retained Mr. Stephan, who reviewed the record and was less agitated about the expenditure of funds. Where there were potential issues, he proposed solutions. Then Mr. Tate considered the matter, recognized that there had been no real loss to the interests of the Nation overall, and encouraged the BTS board to move forward without involving the courts, or advancing claims against past board members. The BTS board appears to have taken Mr. Tate's advice. However, instead of pursuing reform of the Trust with Mr. Stephan's assistance, the board retained another lawyer, Roger Smith, to help with that. In the meantime, the BTS board carried on endeavouring to administer the Trust in the best interests of the beneficiaries, and took Mr. Stephan's advice to convert the loan for the community facility into an equity investment. Contrary to the Plaintiffs' claim and submissions, there was no clear or unequivocal path that the BTS board was compelled to follow in light of the advice of the lawyers involved. The record shows that they responded understandably to the advice they received as they understood it, and did their best to move forward.

The October 12, 2011 BTS Resolution to Reimburse \$1 Million

[110] The Plaintiffs point to a payment made from the Trust to the Nation of \$1 million, and correctly infer that it was in response to a request for reimbursement by the Nation made in a Band Council resolution ("BCR") dated October 12, 2011. The Plaintiffs allege the payment pursuant to the reimbursement request constitutes a breach of trust by the BTS board.

[111] No copy of the BTS resolution is in evidence, but presumably there was one. (It was unlikely to have been signed by Patrick Chipesia or Malcolm Apsassin, as they had resigned from the BTS board in September 2010.)

[112] The documents at trial included the BCR setting out the Nation's request for reimbursement, the minutes of the meeting of Chief and Council authorizing the request, and some supporting accounting documentation for the reimbursement amount. That documentary record is a more complete record than exists for most of the impugned BCRs and BTS resolutions, and shows the following.

[113] The Nation was seeking reimbursement for money it had expended or had committed to spend in relation to the Trust's administration and assets.

- [114] It appears that the reimbursement was instigated by either the Band administrator, Mr. Laird (who had commenced working in that capacity on March 1, 2011), or the Nation's finance department, identifying the outstanding amounts in the accounting records of the Nation and bringing forward to Chief and Council the fact that there were expenses that the Nation had incurred on behalf of the BTS, or Trust assets, for which reimbursement was owing.
- [115] The only, and therefore the best, evidence of what the reimbursements were for is the information contained in the documents themselves: there is no evidence that the amounts being reimbursed were not legitimate expenditures that the Nation had incurred or would incur on behalf of the Trust.
- [116] In the meeting of Chief and Council, the vote was unanimously in favour of the reimbursement request (i.e., was not supported by only the Apsassin Defendants), although the BCR itself only contained three signatures.
- [117] Some of the reimbursements in relation to Pink Mountain (a Trust asset) were for expenses two years earlier, corroborating Patrick Chipesia's testimony that payments of Pink Mountain expenses were often delayed.
- [118] In the face of this evidence, as argued more fully below, there is no basis to suggest that the BTS board, or any of its members, were causing the BTS to be in breach of trust in making the reimbursements that are reflected in the October 12, 2011 BTS board Resolution.

Chief and Council's December 2011-December 2013 Term of Governance

- [119] In December 2011, another election under the Indian Act was held. Joseph Apsassin was re-elected Chief, and the elected Councillors were Malcolm Apsassin, Wayne Yahey, Russell Apsassin and Lisa Hotte. Russell Apsassin died on May 1, 2019, but the other members of the Council testified. Mr. Laird remained the Band administrator, and he testified as well.
- [120] In the Plaintiffs' opening statement at trial, it was asserted that the evidence would show there were secret meetings held by Joseph Apsassin, Malcolm Apsassin and Russell Apsassin in the absence of Wayne Yahey and Lisa Hotte, and at these alleged secret meetings, the "real" decisions of Chief and Council were made, without the input of the other Councillors. That allegation was not established in the evidence. To the contrary, Wayne Yahey testified that the Chief and Council as a group made decisions together, in a reasonably cooperative working relationship. Sometimes there were informal discussions outside of Council meetings about one or more issues, but they were not exclusive to the Apsassin Defendants, and no decisions were made outside of the Council meetings.

- [121] Lisa Hotte testified that she perceived herself as having a different perspective from the others because she did not grow up on the reserve, and that her focus was on social issues, housing issues and off-reserve members. She explained that she generally refused to sign any BCRs or BTS resolutions, as a matter of principle, the content of which was unclear. Not signing resolutions did not mean that she opposed them because even if she voted in favour of a resolution, she nevertheless normally did not sign the paper copy of the BCR.
- [122] While Ms. Hotte said that at one point she had some unconfirmed suspicions that she was missing some meetings when attending to certain functions in Fort St. John on behalf of the Band, there was no evidence that meetings were intentionally held in her absence. Instead, the other members of the Council spoke respectfully of Ms. Hotte in their testimony, notwithstanding that there were obviously some challenges in working with her.
- [123] In summary, the evidence as a whole did not show impropriety, or dysfunction, on the part of the Chief and Council, or the Apsassin Defendants in particular, engaged in the task of governing the Nation during the December 2011-December 2013 period.

Working with Industry

- [124] The evidence was clear that engaging with outside industries to secure work opportunities for members of the Nation, and to generate revenues for the Nation itself, was an important focus for the December 2011-December 2013 Council. That is not surprising. Those were important objectives in the Apsassin family, and they were shared by Wayne Yahey, who worked in the oil and gas industry.
- [125] BRE continued as a business entity that Chief and Council hoped, and believed, would provide significant employment opportunities for members of the Nation who wanted to work, and significant revenues to the Nation as the 100% shareholder of BRE. BRE was not operated by Chief and Council, but rather by its own managers under the guidance of its own board of directors. There was some turnover in the management of BRE, and some difficulties in securing a stable and skilled management team, and Joseph Apsassin explained that there was also a downturn in the oil and gas economy during this period, when the industry shrank, and curtailed operations.
- [126] The challenges BRE faced were reflected in the documentation that supported its request for an emergency loan on May 16, 2013. As Wayne Yahey testified, he listened to the presentation and read the supporting documentation, and he was satisfied that BRE would be able to pay back the loan in a timely way. Malcolm Apsassin, Joseph Apsassin and Russell Apsassin evidently were of a similar view because they endorsed the BCR that supported the BTS board causing the BTS to have the Trust make the loan.

- [127] Malcolm and Joseph Apsassin, and Wayne Yahey, recognized the potential for BRE to be a thriving business, and as Joseph Apsassin's diary entries showed, while BRE struggled at times, the information BRE was providing to Chief and Council was sometimes very positive.
- [128] Negotiations continued with BC Hydro over the Site C project, and the terms being proposed further supported the view that BRE had a profitable future ahead. One of the draft terms included the opportunity for the Nation to receive \$20 million in work opportunities. Malcolm Apsassin explained that it was his understanding that BRE would be the primary contractor for those opportunities.
- [129] In addition to the work opportunities, the draft Site C impact benefit agreement would see \$5 million paid to the Nation within four months of execution, and a payment stream of \$400,000 per year for 49 years. In addition, the Province would transfer valuable lands to the Nation by way of another agreement.
- [130] Negotiations with TransCanada Pipeline Corporation in relation to the Coastal Gaslink project also progressed during this governance period.
- [131] In addition, there were numerous discussions and negotiations with other industry parties that were the subject of meetings with Chief and Council, as documented in the diaries of Joseph Apsassin and the notes of Malcolm Apsassin.

Expectations of Future Revenue from Claims

- [132] Meanwhile, there were litigation claims in process that had been advanced by the Nation against Canada that were anticipated to generate very large sums of money for the Nation.
- [133] These included the settlement of the Agricultural Benefits Claim ("Cows and Ploughs") in 2017 for \$21.5 million. \$7.8 million was distributed to band members, \$3 million was used to pay a bank loan taken out as part of the financing for the community administrative facility, and the rest was used for the Nation's purposes.
- [134] It also included the Treaty Land Entitlement Claim, often referred to as "TLE", which was a claim that the Nation had been wronged when, under Treaty 8, Canada set aside lands for the Nation on a per capita basis but significantly under-counted the Nation's members. That claim has an accepted cash offer from Canada made in April 2016 for \$253 million, and negotiations are ongoing over lands that will also be transferred to the Nation as part of the settlement.
- [135] Another claim was before the Specific Claims Tribunal over mineral rights that the Nation possessed and lost under Canada's administration of its affairs. The mineral rights contained substantial deposits of natural gas and were very valuable. The Nation has succeeded on the liability part of the claim and the damages from the claim are anticipated to be settled shortly for in excess of \$100 million.

Managing the Nation's Finances

- [136] Challenges continued to be experienced in the financial affairs of the Nation, but significant progress was realized in that sphere, with David Laird as Band administrator, Ron Paracuelles as director of finance and Cecil Cheveldave assisting in a consulting capacity on financial and accounting matters.
- [137] Mr. Laird's testimony on that topic was not successfully challenged in cross-examination, and showed that he was productively engaged in making a series of substantial improvements to the performance of the Nation's financial department, in light of the accountant Gordon Ferguson's letters of advice to management, and Cecil Cheveldave's advice in his Capacity Review Report and Management Action Plan.
- [138] That significant improvements were being made was reflected in the July 30, 2012 letter from Gordon Ferguson, which summarized his findings in relation to his advice in the previous year.
- [139] Accordingly, attention to financial issues, and progress toward addressing them, were well underway (but not known to ISC) when ISC wrote to the Nation on September 17, 2012, saying it required a Management Action Plan ("MAP") to be developed by the Nation, and then approved by ISC. (This MAP is separate from the Management Action Plan referred to above, in para. 137, prepared by Cecil Cheveldave.)
- [140] The evidence was somewhat inconsistent as to the significance of the MAP. Ms. De Guzman's testimony initially suggested it was a major step toward more aggressive intervention in the Nation's financial management by the federal government.
- [141] Wayne Yahey and Lisa Hotte did not sign the MAP and said they did not remember it being requested by ISC, although David Laird recalled discussing it with Chief and Council on more than one occasion. While the Plaintiffs suggest that this was because the Apsassin Defendants suppressed the fact that the MAP had been required because they knew it reflected poorly on their governance, the evidence does not support that suggestion.
- [142] The evidence about the MAP, internal to the Nation, was of a different character. The Nation did not see the requirement of the MAP to be a significant step toward third party management by ISC, nor a damning event showing mismanagement. As Mr. Laird explained, it was an important document to complete and implement, but it was largely consistent with what the Nation was doing already, and reporting requirements from ISC were nothing new.
- [143] Accordingly, the MAP was drafted by Mr. Paracuelles and, in February 2013, was signed by three members of Chief and Council and by a person at ISC senior to Ms. De Guzman. The MAP gave the Nation until March 31, 2015 to implement its various steps. Why it was not signed by Ms. Hotte and Wayne Yahey was unclear and was not established.

- [144] There was nothing secret about the MAP within the administration of the Nation. It was the task of the Band administrator and the finance director to work toward implementing the components of the MAP, and they did. The development and implementation of the MAP was cited by Mr. Laird as one of his administration's accomplishments in his December 2013 reporting letter to the Chief and Council at the time of his retirement.
- [145] The evidence as a whole shows that the MAP was understood by the Chief and Council, and the administration, as a useful tool and an unexceptional component of its relationship with ISC.
- [146] It was requested by ISC because of its concerns about financial administration at the BRFN, but it was not intended to, and did not, call for outside management of the Band's finances. I believe the Plaintiffs sought to make more of the MAP than the facts warranted.

Social, Health and Housing Issues

- [147] Social and health issues remained a necessary priority for the Chief and Council in the December 2011-December 2013 term, and were addressed in several initiatives. They included work with Dr. Mark Totten, support by the Chief and Council for the health and education departments, and working with the RCMP in combating gangs, violence and drug problems.
- [148] Housing was also a concern for the Chief and Council, recognizing that mould in houses was a health hazard, and that inadequate housing conditions created stressful conditions for Band members.

Conclusion

- [149] The evidence does not indicate poor governance in the 2011-2013 term, either as measured on its own, or in comparison with that for any other period at the Band. The evidence of the Apsassin Defendants, with that of Wayne Yahey and Lisa Hotte, showed a governing group that worked reasonably hard, and did its best to address the issues the Nation faced during that time. Ms. Hotte's contributions were sometimes perhaps difficult for the Chief and other Council members to fully appreciate, but that does not alter the assessment of the Chief and Council's efforts overall for the 2011-2013 term.

The December 2011-December 2013 Term of Governance for the BTS board

Introduction

- [150] Again in accordance with the BTS Bylaws, the members of Chief and Council automatically became members of the BTS board in December 2011. (New Family Representatives were not appointed during the December 2011-December 2013 term, but they were not required to be appointed by the BTS Bylaws. In the documentary record, it does not appear that issue was raised by anyone at the time as something that ought to be done, not even by Lisa Hotte, who had been a Family Representative until June 2011. Nor were Family

Representatives ever reappointed.)

- [151] The allegations against the Apsassin Defendants in relation to their performance on the BTS board in the December 2011-December 2013 period are centred on the disbursement of Trust monies. The process typically followed was that the Chief and Council requested the expenditure of Trust funds after discussion in a Council meeting. If a decision was made to submit a request to the BTS, a BCR to that effect was prepared. The BTS board addressed the request at its next meeting, and the discussion was recorded in meeting minutes. If approved, the BTS board signed a Trust resolution for the expenditure. Sometimes, it appears the Council and BTS meetings were held on the same day, occasionally one immediately after the other.
- [152] In the absence of the minutes from the meetings being produced at trial, and the lack of specific witness recollections about the requests and expenditures, the best evidence of the purpose of each impugned Trust resolution is in the Trust resolutions and the BCRs themselves, which at least state the purposes of the expenditures.
- [153] The 2nd FANOCC sets out details of the movement of funds from the Trust to the Nation's accounts by way of cheques and electronic transfers. The amounts pleaded, however, are often different than the amounts authorized by the related Trust resolutions. (That discrepancy was not explained, but it was most likely a product of administrative decision-making within the Nation's finance department, which processed the transactions for both the Nation and the Trust. Neither the Apsassin Defendants nor the other members of Chief and Council were involved in determining what specific amounts were transferred, when those transfers occurred, or by what financial instrument. Members of Chief and Council signed the cheques as required by the finance department, but that process was simply a matter of finance department employees locating two signatories in the office at the relevant time, to obtain signatures.)
- [154] As a result, in order to address the conduct of the Apsassin Defendants in relation to the impugned transfers of Trust monies, the analysis of the claim largely begins and ends with the BTS resolutions themselves, and any related BCRs or other documents that were provided at trial.

The Impugned Trust Resolutions

[155] The impugned resolutions can be grouped into five categories

- (a) loans to the Nation;
- (b) loans to Blueberry River Enterprises LP ("BRE");
- (c) reimbursements of the Nation for expenses relating to Trust assets (e.g., Pink Mountain);
- (d) purchase of an interest in land; and
- (e) reimbursements or payments to the Nation for Trust benefit programs.

- [156] Each category of the resolutions under those headings is discussed later in these reasons, beginning at para. 203, and they will not be considered further at this point.
- [157] While the witnesses (including Wayne Yahey and Lisa Hotte) did not remember very much about any of the impugned transactions, none of them believed that they were not authorized by the Trust Declaration. With respect to the loans, none of them testified that they thought the loan recipient (BRFN or BRE) would not, or could not, repay the loans.
- [158] The use of the Trust funds was not concealed from the membership, as alleged by the Plaintiffs. Not only was the use of Trust money disclosed in the audited financial statements for the Nation, that monies were borrowed from the Trust was specifically mentioned in the Nation's newsletter circulated in September 2013. Moreover, none of the BTS directors were ever precluded from discussing Trust expenditures and resolutions with other members.

The December 2013-December 2015 Governance Period for the Nation and BTS

- [159] In the December 2013 election, Marvin Yahey was elected Chief, and Wayne Yahey, Lisa Hotte, Sherry Dominic, and Norma Pyle were elected Councillors. The election for Chief was close; Joseph Apsassin recalled that he lost to Chief Yahey by only six votes.
- [160] For personal reasons, the Band administrator, David Laird, had retired shortly before the election, so the new Council experienced some lack of continuity.
- [161] The testimony of Chief Yahey was to the effect that the transitional period was challenging because, after the election, attempts were made to contact the members who had not been re-elected, but there were difficulties in reaching them. He testified that Mr. Laird was similarly difficult to reach, as was Patrick Chipesia. None of those witnesses agreed that they avoided any calls or were being intentionally difficult to reach after they were not elected. Nor does the evidence support such a conclusion.
- [162] The inference the Plaintiffs sought to have the Court draw was that the Apsassin Defendants and Mr. Laird "scattered" or "went to ground" in the face of their loss of power because they knew their alleged misdeeds would be discovered. That inference is not supported by the evidence. Two of the previous councillors, Wayne Yahey and Lisa Hotte, remained on the new Council. Other than Mr. Laird, no members of the Nation's administrative staff had departed, including the director of finance, Ron Paracuelles. All of those people were available to explain matters. Moreover, all of the BCRs made by the previous Councils were arranged in binders kept in the office, along with all of the Trust resolutions made by the BTS board. In addition, the bank statements for the Nation were printed and kept in binders in the office.

[163] Moreover, as David Laird testified, not only did he not "go to ground", he spent a day with the new Chief and Council in January 2014, to help with their transition, and then agreed to return to serve as Band administrator for 10 weeks in order to assist with finding a new Band administrator and provide continuity while that search was undertaken.

Meeting with Merli de Guzman

[164] In January 2014, Merli de Guzman, still with ISC at that time, travelled from Vancouver and met with the new Chief and Council at the Nation's administrative offices on the reserve. She informed them that the Nation was under a MAP that was not being complied with, and she threatened that ISC would place the Nation under a "Third Party Management Order". The witnesses who attended that meeting were clear as to the message that they took away from it--that the Nation was close to being placed under a third party management order, and they believed that would effectively mean that Chief and Council would no longer govern the Nation. In response, newly elected Chief Yahey asked Ms. de Guzman to "give the Band a year" to put its finances in order before forcing it into third party management. Ms. de Guzman said she would consider it, and later informed the Chief and Council that it had the one year as requested.

[165] Several aspects of the evidence about that meeting are remarkable. First, the MAP that the Nation had agreed to with the ISC did not expire until March 2015, so if Ms. de Guzman purported to give the Nation an additional year from January 2014, it was a false forbearance. The Nation already had more than a year left to achieve compliance. Second, the MAP contained no commitments that could have been said to have been "breached" as of January 2014. Accordingly, there was no basis for Ms. de Guzman to inform Chief and Council that any Third Party Management Order could be made prior to the expiry of the MAP.

[166] Further, Ms. de Guzman knew that a Third Party Management Order would not follow if the Nation did not take steps to reduce its expenditures. The regulations and policies that govern the imposition of such orders recognize that they are a significant incursion and interference with the affairs of indigenous nations. They are implemented with significant care, as they tread upon the very notion of a nation-to-nation relationship that ISC policy and reconciliation principles strive to achieve.

[167] Moreover, a MAP represents only the first stage of ISC intervention, and a Third Party Management Order was not what would follow under the Default Prevention and Management Policy. The policy documents are clear that the second stage is only for a Nation-appointed advisor to be contracted to assist with managing the Nation's finances. The ISC explanatory documents state that third party management is only instituted as a last resort, to ensure the continued delivery of ISC programs to community members.

Ms. Sterritt Hired as Band Administrator

- [168] David Laird was contracted to assist as interim Band administrator in February 2014 for 10 weeks, and he assisted the Nation in hiring Cecilia (Cici) Sterritt as the new permanent Band administrator. Ms. Sterritt began work in April 2014. She has an MBA and had served as a band administrator for two other first nations.
- [169] Ms. de Guzman worked with Ms. Sterritt to cut costs at the BRFN, and Ms. Sterritt achieved certain cost reductions.
- [170] Whether those reductions were a net benefit for the Nation and its members overall is unclear. I do not fault Ms. Sterritt in any regard on that question. The benefit analysis was not part of her employment. She carried out her work well. The extent to which the spending cuts may have exacerbated existing social and health problems among members or families, and whether that had a cascading impact on other aspects of the Nation's affairs, cannot be known. As discussed below, reconciling financial priorities with health and social concerns is a matter of governance policy that elected leaders do their best to balance. There is rarely a right or wrong answer on such matters, and whether the appropriate balance has been struck is normally a matter for the electorate to decide at the ballot box.

BC Hydro Site C Agreement Not Signed

- [171] The December 2013 Chief and Council did not ratify the draft agreements that had been negotiated with BC Hydro in relation to the Site C project. Instead, they had a consultant named Chris Henderson operating as "Lumos Energy" review the draft agreement. His recommendations were that the BRFN not sign the agreement as negotiated because he said he could negotiate a better deal for the Nation. He proposed that he be appointed as the negotiator. (It would seem to have been preferable for the Nation to have had the review of the draft agreements completed by a disinterested consultant, rather than one who was seeking to secure the negotiating work that would result from a negative opinion, but that was the choice that the new Chief and Council made.)
- [172] Since deciding to renegotiate the agreements with Mr. Henderson's assistance, no agreements have been made, and to date, the large, potential benefits from agreements in relation to Site C have not been realized.

Significant Funds for the Band In Future

- [173] Notwithstanding the lack of an impact benefit agreement for Site C, the Nation's financial prospects are extremely positive. The strong financial prospects are the result of pending settlements in relation to the Treaty Land Entitlement claim and the Mineral Rights Claim, mentioned earlier.

The December 2013-December 2015 Term for the Board of Directors of the BTS

\$1 Million Obtained from the Trust

- [174] The new Chief and Council requested, and the BTS board approved, a \$1 million loan from the Trust to the Nation in July 2014. No interest was payable on the loan.
- [175] Ms. Sterritt explained that she learned about the resolution shortly after it was signed and made inquiries. From those, she concluded that "it was clearly not a loan" and informed the Chief and Council that the money was going to be used for Trust expenses. When asked what those were, she explained that the BRFN would use the \$1 million for treaty rights litigation, the elders pension, the school start-up program, the forensic accounting investigation, and litigation costs of this proceeding. Her understanding of why these were acceptable payments from the Trust was that the elders pension was a program that had "been there forever" and that the school start-up program was to "balance out the elders" with money for school supplies for children in August.
- [176] Ms. Sterritt explained that the reason the above-noted expenses were Trust expenses in her view was because they had historically been funded by the Trust. To ascertain this, she consulted with Lisa Hotte and Sherry Dominic, who confirmed that those purposes were historically funded by the Trust. On that basis, Ms. Sterritt was satisfied that the \$1 million could be spent by the BRFN on those needs.
- [177] Accordingly, the interest-free loan remained characterized as such, but the monies were used as if they were an advance on Trust expenses that would be incurred by the Nation (effectively a reimbursement), and this was acceptable to the Chief and Council and the Band administrator at the time.
- [178] The significance of this is that the same Chief and Council who commenced this lawsuit, alleging that the making of Trust resolutions for loans and reimbursements to the Nation was a breach of trust, also believed that a \$1 million loan, and later, a \$1 million reimbursement, were acceptable expenditures from the Trust.

Commencing this Lawsuit

- [179] In April 2014, the new Chief and Council sought a forensic inquiry from accounting firm MNP, purportedly to review the expenditures of the Trust funds between 2010 and 2013, and targeting the conduct of certain people, including the Apsassin Defendants and their spouses.
- [180] Almost a year later, on or about March 15, 2015, MNP's first report was delivered to Chief and Council. Chief and Council kept the existence of that report confidential.
- [181] On May 8, 2015, without the authorization of a Council resolution, the Notice of Civil Claim in this action was filed, but it was not served on the Defendants, and the Band members were not informed that the lawsuit had been commenced.

- [182] Also in May 2015, MNP prepared a one-page summary of its investigation results, which alleged, inter alia, that some BRFN governance rules regarding spending were not followed by the Defendants, and it alluded to overspending on the part of the previous Chief and Council and their families (the "MNP Summary").
- [183] Then, on August 27, 2015, Chief Marvin Yahey and others distributed to the BRFN membership a "Referendum Polling Notice", attaching the MNP Summary and advising that a referendum would be held on October 2, 2015 to decide whether BRFN should "take further action" based upon its contents.
- [184] On October 2, 2015, the referendum was held. It asked BRFN members to vote on whether they wanted the BRFN to sue the Apsassin Defendants and others, civilly, and whether the MNP Report should be referred to the RCMP. The BRFN members were not informed that the BRFN had already, five months previously, filed a lawsuit against the Apsassin Defendants and others. Members of Chief and Council were entitled to vote in the referendum and did in fact vote in it.
- [185] The referendum results showed a tie, 64-64.
- [186] In late November 2015, Chief and Council and the BTS board decided to proceed with the lawsuit.

Cidel Appointed

- [187] The Chief and Council did not reappoint any Family Representatives to the BTS board in the December 2013-December 2015 period, but toward the end of its term, the BTS board applied to this Court to change the trustee of the Trust from BTS to a third-party trustee.
- [188] The Cidel Trust Company was appointed on December 10, 2015.
- [189] That change was not communicated until much later to the lawyers prosecuting the lawsuit on behalf of the BTS and the BRFN.

December 2015 and After

- [190] On December 14, 2015, Marvin Yahey was again elected Chief.
- [191] Ms. Sterritt resigned as the Band administrator and Merli de Guzman, the ISC funding services officer, was seconded to the Nation as Band administrator. She has now left the federal government, and works exclusively as an employee of the Band, in the position of director of operations.
- [192] The Cidel Trust Company resigned as trustee of the Trust. On September 22, 2016, this Court appointed Deloitte as the trustee.

The Legal Analysis of the Claims against the Apsassin Defendants

Knowing Assistance

- [193] Knowing assistance is introduced briefly, above in these reasons, at paras. 42-44. Although the Plaintiffs framed the principal claim against the Apsassin Defendants as breach of trust, the Apsassin Defendants were not trustees, but instead were the directors of the trustee, the BTS. Therefore, as a matter of law, whether they are liable turns on an analysis of whether they knowingly assisted the BTS to dishonestly and fraudulently breach the Trust. The preliminary question, before knowing assistance is considered, is therefore whether the BTS dishonestly and fraudulently breached the trust in the first place.
- [194] The leading authority addressing knowing assistance, noted above at para. 44 of these reasons, is *Air Canada*, in the judgment delivered by Iacobucci J., writing for himself and five other members of the Supreme Court of Canada.
- [195] *Air Canada* considered the personal liability of the two directors of a closely held corporation for the breach of trust by that corporation. The decision is important to the present claim because the Apsassin Defendants were directors of the BTS, which is comparable to the closely held corporation in *Air Canada*. Iacobucci J. addressed the standards for the imposition of personal liability to be applied to strangers to the trust who participate in a breach of trust. The case was resolved on trust principles as opposed to general questions of the personal liability of directors for the acts of the corporation.
- [196] In *Air Canada*, a travel agency, M & L, collected funds from the sale of Air Canada tickets, and held them in trust, as the trustee, to be later paid over to Air Canada. The funds were kept in M & L's general bank account. The two individual directors of the travel agency, who had personally guaranteed a bank demand loan, authorized the bank to withdraw funds from the general account to cover monies owing on the loan. A dispute arose between the directors with regard to misappropriation of funds. The bank sent demand notices to the directors and withdrew the full amount owing under the loan from M & L's general account. As a result, Air Canada did not receive the monies owed to it for ticket sales. It was found that the travel agency clearly knew that the money from the Air Canada ticket sales was not for the general use of the travel agency. Further, the breach of trust by the travel agency was directly caused by the conduct of the two directors, acting solely in their own interest to stop payment on the checks issued to Air Canada, and enabling the seizure by the bank of the funds otherwise payable to Air Canada pursuant to the trust. The issue arose whether the appellant director, as a stranger to the trust, was liable to Air Canada for M & L's breach of trust.
- [197] Air Canada sued the travel agency and both directors personally for the money owed to it for ticket sales. At trial, its claim against the travel agency was successful but the claim against the two directors was dismissed. Air Canada successfully appealed the judgment as it related to the two directors and judgment was entered against them as well. At issue in the Supreme Court of Canada were:

- (1) whether the relationship between the travel agency and Air Canada was one of trust (it was); and
- (2) if the relationship was one of trust, under what circumstances could the directors of a corporation be held personally liable for breach of trust by the corporation, through their knowingly assisting the trustee in the breach.

As noted earlier, although involving a corporation, the case fell to be resolved on trust principles, and did not raise general questions of the personal liability of directors for the acts of the corporation.

- [198] Air Canada creates a test for determining under what circumstances the strangers to the trust will be held personally liable for a breach of trust by the trustee. As noted earlier, the seminal question is whether, and if so in what manner, the trustee itself committed a breach of trust. Only then does the analysis turn to the stranger(s) to the trust, the directors of the BTS in this case, to see how their conduct must be characterized before they are to be found liable for knowing assistance. Paragraphs 58 and 59 from *Air Canada* are applicable:
- [58] It must be remembered that it is the nature of the breach of trust that is under consideration at this point in the analysis, rather than the intent or knowledge of the stranger to the trust. That is, the issue here is whether the breach of trust was fraudulent and dishonest, not whether the appellant's actions should be so characterized. *Barnes v. Addy* clearly states that the stranger will be liable if he or she knowingly assisted the trustee in a fraudulent and dishonest breach of trust. Therefore, it is the corporation's actions [in the case at bar, the actions of the BTS trustee] which must be examined. The appellant's actions will also be relevant to this examination, given the extent to which M & L was controlled by the defendant directors [in the case at bar, the Apsassin Defendants and other directors of the BTS]. The appellant's conduct will be more directly scrutinized when the issue of knowledge is under consideration. It is unnecessary, therefore, to find that the appellant himself acted in bad faith or dishonestly.
- [59] Where the trustee is a corporation, rather than an individual, the inquiry as to whether the breach of trust was dishonest and fraudulent may be more difficult to conceptualize, because the corporation can only act through human agents who are often the strangers to the trust whose liability is in issue. Regardless of the type of trustee, in my view, the standard adopted by Peter Gibson J. in the *Baden, Delvaux* case, following the decision of the English Court of Appeal in *Belmont Finance*, *supra*, is a helpful one. I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take.'" In my opinion, this standard best accords with the basic rationale for the imposition of personal liability on a stranger to a trust which was enunciated in *In re Montagu's Settlement Trusts*, *supra*, namely, whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability. In that respect, the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability. This approach is

consistent with both lines of authority previously discussed.

[Emphasis added.]

As was the case in *Air Canada*, the actions of the directors of the BTS are also relevant, given the extent to which the BTS was controlled by the Defendant (and other) directors.

[199] In the many decisions relied upon in *Air Canada*, on which the finding of knowing assistance was based, the trust monies had been diverted from the intended beneficiary to other entities, including the trustees themselves in many instances. The Apsassin Defendants emphasise that all of the money at issue in this case flowed from the Trust to the Band and its members, and related entities, when the Declaration of Trust shows that the Trust was established for that purpose, i.e., for the benefit of the members of the BRFN. In *Air Canada* itself, by way of contrast, the directors of the trustee knowingly assisted in the breach of trust because they caused trust funds to go elsewhere than to the intended beneficiary, *Air Canada*.

Facts Relevant to Knowing Assistance, and Further Related Legal Analysis

[200] From *Air Canada*, it can be seen as a threshold matter, that in order for a claim of knowing assistance to succeed, the breach of trust by the trustee must be dishonest and fraudulent. It is "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take". By the reasoning in *Air Canada*, that is the standard which best accords with the rationale for imposing liability on a stranger to the trust, namely, whether the stranger's conscience is sufficiently affected, whether it is a knowingly wrongful risk, and one resulting in prejudice to the beneficiary.

[201] Although they allege breach of trust, the Plaintiffs have not sued the trustee at the material time, the BTS. The knowing assistance analysis arises because Plaintiffs have sued only directors of the trustee as opposed to the trustee itself. (An anomaly in the Plaintiffs' claim is that directors of the trustee in both terms, December 2009-December 2011 and December 2011-December 2013, included five people in each term, only three of whom have been sued in each term. In my view, the evidence does not provide a reasonable explanation for this selection of defendants. Nonetheless, the analysis below will examine what the named Defendants and the other directors did as the directors of the trustee, the BTS.)

[202] For determining under the *Air Canada* analysis whether the Apsassin Defendants are liable for knowingly assisting the BTS to allegedly breach the Trust, it is relevant to know what money was taken from the Trust, where it was directed and for what uses.

[203] As noted earlier, the transfers from the Trust the Plaintiffs challenge can be grouped as follows:

- (a) reimbursements of the Nation for expenses relating to Trust assets (e.g., Pink Mountain);
- (b) a purchase of an interest in land;

- (c) reimbursements or payments to the Nation for benefit programs;
- (d) loans to the Nation; and
- (e) loans to Blueberry River Enterprises LP ("BRE").
- (a) Reimbursement of trust expenses

[204] Under (a), above, the expenses for Pink Mountain were as follows:

Date

Amount

October 12, 2011

\$490,718.76

April 30, 2012

\$500,000

April 30, 2012

\$1,000,000

June 27, 2012

\$76,407.05

July 23, 2013

\$548,200

August 23, 2013

\$2,508.80

October 17, 2013

\$239,400

Four-year total:

\$2,857,234.61

[205] Those expenditures were made from the Trust to the BRFN to reimburse the BRFN for capital, maintenance and caretaking expenses the BRFN had incurred for Pink Mountain.

[206] Pink Mountain was owned by the Trust as a Trust asset. The BRFN was entitled to be reimbursed for the expenses it had incurred on that asset on behalf of the Trust.

[207] The Pink Mountain property was purchased with settlement trust monies in about 2000. The purchase included a guiding and outfitter's license, and a certificate enabling a business to be operated there. Pink Mountain is located in an area of cultural and historical significance for the Nation, and the Nation is at present seeking to expand its landholdings in the area through settlement discussions with Canada and British Columbia. At all material times, Pink Mountain has been owned by Blueberry First Nations Holdings Ltd., the shares of which are 100% owned by the BTS for the Trust. The Plaintiffs submitted that Pink Mountain is owned by the BRFN. They pointed to consolidated financial statements, but those do not assist because they consolidate the Band, Trust and other assets into a single financial statement. Two of the Plaintiffs' own witnesses, Wayne Yahey and Marvin Yahey, testified as to their belief that Pink Mountain was a trust asset. The Apsassin Defendants also testified to that effect.

[208] The BTS was probably correct in law when it caused the Trust to reimburse the BRFN for Pink Mountain expenses. I believe s. 3.6 of the Trust Declaration authorized that. Section 3.6 provides:

The Trustee may pay out of the capital or income of the Trust Fund, or both, all reasonable expenses, including all taxes and other imposts, incurred and arising with respect to the Trust. However, in the absence of any other designation by the Trustee, expenses shall be deemed to be paid first out of the unattributed Income used in calculating the Distributable Income described in paragraph 2.1(b).

[209] In reviewing all of the Trust expenditures the Plaintiffs complain of (i.e., those referred to in subparas. (a)-(e) in para. 203 above), to establish knowing assistance against the Apsassin Defendants, the Plaintiffs would need to show more than simply non-compliance with a provision of the Trust Declaration concerning any such expenditure. The Plaintiffs would need to go further, in accordance with the analysis in *Air Canada*, and show that the BTS took a risk to the prejudice of another's rights, which risk was known to be one which there was no right to take. Knowing assistance, to be made out, requires an element of moral wrongdoing, as analyzed and discussed in *Air Canada*.

[210] The other expenses for which the Trust reimbursed the BRFN were as follows:

Date

Amount

October 12, 2011

\$327,158.27

Various expenses

August 23, 2012

\$200,000

Offices

November 26, 2012

\$1,000,000

Accrued expenses

Four-year total:

\$1,527,158.27

[211] The BTS resolution for the amount of \$1 million on November 26, 2012 is not informative as to what the \$1 million in accrued expenses were for. That resolution would have been supported by detailed documentation, including receipts. In the absence of that documentation, which the Plaintiffs did not produce from their records, the best evidence is the resolution itself, which indicates that there were accrued expenses the BFRN had incurred that were properly reimbursed by the Trust.

[212] Section 3.6 of the Trust Declaration, quoted earlier, authorizes the reimbursement to the BFRN for the expenses totaling \$1,527,158.27, as it did for the Pink Mountain expenses, addressed earlier, which totalled \$2,857,234.61.

(b) Purchase of an interest in land

[213] An impugned resolution, dated October 9, 2012, released Trust funds in the amount of \$83,134 to secure an interest in lands near Fort St. John. The lands were referred to as the "Bouffiaux" parcel, situated across the Alaska Highway from the reserve. Wayne Yahey, Joseph Apsassin and Malcolm Apsassin all testified that they believed the purchase to be a good investment for the Trust, because it was considered to be a good location for a gas station or other roadside business, and would increase in value as Fort St. John expanded. Section 3.3(d) of the Trust Declaration reads as follows:

3.3 The Trustee may:

(d) purchase any property, or take options or rights of refusal from other parties on such terms and conditions as it sees fit

[214] Section 2.1(a)(ii)(B) of the Trust Declaration is also relevant:

2. TRUST PURPOSES

2.1 The Trust Fund shall be used for any one or more of the following purposes:

(a) to acquire and hold the Trust Fund for the benefit of the Beneficiaries and more particularly to acquire and hold

...

(ii) investments, having a total cost to the Trust of no more than \$8,800,000, in

. . .

(B) Facilities to lease or otherwise make available to those businesses for a reasonable return . . .

and for this purpose and for the purposes of paragraph 2.2(a) any amount at risk because of a guarantee issued by the Trustee shall be deemed to be an investment in a debt

("Facilities", referred to above in (B) is defined in the Trust Declaration to include land.)

[215] In summary, in my view, the Trust Declaration authorized the purchase of the "Bouffiaux" parcel. To repeat a theme, however, under the knowing assistance analysis, whether the Trust Declaration authorized the purchase is not the central question. Assuming for the moment it did not authorize the purchase, the issues, under Air Canada, are whether the BTS, the trustee, breached the trust dishonestly and fraudulently, and if so, whether the directors of the trustee, including the Apsassin Defendants, knowingly assisted in the dishonest and fraudulent breach.

(c) Benefit programs

[216] The benefit program expenditures in issue are:

Date

Amount

October 12, 2011

\$129,082.97

Off-reserve renovations

October 12, 2011

\$200,000

Winterizing on-reserve housing renovations

July 12, 2012

\$249,639.73

Elder pension 2009-2013

July 12, 2012

\$154,800

2009 Family and Community Support

July 12, 2012

\$154,800

2009 Cultural Programs

August 23, 2012

\$87,500

School start-up program

December 12, 2012

\$548,000

Christmas Adult Dividend (\$2,000)

August 14, 2013

\$82,500

School start-up program

August 23, 2013

\$106,337.94

On-reserve housing repairs

September 12, 2013

\$123,000

Off-reserve housing renovations 2009-2010

November 26, 2013

\$403,500

Christmas Adult Dividend (\$1,500)

Four-year total:

\$1,887,360.64

[217] The last expenditure in the list above, \$403,500, was not pleaded but it was touched upon in the evidence. The Plaintiffs say that was a per capita distribution, and therefore a breach of s. 3.1(a) because the criteria stated there for a distribution were not satisfied. In the context of the Trust Declaration, I would characterize the Christmas Adult Dividend as a benefit program as opposed to a distribution. It was payable only to adult members and was paid to help out families at what was often a hard time of year, intended to enable adult members to be able to purchase Christmas presents for the children.

[218] All the benefit programs, to directly assist the Band membership through a variety of expenditures, have been in place, and have sometimes been modified, over many years, from 1998, when Trust money first came to the Band, to 2007, when the present Trust was

incorporated, and from 2007 to the present. The Plaintiffs selected the period 2009-2013 for examining benefit programs, but there was no difference whatever, on the evidence, between the Trust financing the benefit programs before 2009, from 2009 to 2013, and after 2013.

[219] The Trust Declaration sections relevant to the benefit program payments include particularly ss. 2.1(b) and 2.1(c). They are not straightforward:

2. TRUST PURPOSES

2.1 The Trust Fund shall be used for any one or more of the following purposes:

...

- (b) to the extent that the Distributable Income of the Trust for any year of the Trust is not attributed to the nations by virtue of section 75 of the Income Tax Act of Canada, to allocate that unattributed Distributable Income for that year to the Nations to be used for the benefit of the Members and to pay it to the Nations for that purpose as soon as is reasonably possible after the financial statements of the Trust for the year have been completed and in any event before April 1 of the following year; and
- (c) to the extent that the Distributable Income of the Trust for any year of the Trust is so attributed
 - (i) to retain that Distributable Income as capital invested in investments described in clauses 2.1(a)(ii)(A) or (B) or in RRSP Investments to the extent that it is reasonably required to maintain the financial viability of the business structure of the Nations as a whole;
 - (ii) to the extent that the Distributable Income is not so required to be retained, to apply it to current or capital expenditures for the purposes of assisting in the provision of training, business or employment opportunities to the Members or to assist in the provision of income support and counselling for Members who are elders or who suffer from mental or physical challenges or who are single parents or to assist in providing the Members with educational, health, housing, recreational, cultural, community, administrative or other benefits or Facilities or spiritual opportunities or Facilities, except that none of the Distributable Income shall be so applied to the extent that doing so would reduce the amount of funding from other sources that would otherwise be available for the provision of that support or counselling or of those opportunities, benefits or Facilities

[220] In my view, it is not clear that the payments for the benefit programs were made contrary to the terms of the Trust Declaration. It is not clear what category of funds was used for the benefit programs at each of the relevant times, (a) as between Distributable Income and the capital of the Trust, and if the former, (b) whether they were attributed or allocated funds, and even if they were capital funds, (c) whether the Trust Declaration failed to provide in any event for the capital funding as is implied in s. 2.1(c)(ii).

[221] Whether the Trust Declaration authorized the payments for the benefit programs, as the Apsassin Defendants contend, is a difficult matter of argument having regard to the wording of the Trust Declaration, and the applicable trust law principles. However, the overriding point, again, is that the BTS, in causing Trust funds to be released for programs directly benefiting the Band membership, in accordance with long-standing practice, cannot be said to have breached its duties as trustee under the Air Canada analysis. There was nothing in what the BTS did to even suggest fraud, in any form. Any risk it took certainly was not known to be one which there was no right to take. The Apsassin Defendants never caused, or sought to cause, money to be diverted away from those for whom the Trust intended the money to be spent, and into their own pockets or the pockets of third parties.

(d) Loans to BRFN from the Trust

[222] The loans to the BRFN from the Trust placed in issue by the Plaintiffs include the following:

Date

Amount

Terms

Oct 17, 2012

\$208,716

No interest; 13 day term

Oct 27, 2012

\$1,000,000

Interest at market value

May 16, 2013

\$200,000

Interest at prime + 1%

Sept 26, 2013

\$200,000

5% + 1% for each 30 days

Nov 21, 2013

\$1,700,000

No interest

\$3,308,716

[223] To determine whether the loans from the Trust to the BRFN were authorized by the Trust Declaration, the following provisions of the Trust Declaration in particular need to be considered:

2. TRUST PURPOSES

2.1 The Trust Fund shall be used for any one or more of the following purposes:

- (a) to acquire and hold the Trust Fund for the benefit of the Beneficiaries and more particularly to acquire and hold

...

- (ii) investments, having a total cost to the Trust of no more than \$8,800,000, in

(A) shares, units, debt or any other securities issued by a company, partnership, trust or any other business vehicle that might reasonably be expected to provide training, employment or business opportunities to the Members

...

...

2.2 When the Trustee acquires and holds assets as described in clauses 2.1(a)(ii)(A) or (B), the Trustee shall

...

- (b) invest no more than a total of \$4,400,000 in investments that are not Joint Investments and no more than \$500,000 in any one company, partnership, trust or other business vehicle that is not a Joint Investment;
- (c) invest in investments that are not Joint Investments only by way of loans bearing a reasonable rate of interest and reasonable repayment terms

...

3.1 Notwithstanding any other provision of this Declaration, the Trustee shall not be empowered to

...

- (b) loan any of the Trust Funds unless

- (i) the loan is reasonably secured and it is reasonably likely, on a conservative basis, that the loan will be repaid in full according to the terms on which the loan is made; and

- (ii) the loan is within the limits for investment set out in subparagraph 2.1(a)(ii) and paragraph 2.2(b)

- [224] The Apsassin Defendants, in their closing argument, submitted as follows with respect to these loans:
- [257] According to section 2.1(a)(ii) of the Trust Declaration, the trustee may loan up to \$8.8 million to "any other business vehicle that might reasonably be expected to provide training, employment or business opportunities to the Members". A "business vehicle" is not a defined term in the Trust Declaration, and the Apsassin Defendants say it includes the BRFN itself. Chief Yahey agreed with the characterization (generally - he was not asked to interpret the term as it appears in the Trust Declaration). Among its many functions, the BRFN is a business vehicle because it enters into joint ventures, impact benefit agreements and other contracts with industry. The BRFN's business activities provide employment and training opportunities for many members and generate substantial revenue. The Apsassin Defendants explained that having the BRFN engaging in business activities was of central importance to their political leadership, with the object of diversifying the band's revenues and securing work for its members.
- [258] The Apsassin Defendants submit that loans to the BRFN were a "Joint Investment" as defined in the Trust Declaration because the BRFN is a business vehicle in which at least 50% of its capital is provided by "a Person" (defined to include governments). That Person jointly investing in the BRFN is Canada, a "Person" that has "directly or indirectly realised more than \$5 million in revenue per year over the previous ten years" and although may not have been "profitable in six of those ten years", it is plainly a joint investing entity with sufficient resources to reasonably cause the trustee to make a "variation in the revenue or profitability requirement" as per the definition of "Joint Investment".
- [259] Only non-Joint Investments have to bear interest per 2.2(c) of the Trust Declaration. This provision demonstrates that the Trust Declaration contemplated loans being made that were not simply motivated by a return-on-investment rationale.
- [260] The absence of a term for repayment of some of the loans means that they are demand loans, repayable on reasonable notice being given.
- [261] Section 2.2(b) of the Trust Declaration says that the trustee cannot loan more than \$4.4 million to non-Joint Investments, but can loan up to \$8.8 million in Joint Investments. At none of the material times did the impugned loans breach the \$8.8 million threshold. This is because in April 2013, the \$3.75 million loan from 2008 was converted into an ownership interest in the community administration facility. Prior to that transaction, the total loans from the Trust to the BRFN was \$4,958,716. After the conversion transaction removed \$3.75 million from that amount, there was room for the additional loans made in 2013 to the BRFN and to BRE. The total of all the loans at the end of the BTS board's term in December 2013 was \$5,108,716; substantially below the \$8.8 million limit.
- [262] The next restriction to consider is that section 3.1(b)(i) of the Trust Declaration required the loans to be "reasonably secured" and likely, on a conservative basis, to be repaid in full. There is no definition as to what "secured" means, and the Apsassin Defendants submit that

it does not necessarily mean secured by a security instrument. Instead, reasonably secured refers to any circumstance, provision or instrument that reasonably protects the Trust's investment to ensure repayment of the loan. With a loan to the BRFN, the structural fact that the BTS board are the Chief and Council of the BRFN provides that reasonable security - through control of the borrowing party.

- [263] This view is supported by *Paul v. General Magnaplate Corp.*, [1995] O.J. No. 4105 (G.D.), the defendants sought an order for security for costs of the action. The plaintiff responded with a plea of impecuniosity. The court rejected that plea on the basis that the evidence was insufficient, but nevertheless ordered that security for costs need not be posted because notwithstanding the business purchase at issue in the case had not completed, the defendants had "de facto possession of the business and its tangible and intangible assets" (para 21). On that contextual analysis, Justice LaForme held, "I cannot conclude that the defendants require the protection of this rule since their costs are already reasonably secured given their possession of virtually all of the plaintiffs' assets" (para 24).
- [264] In the same vein, the Personal Property Security Act, RSBC 1996, c. 359 provides that a security interest is perfected when a debtor has control of collateral. In other instances, a personal guarantee constitutes "security" in the broader usage of the term.
- [265] The term, "reasonably secured" as it appears in the Trust Declaration, should be interpreted broadly to mean that the BTS board has made the loan with such arrangements or in such circumstances whereby the loans are reasonably safe and repayment is reasonably assured. This circumstance is, of course, a unique one and is similar to advancing an inter-corporate loan where the same actors on the BTS board govern the recipient of the loans and can ensure such priority is given to its repayment as needed. As such, the loans were reasonably secured.
- [266] On the evidence, they were also reasonably likely to be repaid in view of the large amounts of money that the BRFN was expected to receive in the near future.
- [267] With respect to whether the requirements of section 2.2(f) of the Trust Declaration were met, while there may not have been a detailed budget for each specific loan (the evidence is unclear as much documentation is missing), because the loans were not to third parties, but were to a related party that was governed by the trustee and subject to common administration in the finance department, those formalities were unnecessary as the BTS board had full knowledge of how the invested funds would provide either a long term source of profit or provide training, employment and business opportunities for members of the BRFN. The budgets that the Chief and Councillors had developed with the assistance of David Laird and Ron Paracuelles accomplished that in a practical sense.
- [268] Moreover, as discussed further below in the section on mitigation, if there were any technical defaults in relation to the loans to the BRFN, because the trustee and BRFN are co-plaintiffs in this litigation, there can be no deficiency that they cannot together correct. For example, if a reasonable rate of interest was considered to be required, the two plaintiffs

asserting that fact can amend the terms of the loan to provide for it. If a budget or security is seen as missing, the one plaintiff can obtain it from the other. What they cannot do is refuse to take such steps to rectify any deficiencies they consider to be present, and then ask the court to order damages against the defendants for those very deficiencies that they refuse to address as between themselves.

- [225] It is difficult to conclude whether all of the loans in issue to the BRFN from the Trust climb through all of the requirements of the Trust Declaration quoted above. However, as I have set out previously, that is not the issue in the knowing assistance analysis. The question instead, assuming non-compliance with the Trust Declaration, is whether the BTS, in 2009-2013, dealing with the Trust assets, generally as their predecessors and successors did, and intending to cause funds for the benefit of the Band and its members, can be found to have acted fraudulently, as the directors of the BTS, in accordance with the Air Canada analysis, summarized at para. 59 of that decision, quoted above at para. 198 of these reasons.
- [226] I do not find that the Plaintiffs have established the fraud on the part of the Apsassin Defendants that would be called for under the Air Canada analysis in order to conclude that they knowingly assisted the BTS in any dishonest and fraudulent breach of trust in causing the loans to the BRFN.
- [227] Trust law, and trust declarations, are usually found to be complicated, and sometimes difficult to comprehend even for those trained in the law. The Apsassin Defendants, through no fault of theirs, did not even have high school certificates. Chief Joseph Apsassin reached grade five. These Defendants were trying to do for the Band and its members what other directors of the BTS had tried to do over the years, help the membership. I observe also that in the lengthy cross-examinations of the Apsassin Defendants, any kind of moral wrongdoing on their part was simply not made out. They often had little understanding of the questions asked of them that were linked to concepts of trust law, but they never appeared, in my observation, to be evading or avoiding answers to questions, or revealing any kind of dishonesty. Sometimes, I sensed that they answered questions, or attempted to, without fully understanding them, but that is not a badge of dishonesty, or of them having taken steps they believed they had no right to take. The Plaintiffs sought to place considerable weight on the legal advice given, or available, to these Defendants, but that is addressed above at paras. 90-109 of these reasons. There was not a legal consensus conveyed to the Defendant BTS directors, or any of the directors, giving them a clear path to follow. Lawyers had varying opinions. Importantly, none of them found that there was any fraudulent conduct. In the meanwhile, the Defendants, and the other BTS directors and Council members, had to carry on both as the governors of the Band and the directors of the trustee. The Plaintiffs called as witnesses none of the lawyers who came and went from the scene. When the lawyer input is seen in its context, on the available evidence, it does not lead to any conclusion of fraudulent conduct of any kind on the part of the Apsassin Defendants.

(e) Loan to Blueberry River Enterprises LP

[228] The loan in issue to BRE from the trust was \$1.8 million. Whether it conformed with the Trust Declaration requires an analysis of the same provisions quoted above from the Trust Declaration when the loans to the BRFN were under consideration.

[229] The loan to BRE was the subject of a detailed presentation to Council with a budget, and repayment terms. It was considered by the directors of the BTS to be a reasonable investment, and bore a reasonable rate of return for the Trust. It was secured by the BRFN owning 100% of BRE's shares and was made with the expectation of the BTS directors that BRE would become a successful enterprise, taking into account the numerous lucrative industry opportunities that were available to it. BRE has partially repaid the loan. As was the case regarding the loans to the BRFN, addressed above, the relevant question for the BRE loan is whether the BTS directors causing it to be granted could attract a finding of knowing assistance against the Apsassin Defendants. For reasons I expressed above, when considering the loans to the BRFN, I conclude that the Plaintiffs cannot make out a claim for knowing assistance in connection with the loan to the BRE.

Further Case Authority Addressing Knowing Assistance

[230] The discussion of Air Canada is found above at paras. 194-199 of these reasons, and its application to the payments from the Trust is set out above at paras. 200-229.

[231] The Supreme Court of Canada again examined knowing assistance in two decisions it delivered on October 30, 1997. In *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 [Gold], Iacobucci J. delivered reasons for himself, La Forest and Cory JJ. Although writing in dissent, what is set out below in his reasons was not in dispute. He said this at paras. 30-34:

[30] This Court reviewed the law of knowing assistance in *Air Canada*. In that case, we adopted the definition of "knowing assistance" given in *Barnes v. Addy*, where Lord Selborne L.C. stated that a stranger to the trust will be liable if he or she "assist[s] with knowledge in a dishonest and fraudulent design on the part of the trustees" (p. 252).

[31] A "dishonest and fraudulent design" includes "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary". As was said in *Air Canada* (at p. 826):

I would therefore "take as a relevant description of fraud 'the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take'."

[32] As the name "knowing assistance" implies, the plaintiff must prove not only that the breach of trust was fraudulent and dishonest, but also that the defendant participated knowingly in that breach of trust. As stated in *Air Canada* (at p. 811):

The knowledge requirement for this type of liability is actual knowledge; recklessness or wilful blindness will also suffice.

[33] As Millett J. explained in *Agip (Africa) Ltd. v. Jackson*, [1990] 1 Ch. 265, at p. 292, liability is imposed, in cases of knowing assistance, on the basis that the defendant has participated in a fraud and "participation", in its relevant sense, implies actual knowledge of the fraud being perpetrated by the rogue trustee. La Forest J. reached a similar conclusion in *Citadel* where he described liability in knowing assistance as "fault-based" liability (at para. 46). Thus, the basis of liability, participation in a fraud, supports the test for liability which I set out in *Air Canada*, actual knowledge of the trust and its fraudulent breach.

[34] In the present case, in order to recover damages for knowing assistance, the appellant must demonstrate the following:

- (1) That there was a trust;
- (2) That the named trustee, Rosenberg, perpetrated a dishonest and fraudulent breach of trust; and
- (3) That the respondent Bank participated in and had actual knowledge of Rosenberg's dishonest and fraudulent breach of trust.

[Emphasis added in paras. 30, 31 and 33.]

[232] In *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, La Forest J., with whom Gonthier, Cory, McLachlin, Iacobucci and Major JJ. concurred, wrote as follows in para. 48 of his reasons:

[48] Given the fundamental distinction between the nature of liability in assistance and receipt cases, it makes sense to require a different threshold of knowledge for each category of liability. In "knowing assistance" cases, which are concerned with the furtherance of fraud, there is a higher threshold of knowledge required of the stranger to the trust. Constructive knowledge is excluded as the basis for liability in "knowing assistance" cases; see *Air Canada v. M & L Travel Ltd.*, *supra*, at pp. 811-13. . . .

[Emphasis added.]

[233] Finally, in surveying case law addressing knowing assistance, I quote Grauer J., as he then was, in *PricewaterhouseCoopers Inc. v. Flash & The Boys, LLC*, 2014 BCSC 1093, at para. 20 [PricewaterhouseCoopers]:

[20] As the Supreme Court of Canada pointed out in the *Air Canada* case at pp. 824-826, it is not just any breach (whether of trust or of fiduciary duty) that will give rise to liability on the part of a stranger to the relationship who knowingly assists in that breach. It must be a breach that is fraudulent and dishonest. Thus there must be a dishonest quality to the fiduciary's act of breach that signifies a level of misconduct or impropriety that is morally reprehensible (*Enbridge Gas Distribution Inc* at para. 27). This element may be satisfied by "the taking of a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take" (*Air Canada* at p. 826).

[Emphasis added.]

[234] When the reasoning from those authorities is applied to the facts of this case, it is clear, in my view, that the Apsassin Defendants cannot properly be found liable for knowing assistance with respect to any of the Trust expenditure summarized above at para. 203. The dishonest quality, signifying morally reprehensible conduct, is absent. When it is remembered that the Trust monies were being directed to the benefit of the Band members, the intended Trust beneficiaries, and not being diverted to the directors or some third party, it is particularly difficult to infer any dishonesty.

Notice to Admit

[235] The Plaintiffs, at para. 214(e) of their closing submissions, sought to introduce para. 16 from their notice to admit, dated March 5, 2019. Paragraph 16 contains 29 subparagraphs and some of those are also subdivided into further categories of requested information.

[236] The notice to admit was sent on the eve of trial when the case was to be heard in 2019. Counsel for the Apsassin Defendants responded to the notice to admit on March 19, 2019. His letter reads as follows:

We write in response to the Notice to Admit that was delivered to our offices on March 5, 2019.

In light of recent events concerning the ability of the plaintiffs to advance the claims given the status of the trusteeship and the orders of Mr. Justice Macintosh at the Trial Management Conference of March 8, 2019 allowing certain summary proceedings to occur, we deem the request to be improper and our clients refuse to admit to the truth of the facts or the authenticity of the documents at this time.

Once these matters have been resolved, we will reassess our clients' ability to provide a substantive response.

[237] Counsel for the Plaintiffs responded the same day, in a letter marked "with prejudice", joining issue with the position taken in the letter from counsel for the Apsassin Defendants, and then stating that the remedy the Plaintiffs would be seeking for the refusal to admit was costs. The letter spoke of no other remedy.

[238] The trial was rescheduled for 2020. The notice to admit of March 5, 2019, was never referred to again until the Plaintiffs' closing submissions.

[239] In seeking to have the Apsassin Defendants bound by the contents of the notice to admit, the Plaintiffs cited *Skillings v. Seasons Development Corp.* (1992), 70 B.C.L.R. (2d) 14 (S.C.) [Skillings]. In my view, that decision is to be distinguished. The letter of refusal in that case, unlike the Apsassin Defendants' letter of March 19 quoted above, did not adopt the language for refusal found in the rule. Of at least equal importance, counsel in *Skillings* seeking to rely on the admissions responded, not by saying that the only question was costs, but instead asserting that the response had been deficient and that he intended to

rely on the deemed admissions. Furthermore, the question in *Skillings* returned to Court, when the same judge, hearing further argument, permitted the deemed admission to be withdrawn: *Skillings v. Seasons Development Corp.*, [1992] B.C.W.L.D. 1922 (S.C. Chambers). The first decision in *Skillings* was expressly not followed in *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1994), 28 Alta. L.R. (3d) 89 (Q.B.) at paras. 16, 20. Finally in examining the authorities, in this Court's decision in *Luu v. Wang*, 2009 BCSC 860 at paras. 93-96, the first *Skillings* decision was distinguished. On facts similar to those before me, the respondent was not bound by the notice to admit having written a refusal letter.

[240] In my view, the correct conclusion is that the notice to admit cannot be binding against the Apsassin Defendants.

"Evenhandedness" Argument

[241] In their closing submissions addressing breach of trust, the Plaintiffs raised the trust law principle of evenhandedness as against a trustee. The Plaintiffs' submission, as I understood it, was that the BTS could not satisfy a trustee's obligation of evenhandedness when payments out of the Trust benefited living Band members but not those who were not yet born at the times the funds left the Trust. I believe the relevant provision in the Trust Declaration is s. 3.1(a)(i), preventing any per capita distribution unless it will maintain an "even hand between the present and future Members "

[242] The Plaintiffs' position that the trusteeship by the BTS did not satisfy the requirement of evenhandedness was not raised in any of the four iterations of the notice of civil claim. Importantly, in the 2nd FANOC, at p. 19, paras 98-100, the Plaintiffs pleaded their five particulars of breach of trust, and made no reference to a breach of a duty of evenhandedness. Nor was it referred to in the Plaintiffs' opening statement. Nor was there any line of questioning in the course of the trial which appeared to address the concept of evenhandedness. In the result, in my view, the Apsassin Defendants are unfairly prejudiced by having to face that question for the first time in the midst of final argument. In the result, I do not address evenhandedness, to the extent that it may be relevant. Had the point been pleaded, or developed in the Plaintiffs' opening statement, or evidence in chief or cross-examination, the Defendants could have addressed it with their own questioning, or possibly expert evidence, to place evenhandedness in a proper evidentiary context for final argument.

[243] In any event, evenhandedness is more relevant to a consideration of whether there was a breach of trust by non-compliance with a trust declaration than it is to the question of whether the directors of a trustee knowingly assisted in the dishonest and fraudulent breach of a trust. In my view, whether the directors of the BTS knew of, let alone complied with, a duty of evenhandedness as between living and future Band members, does not lead to the conclusion that a risk was taken which the BTS or its directors knew there was no right to take. It is unrealistic, on the facts of this case, that any non-compliance with the

principle of evenhandedness, in so far as it applies to the unborn, converted the conduct of the BTS directors to being "knowingly wrongful" (Air Canada, para. 59).

The Plaintiffs' Other Claims against the Apsassin Defendants

Nig Creek

[244] Nig Creek Contracting Ltd. ("Nig Creek") is a private company, fully owned and controlled by the Defendant Patrick Chipesia.

[245] Mr. Chipesia used Nig Creek for a period in 2012-2013 in connection with his work as a manager at Pink Mountain.

[246] When Mr. Chipesia managed Pink Mountain (through the use of Nig Creek) he was neither a member of the Council, nor a director of the BTS. He knew that payment for his work at Pink Mountain would at first instance come from the Band's account. He also believed, correctly, that Pink Mountain was a Trust asset, so that the Trust would rightfully reimburse the Band for the money it spent at Pink Mountain, including its payment to Nig Creek for Mr. Chipesia's management. The money obtained by Nig Creek was used to pay its employee, Mr. Chipesia, for his work managing Pink Mountain.

[247] As a matter of law, before Nig Creek could be found liable for knowing receipt, the Plaintiffs would have to show that (1) Nig Creek received property subject to a trust in favour of the Plaintiffs; (2) the property was taken from the Plaintiffs in breach of that trust; (3) Nig Creek had at least constructive knowledge of that breach of trust; and (4) Nig Creek applied the property for its own use and benefit (see Air Canada, paras. 35-36).

[248] Nothing in the facts I have cited above implicates Nig Creek in knowing receipt. Mr. Chipesia managed Pink Mountain. He was paid through his company, Nig Creek. Pink Mountain was owned by the Trust. The Trust reimbursed the Band for its payment to Nig Creek. The Plaintiffs' claim against Nig Creek for knowing receipt is dismissed.

Breach of Fiduciary Duty

[249] The Plaintiffs framed their claim for breach of fiduciary duty as follows (2nd FANOC at para. 93):

At all material times [the Apsassin Defendants] owed a fiduciary duty to the Plaintiffs, including a duty of loyalty and good faith and the duty to avoid any conflict of interest and self dealing. These Defendants breached this duty by putting their interest ahead of and in conflict with BRFN, to the detriment of BRFN.

[Emphasis added.]

- [250] The Plaintiffs provided 11 particulars at page 18 of their 2nd FANOC, the first four of which, alleging self-dealing, are no longer being advanced. Self-dealing did not arise from the evidence. By the time of trial, certainly by the end of trial, the Plaintiffs claimed that the Apsassin Defendants as members of Chief and Council owed a fiduciary duty to the BRFN and breached this duty by mismanaging the Nation's finances.
- [251] The claim for breach of fiduciary duty, and the claim alleging negligent governance, addressed below, seek to affix personal liability on the Apsassin Defendants as governors of the BRFN. Central to my analysis of both the claim for breach of fiduciary duty, and the claim of negligent governance, is the fact that Chief and Council are the governing body of the BRFN, and exercise the public law duties of a government. This overarching consideration informs the standard for imposing fiduciary duty obligations on the Apsassin Defendants.
- [252] Section 69 of the Indian Act authorized the BRFN's Chief and Council from 2009 to 2013 to govern its own finances:

Management of revenue moneys by band

69 (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

- (2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the Financial Administration Act shall not apply to a band to which an order made under subsection (1) applies.

- [253] The meaning of "revenue monies" is contained in section 62 of the Indian Act, where it is distinguished from capital monies:

62 All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

- [254] The associated regulation is the Indian Band Revenue Moneys Order, SOR/90-297, which lists the BRFN in the schedule as one of many bands authorized to control, manage and expend their revenue monies in whole.

- [255] Accordingly, the Chief and Council's financial management at the material times was an exercise of statutory powers.

- [256] As our Court of Appeal held, in *Gitga'at Development Corp. v. Hill*, 2007 BCCA 158 at paras. 27-28, a governing council is not, however, limited to the Indian Act powers:

[27] A Band Council may sue and be sued and enter into contracts on behalf of the Band it represents: *Joe v. Findlay* (1987), 12 B.C.L.R. (2d) 166 (B.C. S.C.); *Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135* (1992), [1993] 1 W.W.R. 373 (Alta. Q.B.) ["TLC"]; *Wewayakai Indian Band v. Chickite* (1998), [1999] 1 C.N.L.R. 14 (B.C. S.C.); Clifton. In TLC, the Court wrote about a guarantee the Band had given:

Although the Band Council is clearly a creature of statute, deriving its authority solely from the Indian Act (*Paul Band v. R.* [1984] 2 W.W.R. 540 (Alta. C.A.) at 549), it by necessity must have powers in addition to those expressly set out in the statute. This was recognized by the British Columbia Supreme Court in *Norman Lindley et al. v. Derrickson* (29 March 1976) [unreported] wherein it was held that a "Band Council must have the implied power to bring legal proceedings on behalf of the Band" [p. 84]. In this regard I accept the suggestion Jack Woodward advances in his book *Native Law* (Toronto: Carswell, 1989) at 166:

It may be said that Band Councils possess at least all the powers necessary to effectively carry out their responsibilities under the Indian Act, even when not specifically provided for. There is an implied power to contract, without the need for authority in the Indian Act.

Given that the Band Council had the power to give the guarantee on behalf of the Band, the question then becomes whether this power was properly exercised.

[Emphasis added.]

[28] I accept that reasoning. . . .

[Emphasis in original.]

[257] The leading case addressing whether a fiduciary duty exists in a government context is *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [Elder Advocates]. The claim there was a putative class action wherein the plaintiffs were residents of public elder care home facilities funded in part by the Province of Alberta and in part by an administrative fee charged to the plaintiffs. The claim alleged that the province required the care homes to charge the maximum administrative fee for all residents to reduce the burden on its contribution. The pleadings included claims of breach of fiduciary duty and negligence against the province, both of which were struck.

[258] Chief Justice McLachlin, writing for the Court, noted that "the same broad principles apply to private actors and governments, though they may play out differently where the alleged fiduciary is a public authority": *Elder Advocates* at para. 26. At paras. 29 to 36, the Court explained that the test to establish a fiduciary duty requires:

- (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
- (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

- (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.
- [259] With respect to the first stage of the test, the Court stated that the undertaking to act in the best interest may result from the exercise of statutory powers; however, the statutory language must clearly support the undertaking: *Elder Advocates* at paras. 32, 45. The Court further cautioned that, in the government context, the test must be applied in light of the government's public law duties, with the result that "governments will owe fiduciary duties only in limited and special circumstances": *Elder Advocates* at para. 37.
- [260] The Court explained that this is because the exercise of government power and decision-making requires compromising and prioritizing interests, which is inconsistent with a fiduciary's duty of undivided loyalty to the beneficiary:
- [42] First, the requirement of an undertaking to act in the alleged beneficiary's interest will typically be lacking where what is at issue is the exercise of a government power or discretion.
- [43] The duty is one of utmost loyalty to the beneficiary. As Finn states, the fiduciary principle's function "is not to mediate between interests. It is to secure the paramountcy of one side's interests ... The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests" (P. D. Finn, "The Fiduciary Principle" in T. G. Youdon (ed.), *Equity, Fiduciaries and Trusts* (1989), at p. 27 (underlining added). See also Hodgkinson, per Sopinka J. and McLachlin J., as she then was, dissenting, at p. 468.
- [44] Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Guardian ad litem of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105 (Ont. C.A.), at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. R.*, 2001 FCT 1408, [2002] 2 F.C. 484 (Fed. T.D.), at para. 178.
- [Emphasis added.]
- [261] In this case, the Nation faces many pressing social issues including health, housing, violence, and education, which Chief and Council are tasked to address and alleviate. Chief and Council must balance and prioritize some objectives over others in their financial management and discretionary decision-making. Prioritizing one interest over another is a matter of policy and discretion, and is at odds with the fundamental duty of a fiduciary of undivided loyalty.

- [262] I agree with the Apsassin Defendants' submission that "[c]uts to spending programs in health and social development may cause hardship on more marginalized members of the Nation, while fiscal prudence may appeal to more stable members. No government can make everyone happy" (Apsassin Defendants' Closing Submission at para. 337).
- [263] Thus, in the absence of personal gain from wrongdoing and misappropriation, which is no longer alleged, or, if it is, is not established on the evidence, the Apsassin Defendants as members of Council, were not acting within the strictures of an undertaking of undivided loyalty in exercising their statutory power and duty to manage the BRFN's finances.
- [264] As to the second stage of the test, the Court in *Elder Advocates* held that no fiduciary duty is owed to the public as a whole:
- [49] [The government is] entitled to make distinctions between different groups in the imposition of burdens or provision of benefits, subject to s. 15 of the Charter, which forbids discrimination. As stated in *Galambos*, the claimant must point to a deliberate forsaking of the interests of all others in favour of himself or his class.
- [50] No fiduciary duty is owed to the public as a whole, and generally an individual determination is required to establish that the fiduciary duty is owed to a particular person or group. A fiduciary duty can exist toward a class -- for example, adults in need of a guardian or trustee, or children in need of a guardian -- but for a declaration that an individual is owed a duty, a person must bring himself within the class on the basis of his unique situation.
- [Emphasis added.]
- [265] In this case, the claim for breach of fiduciary duty is advanced on behalf of the BRFN as a whole. That position is not supported by the reasoning in *Elder Advocates*. The members of the BRFN collectively are not a specific group of persons under this part of the test; rather, they are the entirety of the Nation being governed by Chief and Council. Therefore, no fiduciary duty can be owed to the BRFN as a whole in this context.
- [266] Concerning the third element, Chief and Council's fiscal decisions in this case do not engage the nature of the interest required to find a fiduciary duty: *Elder Advocates* at para. 51.
- [51] It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific private law interest to which the person has a pre-existing distinct and complete legal entitlement. Examples of sufficient interests include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person. The entitlement must not be contingent on future government action .

[Emphasis added.]

[267] And in addition to that hurdle, there is another one:

[53] Moreover, the degree of control exerted by the government over the interest in question must be equivalent or analogous to direct administration of that interest before a fiduciary relationship can be said to arise. The type of legal control over an interest that arises from the ordinary exercise of statutory powers does not suffice. Otherwise, fiduciary obligations would arise in most day to day government functions making general action for the public good difficult or almost impossible.

[Emphasis added.]

[268] The Plaintiffs submit three decisions in support of their claim that the Apsassin Defendants owed a fiduciary duty as members of Chief and Council. In my opinion, all three cases are distinguishable.

[269] The first is this Court's decision in *Blueberry Interim Trust (Re)*, 2011 BCSC 769. The Plaintiffs cite paras. 31, 32, and 43, regarding the duties of the Chief of the Band. First, paras. 31 and 32 are submissions of the Public Guardian stating its position concerning the duties of the Chief, not findings of the Court. Further, the Court's discussion, at para. 43, is considering a breach of fiduciary duty in another case, *Assu v. Chickite*, [1999] 1 C.N.L.R. 14 (B.C.S.C.) where the decisions under review had advanced the personal interests of elected band members, which is absent in the case at bar. Most importantly, the issue in *Blueberry Interim Trust* was whether the Chief owed a fiduciary duty particularly to the minor members of the Band, when he was in receipt of the settlement funds on behalf of the minors. The case was an individualized determination of fiduciary duty owed to a specific group, and does not support the imposition of fiduciary duty on elected members of a band council to the entire band membership. The ratio in *Blueberry Interim Trust*, based on the finding of a fiduciary duty by the Chief to a particular group within the Band (Band minors), for whom the Chief had received settlement funds, is supportable in accordance with the reasoning in *Elder Advocates*. Any dicta in *Blueberry Interim Trust* of a chief and council owing a fiduciary duty at large, to the whole of the nation being governed, is not. That is because it is impossible to reconcile a fiduciary's obligation of undivided loyalty with the task facing a chief and council, of having to decide, every day, between competing demands and requests by the various interest groups within a first nation. (It is understandable that *Blueberry Interim Trust* did not take into account *Elder Advocates*. *Elder Advocates* was decided on May 12, 2011. The hearing in *Blueberry Interim Trust* was on January 11-13, 2011, and the case was decided June 13, 2011.)

[270] Similarly, the context in *Westbank Indian Band v. Derrickson*, [1993] B.C.J. No. 1338 (B.C.S.C) [*Westbank*] differs from that in the present case. In *Westbank*, the defendant chief was a substantial locatee property owner of the property in issue. The Court found that he breached his fiduciary duty to the plaintiff band when he failed to comply with the band's criteria for determining his compensation for severing the property, and personally benefitted in the amount of \$112,500 at the expense of the band: *Westbank* at para. 43. That

case, unlike this one, involved self-dealing and conflict of interest.

- [271] A claim for breach of fiduciary duty in the context of indigenous government has only been found to succeed in instances of self-dealing, misappropriation and serious, unsanctioned conflicts of interest: *Gadwa v. Joly*, 2018 FC 568 at paras 35-41; *Louie v. Louie*, 2015 BCCA 247; *Ermineskin Cree Nation v. Minde*, 2010 ABQB 93.
- [272] Finally, the Plaintiffs rely on the Alberta Queen's Bench decision in *Piikani Investment Corporation v. Piikani First Nation*, 2008 ABQB 775 at para. 91. The Court's limited discussion in *Piikani* of the duty of chief and council, appears to address their duty as public officials as opposed to fiduciaries. Further, *Piikani* was decided prior to the Supreme Court's decision in *Elder Advocates*.
- [273] For the reasons above, I find that the Apsassin Defendants as governors did not owe a fiduciary duty to the Band membership as a whole, and thus, the claim for breach of fiduciary duty must fail. In any event, in my view, if there had been a fiduciary duty owed to the Nation as a whole, I do not find that it was breached. A fiduciary is required to act with absolute loyalty to the beneficiary (*Elder Advocates* at para. 22). The Plaintiffs' case for breach of fiduciary duty (see para. 93 from 2nd FANOC, quoted above at para. 249 of these reasons) alleges that the Apsassin Defendants breached their fiduciary duty by putting their interest ahead of, and in conflict with, the BRFN, to the detriment of the BRFN. There is no evidence of that. All the expenditures in issue from the Trust went to the intended beneficiaries under the Trust Declaration, for the members of the Band. In the absence of self-dealing and bad faith, there is no basis for concluding that the expenditures in question in any way breached a fiduciary duty. Fiduciary duty has to do with matters of honesty and dishonesty, good faith and bad faith, not negligent mismanagement, which is addressed below in these reasons. Finally on this point, I do not find that the Plaintiffs established a lower standard of financial management by the Apsassin Defendants than occurred under other Band governments over the years at the BRFN, or any standard against which to measure the Apsassin Defendants' performance.

Claim of Negligent Governance

- [274] The Plaintiffs base their claim for negligent governance against the Apsassin Defendants on their alleged financial and administrative mismanagement of the BRFN. The Plaintiffs pleaded in their 2nd FANOC as follows:
109. [The Apsassin Defendants] owed a duty to BRFN to carry out their responsibilities as Chief and Council to oversee and supervise and be accountable to BRFN and its collective membership for the financial and administrative affairs of BRFN. Each of these Defendants failed to exercise their duty [in] a responsible, diligent and competent manner.
- [275] To establish a claim in negligence, the Plaintiffs must first demonstrate that in the relationship between the Band and the Apsassin Defendants, as elected members of a government, these Defendants owed a duty of care to the BRFN. The legal framework for

determining whether a duty of care is owed is the Anns/Cooper test set out in *Cooper v. Hobart*, 2001 SCC 79, which asks (1) whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care, and if yes, (2) whether there exist residual policy considerations that justify denying liability.

- [276] As noted above, the negligence claim is against three of five members of a governing body exercising public law duties. Our Court of Appeal has recently explained how negligence claims are to be considered in the public law context. In *Wu v. Vancouver (City)*, 2019 BCCA 23 [Wu], the City of Vancouver appealed from an order of this Court holding the city liable to compensate a homeowner for failing to make a decision on a development permit application within a reasonable period of time.
- [277] With respect to the first stage of the Anns/Cooper test, Harris J.A. noted an "increasing emphasis placed on the analysis of proximity, at the expense of reasonable foreseeability, as the critical element in recognizing a prima facie duty of care": Wu at para. 50. He further explained the effect of this increasing emphasis in the public law context at para. 52:
- [52] The evolution in the Anns/Cooper framework is also reflected in cases dealing with the recognition of private law duties owed by public authorities. The historical emphasis on the distinction between operational and policy decisions has been overshadowed by a more rigorous proximity analysis. One of the difficult issues has been the role that a statutory scheme of regulation plays in analysing whether sufficient proximity exists between a public authority and a claimant to justify recognizing a prima facie private law duty of care. In relation to the proximity analysis in relation to public authorities, the issue is complicated first by the underlying principle that no nominate tort of breach of statutory duty is recognized in Canada, and second by the fact that public authorities generally have powers and duties to act in the public interest rather than in a manner designed to protect the private interests of individuals affected by a scheme of regulation.
- [278] Justice Harris outlined four general principles that apply to the recognition of a prima facie duty of care: Wu at paras. 54-57. To summarize, he found that while a statutory scheme may be relevant to whether proximity exists, and potentially give rise to a private law duty of care, its existence is generally insufficient to support a finding of proximity; that is because statutory schemes exist to promote a public good. Where a conflict arises between a potential private law duty, and the public authority's duty to the public, the public law duty will likely prevail.
- [279] Based on those broad principles, Harris J.A. summarized the law as follows:

- [58] What I take from these broad principles is that, as a general proposition subject only to arguably rare exceptions, statutory duties owed by public authorities are insufficient to ground private law duties arising out of interactions that are inherent in the exercise of the public law duty. Indeed, it is difficult to convert public law duties into private law duties where those public law duties exist to promote a public good. Generally, discharging public law duties does not give rise to a private law duty of care to particular individuals.
- [59] Typically, if a private law duty of care is recognized, it will arise from specific interactions either between the public authority and the claimant sufficient to create the necessary proximity or in the context of a statutory scheme: *Imperial Tobacco* at paras. 45-46.
- [280] Applying those principles, Harris J.A. found there was no such specific interaction between the city and the respondent sufficient to establish the necessary proximity required to support a duty of care.
- [281] In the case at bar, the Plaintiffs argue that the Apsassin Defendants owed a duty to the Band without identifying any specific interaction between them that would provide sufficient proximity to support a private law duty of care. The claim ignores the distinction between a government's public law duty and the private duty of care relevant to a negligence claim.
- [282] The Plaintiffs point to the financial deficits reported in the relevant years as evidence of the Apsassin Defendants' negligent governance. They also allege that the Apsassin Defendants acted without regard to the wellbeing of the BRFN. However, the evidence shows that Chief and Council made investments and expenditures for various social initiatives such as housing, education, healthcare, etc., that Chief and Council as the governing body, had decided were necessary and appropriate. Presumably, Chief and Council had decided that the benefit of these expenditures outweighed the prejudice of operating at a deficit. Chief and Council also knew that significant funds would eventually be coming to the Band from the resolution of its various claims. This exercise of balancing priorities and needs is at the core of Council's public law duty to the Band, as the governing body, and does not give rise to a private law duty of care.
- [283] Turning to the second stage of the *Anns/Cooper* test, Harris J.A. held in *Wu* that even if a public authority had the duty to make a decision within a reasonable time, and could be liable if the duty is not met, the potential burden on a public authority would be extraordinary. The prospect of indeterminate private law liability, also a concern in *Elder Advocates*, is a policy consideration sufficient to negate the private duty of care: *Wu* at para. 73.

- [284] The same can be said in this case. If a private duty of care is recognized as between chief and council and a band generally, band councils across Canada would be subject to potential liability for every decision they make. This risk of indeterminate liability is a policy consideration that justifies not recognizing a duty generally. It can be properly resolved by only recognizing a private duty of care in cases involving specific interactions between the parties: Wu at paras. 72-78.
- [285] Even if there is a duty of care in this case, the Plaintiffs provided essentially no evidence to inform the standard of care applicable to the governance or financial management of the BRFN. They have not shown that the Apsassin Defendants' financial management and administration fell below a satisfactory standard. The Apsassin Defendants, along with the other directors of the trustee, caused the Trust to expend funds for the needs of the Band and its members. I note, as I did earlier, that the evidence does not show a difference between what the Apsassin Defendants did and what the other Councillors did.
- [286] Finally, the remedies for disagreements between indigenous councils and their bands are the same as for any other government in Canada--judicial review of specific decisions is sometimes available, but more often the appropriate remedy is the ballot box.
- [287] The claim for negligent governance is dismissed.

An Argument by the Apsassin Defendants that the Plaintiffs Have Suffered No Loss

- [288] The Plaintiff trustee is entitled to sue for losses if they were wrongly incurred by the Trust's prior trustee, the BTS, and by extension, can sue the directors of that trustee, the Apsassin Defendants and the other directors (who were not sued), in knowing assistance. However, a plaintiff cannot construct losses in order to claim them against a defendant.
- [289] In this case, however, the Plaintiff trustee, who claims that there has been a wrongful payment of Trust monies, is advancing its claim with, not against, the BRFN and its members, who were the primary recipients of the funds said to have been wrongfully dispersed.
- [290] It cannot be said that there has been a loss to the intended beneficiaries of the Trust, that is the Plaintiff Nation and its members, when the Nation received the funds for the various intended purposes, and allocated and spent them accordingly.
- [291] If the Plaintiff trustee and the Plaintiff Nation believe that monies were wrongfully transferred from the Trust to the Nation, the Nation should pay them back. The evidence is uncontradicted that the Nation is about to receive approximately \$350 million from the settlements of claims with Canada. The Plaintiffs however appear to have chosen to write off or forgive money owing from the Nation to the Trust. In my view, that is an artificial creation of loss. If there was any loss, the party who received the funds, the Nation, can make good the loss by paying to the Trust the \$11 million the Trust claims as soon as the Nation has the funds from the settlements.

Conclusion

[292] The claims against the Apsassin Defendants, for knowing assistance, breach of fiduciary duty and negligence, as well as for breach of trust, are dismissed.

[293] Costs can be spoken to.

The Claims against David Laird

Overview

[294] David Laird is sued for breach of contract, negligence, breach of fiduciary duty, knowing assistance and knowing receipt, all in connection with his role as the Band administrator for the BRFN from March 2011 until his retirement in December 2013. A brief summary of Mr. Laird's background is found above at paras. 2 and 37-41 of these reasons.

[295] Ironically, when David Laird retired from the Band administrator position in December 2013, the BRFN gave him a certificate. It read:

David Laird

We wish to extend our sincere appreciation for all your hard work and time you have spent with us

December 2013

"A true friend unbosoms freely, advises justly, assists readily, adventures boldly, takes all patiently, defends courageously, and continues a friend unchangeably."

~ William Penn

Blueberry River First Nations

[296] The Plaintiffs are hard-pressed to disregard that sentiment when those within the Nation who caused Mr. Laird to be sued are the same people who asked him to come back in 2014, to assist the new government of the Nation for the 10 weeks Mr. Laird had available in his schedule. Mr. Laird had the misfortune to be joined in this action, along with several others against whom the Plaintiffs eventually discontinued their claims, simply because, in 2011-2013, he happened to be one of those who had contracted to work with the Apsassin-lead governments.

[297] In my view, Mr. Laird did excellent work for the Band throughout his employment as Band administrator. It was a difficult role for anyone at any time in the Band's recent history, given the numerous and serious social problems the Band faces.

[298] Mr. Laird was a credible witness. He answered questions directly and candidly. He did not embellish answers that were clearly supportive of his position. He was never defensive or evasive in the course of cross-examination. He gave the Court no reason to disbelieve any

part of his testimony. The witnesses he called in his defence were also credible. They included three people the Plaintiffs had originally sued in this case, Mr. Laird's wife Brita Laird, who had performed nursing and other work for the Band, Mark Totten, an experienced social worker who helped the Band members cope with the numerous social problems that burden them, and Cecil Cheveldave, an accounting and finance professional.

- [299] The Plaintiffs endeavored to fix Mr. Laird with responsibility for any non-compliance there may have been with the terms of the Trust Declaration when money was transferred from the Trust to the Band. The evidence is clear, however, that Mr. Laird's only contract (through the Woodbridge partnership he has with his wife) was with the Band itself, and not with the trustee or the Trust. Mr. Laird's responsibilities regarding money that came from the Trust began only once the money entered the Band account. He had no particular financial background, and no background whatever in the operation of trusts, nor did he hold himself out as having any such expertise. The Plaintiffs endeavored to implicate Mr. Laird in Trust dealings because, from time to time, he was at meetings of the BTS. However, the evidence showed that such meetings immediately followed meetings of the Chief and Council, where Mr. Laird had to be in attendance, and it will be recalled that the Chief and Council were also directors of the BTS. Mr. Laird cannot be assigned responsibility for Trust decisions from having stayed in the room when trustee meetings immediately followed Council meetings. As a practical matter evidencing his lack of control in financial matters, Mr. Laird had no cheque-signing power with either the Trust or the Band.
- [300] Mr. Laird's work for the Band cannot be assessed without recognizing the social ills the Band was facing, which called for attention and the dedication of financial resources. It is not an overstatement to say that the Band on the reserve was a community in turmoil, in March 2011, when Mr. Laird assumed his position. The Band faces ongoing issues of drug and alcohol abuse, clinical depression, family violence and gang-related crime. Another backdrop for staff was in the perennial tension between the Yahey family and the Apsassin family.
- [301] Despite these obstacles, the financial evidence as a whole leads to the conclusion that Mr. Laird performed well in financial matters, relative to both predecessors and successors in senior management.
- [302] When the financial statements are examined for 2013-2018, his performance can be favourably assessed. During his "watch", net financial assets, revenue from the federal government, total revenue, operating deficits and salary and administration expenses compare reasonably with the comparable data for non-Laird years.

- [303] The evidence further demonstrates that Mr. Laird focused on expenditures for the wellbeing of the Band membership. That can be seen from a comparison of the financial statements for 2014 (the fiscal year-end was March 31, so that 2014 data includes the last nine months of Mr. Laird's Band administration) and 2018 for social services, education, health/wellness and housing.
- [304] Further, a review of the consolidated statement of operations and accumulated operating surplus, shows a surplus over budget for 2014 for the expense headings for which he was responsible, including administration, public works, housing and community cultural programs.
- [305] The financial evidence as a whole, shows Mr. Laird neither as a star nor as a failure when his responsibility for financial issues is measured. The point in that regard is that his performance in financial matters was at least average or better viewed in the context of the years from 2007, when the Trust was established, to the present. The Plaintiffs presented no expert evidence to illustrate standards for band administration of first nations, and so the assessment of Mr. Laird's work is largely confined to examining it within the context of this Band in particular.
- [306] As I noted earlier, Mr. Laird had no signing authority for Trust expenditures, and nor did he have any other Trust responsibilities. Today, when there is an institutional trustee for the Trust, it is easy to recognize that the Band administrator does not have trust responsibilities. It was no different during Mr. Laird's tenure, in that the Trust was a separate entity for which the Band administrator was not responsible. As a hypothetical, it may have been the case that Mr. Laird would have had some duty to take some action if he had learned that Trust money was being diverted away from the Band and its membership, into the pockets of the directors of the trustee, or entities unrelated to the Band. That, however, was never the case. Monies came from the Trust to the Band, and Mr. Laird did not have occasion to parse the Trust Declaration to see that its complicated requirements were followed. Mr. Laird was also aware that the Band had access to lawyers, accountants and advisors in band governance. At least four lawyers, none of whom were called to testify, wrote memos or letters discussing Trust matters, as discussed above at paras. 90-109 of these reasons.

Further Facts Regarding David Laird

- [307] David Laird was conscientious, and acted responsibly, as the Band administrator, wanting to improve the lives of the members. He was focused on the community's best interests. He acted in a professional and proper manner. During his tenure, he achieved the following:
- (a) Ensured that financial statements and budgets were prepared for various departments;
 - (b) Developed budgets with department managers;
 - (c) Introduced protocols regarding the supervision and management of BRFN staff;

- (d) Established a BRFN management team;
- (e) Facilitated the development of the Governance Manual and policies for the BRFN and its departments;
- (f) Facilitated the creation of an Administration Policy File for the BRFN;
- (g) Facilitated the creation of job descriptions and personnel files for all of the employees of the BRFN;
- (h) In terms of the administration of the finance department of the BRFN, he retained a consultant, Cecil Cheveldave, to conduct a BRFN Financial Administration Capacity Review, develop a Management Action Plan for implementing the BRFN Financial Administration Capacity Review report, work with the finance director, Ron Paracuelles, to implement the Management Action Plan, and create the BRFN Financial Administration Law with 21 policies. Mr. Laird also hired Cecil Cheveldave to help address financial and accounting issues, including, financial reporting, providing monthly statements, preparing budgets, implementing finance software, and improving the process for accounts payable and accounts receivable;
- (i) Facilitated the creation of an Employee Handbook for all employees of the BRFN;
- (j) Facilitated the creation of a Residency By-Law;
- (k) Facilitated the creation of an Animal Control By-Law;
- (l) Supported the development of the Health Services Program and Policy Manual;
- (m) Promoted and supported the revision of the BRFN Comprehensive Community Development Plan;
- (n) Promoted and supported the development of a BRFN Five Year Economic Development Plan;
- (o) Promoted and supported the creation of a community Housing Authority Policy Manual;
- (p) Promoted and supported the creation of a BRFN webpage;
- (q) Was instrumental in assisting Chief and Council in obtaining the necessary accounting advice regarding the BRFN;
- (r) Conducted regular Team Management Meetings, so that each department understood and performed its obligations and responsibilities;
- (s) Implemented the recommendations made by Cecil Cheveldave with respect to the Finance Department;
- (t) Worked with the RCMP, Ministry of Community and Family Development, Family Services, and the BRFN Health Department to address health and safety issues in the community;

- (u) Encouraged the directors within the Band structure (not the directors of the trustee) to identify funding sources and assisted them in developing proposals to secure supplemental funding for their programs (the evidence of Mark Totten, Sharon MacDonald and Brita Laird);
- (v) He held regular meetings with all of the Band directors, and encouraged their contribution to the management and governance of the BRFN; and
- (w) Was instrumental in hiring and assisting the consultant, Mark Totten, to address social problems.

[308] The evidence does not permit any real debate about the remuneration Laird received. It is clear on the evidence that through the Woodbridge partnership, he received from the Band, not the Trust, only what he was entitled to receive pursuant to the terms he negotiated with the Band. There was no evidence to suggest in any way that his level of remuneration was unreasonable.

[309] The MAP for ISC was prepared for the Band under Mr. Laird's supervision, and was signed, on behalf of the Band, on or about February 28, 2013. The MAP as submitted gave the Band until March 31, 2015 to have the recommendations it contained implemented. Mr. Laird implemented, or caused to be implemented, many of the changes required as a result of the MAP, including the following:

- (a) Having budgets prepared by all of the departments in the BRFN which were monitored by Ron Paracuelles, as director of finance, and his department;
- (b) Hiring professionals for the finance department, including Brenda Jimmy and Leonard Jarvis;
- (c) Creating a Financial Administration Law through Cecil Cheveldave;
- (d) Reporting to Chief and Council on a regular basis with respect to the finances;
- (e) Cutting the "daily commute" reimbursement to offsite employees by 50%;
- (f) Promoting and supporting the creation of an Employee Handbook and Job Descriptions for all employees, and developing a Performance Appraisal Policy and performance appraisal tools based on the individual's job description;
- (g) Hiring a professional, in 2012, to act as the department head of lands and resources, Melissa Knight; and
- (h) Hiring Neil Sterritt, an expert in band administration, who conducted workshops for Chief and Council.

Legal Analysis

Breach of Fiduciary Duty

- [310] The breach of fiduciary duty claim against David Laird is pleaded at para. 93B of the 2nd FAN OCC. The pleading says he, and other Defendants, had a duty to avoid any conflict of interest and self-dealing, which they, including Laird, breached by putting their interest ahead of and in conflict with the BRFN. There are four particulars given regarding Laird including inadequate oversight of financial and administrative affairs, accepting payments above those agreed-upon, approving and directing expenditures above the financial capabilities of the Band, and acting without care or regard to the financial controls in place to guard against financial mismanagement. (I will not speak further about the complaint of excessive financial remuneration. As I said earlier, there is no evidence of that.) The pleading goes on, in para. 94, to say that Laird acted in bad faith and for an improper purpose to benefit himself. At para. 95, it pleads that Laird was aware that his conduct was unlawful. Damages are claimed in the amount of \$10,057,366.23.
- [311] Relationships in which a fiduciary obligation has been found are marked by the three characteristics stated by Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99, as summarized in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 30. The characteristics include (1) the fiduciary having scope for the exercise of some discretion or power; (2) having the ability to unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary being peculiarly vulnerable to or at the mercy of the fiduciary.
- [312] Mr. Laird never had the unilateral power or discretion required in a fiduciary analysis so as to effect the Band's legal or practical interests. As noted earlier, he had no cheque-signing power. Equally important, he could only recommend steps. It was Chief and Council who made the final decisions. In Trust matters, Laird had no responsibilities, and he was aware that the Chief and Council received advice from lawyers and others who had more knowledge of trusts than did Laird. I find that the Plaintiffs have not established a breach of fiduciary duty on Mr. Laird's part. The Plaintiffs submitted that, if all else failed, Mr. Laird had a duty to resign in the face of what he observed. In my view, Mr. Laird was free to resign when he chose to, in December 2013. Moreover, failing to resign can neither create fiduciary duties nor constitute a breach of a fiduciary duty, at least not on the facts of this case.

Knowing Assistance

- [313] The law of knowing assistance has been set out above, in considering the Plaintiffs' claims against the Apsassin Defendants, at paras. 193-199, and 230-234 of these reasons.
- [314] This plea against Mr. Laird is found at paras. 102-108 of the 2nd FAN OCC. The question, in summary, is whether David Laird knowingly assisted in a fraudulent or dishonest breach of trust regarding money coming out of the Trust. Paragraph 106 in the 2nd FAN OCC says that Laird knew the funds he was receiving for his work were Trust funds.

- [315] Mr. Laird, like every other party who contracted to provide goods or services to the Band, was paid (in his case through the Woodbridge partnership) by the Band, out of the Band's account.
- [316] I found in addressing the case against the Apsassin Defendants that they were not liable for knowing assistance in connection with the Trust funds. The required mental element of moral wrongdoing, as elaborated in the law of knowing assistance, was not present on the part of the trustee. There is no basis for concluding that it was present in the mind of David Laird, who, at most, was assisting the Band and the Chief and Council with their Band Council resolutions to expend for the Band members funds coming from the Trust.
- [317] For liability under knowing assistance, there must be a dishonest quality that signifies a level of misconduct or impropriety that is morally reprehensible: PricewaterhouseCoopers at para. 20, see above at para. 233 of these reasons. There is nothing of that sort in the work of David Laird on behalf of the Band. All that Mr. Laird did was see that money coming from the Trust was directed to the purposes of the Band and its members in accordance with the Band Council resolutions.

Knowing Receipt

- [318] The law of knowing receipt is summarized in Gold at paras. 40, 42, 74:
- [40] In a knowing receipt case, the plaintiff sues to recover his or her property which has come into the possession of the defendant, as a result of a breach of trust. As Lord Selborne L.C. said in *Barnes v. Addy*, the defendant has "receive[d] and become chargeable with some part of the trust property" (at pp. 251-52). However, the mere fact of receipt, of possession, is not a sufficient condition for liability. To be "chargeable" with trust property, a defendant must have received it in his or her own right, must have enjoyed the property beneficially. There is, thus, no cause of action in knowing receipt against a person who holds trust property merely as an agent for a third party. This was the rationale for dismissing the plaintiff's knowing receipt claim in *Air Canada*. As mentioned therein (at pp. 810-11):

The . . . category of "knowing receipt" of trust property is inapplicable to the present case because it requires the stranger to the trust to have received trust property in his or her personal capacity, rather than as an agent of the trustees.

See also *Agip (Africa) Ltd.*, at p. 288.

. . .

- [42] As with knowing assistance, the plaintiff must prove a certain degree of knowledge on the part of the defendant to justify liability in knowing receipt. Unlike knowing assistance, where a clear test for the requisite level of knowledge has been set out by this Court in *Air Canada*, the case law does not clearly set out the degree of knowledge required to justify liability in cases of knowing receipt. Harpum, *supra*, states (at p. 267):

If a trustee transfers trust property [in breach of trust], the recipient must take that property subject to the trusts unless . . . the recipient is a bona fide purchaser without notice of that fact.

However, the exact meaning of "notice" has occasioned some disagreement in the jurisprudence.

. . .

[74] In order to establish that the respondent was in "knowing" receipt, the appellant must establish one of the following:

- (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

Baden v. Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA, [1992] 4 All E.R. 161 (Ch.), at p. 235.

[319] From the 2nd FANOC, at paras. 102, 104, 106 and 108, the thrust of the complaint under this heading is that Laird received Trust funds for his own benefit.

[320] The evidence is that Mr. Laird (Woodbridge), like every other party who contracted to provide goods or services to the Band, was paid for his efforts by the Band. According to the report of the forensic accountants, the Band received over \$37 million from sources other than the Trust during the time of Laird's employment. The fact that the Band was also placed in funds from the Trust during the same time, which were comingled with other money, can in no way infect Mr. Laird with any of the indicia of wrongdoing required for the Plaintiffs to succeed against him under a knowing receipt analysis. In this respect, he was in the same position as every other provider of services to the Band.

Negligence and Breach of Contract

[321] As is often the case when a defendant has rendered services pursuant to a contract, there is a substantial overlap in the analysis for determining whether that person breached the contract or was liable in negligence for the manner in which the contract was performed. The case of *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 is an example.

[322] Negligence and breach of contract are addressed under a joint heading in the 2nd FANOC, beginning at page 21. At para. 111, the Plaintiffs say: "The Defendant owed a duty to BRFN as band administrator. . . to ensure that proper financial controls were in place and enforced. . .", and eight particulars of that complaint are then set out. Whether the analysis is framed under breach of contract or negligence, the only duty Mr. Laird owed was to the Band and its members. The evidence does not lead to a finding that Mr. Laird was negligent, or otherwise in breach of his contract, in any of his time and effort as the Band administrator. In hiring Cecil Cheveldave to advise him and the Band on financial and accounting matters, and in working with Ron Paracuelles as director of finance, Mr. Laird

did what one reasonably could in his circumstance to brief them properly and endeavor to implement their recommendations. It must be remembered that the Band's affairs and administration had been in a somewhat dysfunctional state for some years prior to Mr. Laird's arrival in 2011. He did what reasonably could be done to administer both financial matters and the other aspects of band administration.

[323] Mr. Laird was brought into this case as a Defendant at the time when the operating minds of the Plaintiffs appear to have decided that the Apsassin Defendants were taking money from the Trust for their own purposes. I believe they kept Mr. Laird in the case on the theory that the Apsassin Defendants would have needed his help in implementing their wrongful plans. As the litigation dragged along, and it became apparent that the central issue was the role of the Apsassin Defendants in transfers from the Trust, I believe the Plaintiffs left David Laird in the lawsuit when perhaps they should not have.

Conclusion

[324] The claims against David Laird and Woodbridge are dismissed.

[325] Costs can be spoken to.

[326] As seen at para. 292 above, I have reached the same conclusion with respect to the claims against the Apsassin Defendants.

"Macintosh J."

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