

CANADA / JUDGMENT

Canada (Attorney General) v. Kostic

2024 FC 1238

COURT

Federal Court

DECIDED

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Canada (Attorney General) v. Kostic

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Decision Content

Date: 20240808

Docket: T-1098-24

Citation: 2024 FC 1238

Ottawa, Ontario, August 8, 2024

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

(Respondent on Motion)

and

LILIANA KOSTIC

Respondent

(Applicant on Motion)

ORDER AND REASONS

[1] This is a motion brought by Ms. Liliana Kostic. It was filed on May 22, 2024 in response to a Notice of Application filed by the Attorney General of Canada on May 3, 2024, which application seeks an order, pursuant to s 40 of the Federal Courts Act, RSC, 1985, c F-7 [Federal Courts Act], declaring Ms. Kostic to be a vexatious litigant and imposing restrictions on her access to this Court [Vexatious Litigant Application].

[2] By way of this motion, Ms. Kostic seeks a stay of the Vexatious Litigant Application.

Notice of Motion [3] In her Notice of Motion, Ms. Kostic, who is self represented in this motion, describes the motion as follows:

THE MOTION IS FOR Stay of this Action/Application; and other interim relief requesting enforcement of agency, prepayment of costs, save harmless, and indemnity and Insurance rights and legal entitlement for Liliana Kostic to be first determined in this action or under separate other proceedings as this court may determine/permit. AN Order for a Stay; An Order enforcing Save harmless, Indemnity, agency prepayment and Insurance retroactive, present and future. Alternatively, an Order Nunc Pro Tunc hearing the earlier Motion records filed and unheard that sought this relief and was Ordered to be heard after or as would be required.

THE GROUNDS FOR THE MOTION ARE the AGC, INAC, Crown and its various State actors, agents and privies have demonstrated a pattern of improper, abusive, and vexatious proceedings in this Court and other Canadian courts (the grounds beyond this Motion record are intended to be argued orally, including applicable references to any statutory provision alleged violated and/or rule to be relied on).

Background [4] In an effort to provide some context around this motion and the Vexatious Litigant Application, it may be helpful to provide, in skeletal form, some background litigation history.

[5] In that regard, the AGC points to the Alberta Court of Appeal's background depiction in *Piikani Nation v Kostic*, 2018 ABCA 234 [Piikani Nation v Kostic 2018], which describes the initial action against Ms. Kostic, and others, and some of the actions that Ms. Kostic had commenced in the Alberta courts up to that time:

[2] Pursuant to a 2002 Settlement Agreement, the Piikani Nation agreed to allow a portion of its lands to be used for the development of the Oldman River Dam, which included a hydro-electric power plant. In exchange, the Piikani Nation received \$64.3M that was settled in the Piikani Trust. The Settlement Agreement contemplated, among other things, that the trustee of the Piikani Trust could invest the funds. Piikani Investment Corporation (which later filed

a proposal in bankruptcy through the Grant Thornton Group as trustee) was designated as the beneficiary of the Piikani Trust, as the Piikani Nation's investment vehicle. The trust funds were to be invested through "Institutional Investment Counsellors". The CIBC Trust Corporation was selected as the investment trustee.

- [3] The trust agreement between the Piikani Nation and CIBC Trust conferred upon the Piikani Nation the power to appoint not only the broker (the "Institutional Investment Counsellor") but also such additional advisors as the Piikani Nation directed the investment counsellor to retain.
- [4] The appellant, Ms. Kostic, was the advisor selected by the Piikani Nation, and the Piikani Nation covenanted with Ms. Kostic that it would direct whichever investment counsellor was appointed to retain her. At first the Piikani Nation retained CIBC Wood Gundy as the institutional investment counsellor, and directed it to hire Ms. Kostic as the advisor. When Ms. Kostic changed employers, Raymond James was retained as the institutional investment counsellor, and it was directed to hire her to be the advisor: see *Kostic v Piikani Nation*, 2017 ABCA 53 at paras. 5-12, 48 Alta LR (6th) 310.
- [5] In November of 2006, the Piikani Nation gave notice to Ms. Kostic of termination of their business agreement. The Piikani Nation and Piikani Investment Corporation commenced QB Action #0601 13081 against Ms. Kostic, Raymond James, some band councillors, and others alleging negligence, breach of fiduciary duty and conspiracy (the "Negligence Action"). This action alleges irregularities in the appointment of Raymond James and other dealings with the trust funds, that Ms. Kostic and Raymond James were not qualified to be appointed, and that the trust funds were placed in unauthorized investments. In a third party notice in this action, Ms. Kostic claims indemnity from CIBC World Markets Inc.
- [6] The Negligence Action specifically pleads "fraud" and other misconduct on the part of Ms. Kostic and some band councillors. Particulars of those allegations included the use of "Swift Transfers" and "blocking of accounts", alleged to be part of a conspiracy to misapply funds in the Piikani Trust. Ms. Kostic pressed the Piikani Nation to produce evidence in support of these allegations, and any resulting damage. The Piikani Nation maintains that it never alleged that "blocked accounts" were created, but that CIBC had "blocked some existing accounts". The blocking had effectively prevented any damage arising from any "Swift Transfers". As a result, the events surrounding the Swift Transfers were reduced from an independent cause of action to alleged particulars of other pleaded misconduct.
- [7] Ms. Kostic commenced another action, QB Action #0801 05039, against the Piikani Nation for wrongful termination of their business agreement, claiming financial losses as a result of being denied the opportunity to earn commissions as an investment advisor (the "Wrongful Termination Action"). She also claimed to have suffered a stroke as a result of certain embezzlement allegations made against her upon her termination.

- [8] Ms. Kostic later commenced QB Action #1601 01693 against Canadian Imperial Bank of Commerce, CIBC World Markets Inc. and CIBC Trust Corporation claiming, among other things, full indemnity in the Negligence Action (the “Indemnity Action”).
- [9] Due to the complexity and intensity of the litigation, a case management judge was appointed. He formulated and amended a detailed litigation plan. One feature of the litigation plan was that no applications could be brought unless they were pre-screened by the case management judge, and “leave” to bring that application was granted (see the order of June 22, 2016, EKE 1701-0063AC A480). The present six appeals arise from the case management process.
- [10] As a part of the litigation plan, the case plan, the case management judge had directed that no new claims could be brought without prior approval. Because of concerns about a limitation period, Ms. Kostic commenced, without prior approval, QB Action #1701 01341 against CIBC Trust Corporation. It claimed that CIBC Trust was complicit in the termination of her agreement with the Piikani Nation, and that it had played a part in commissioning the Navigant Report that resulted from an investigation into the affairs of the Piikani Trust. The claim was for damages for interference with economic relations through knowingly making false allegations of embezzlement and other misconduct. This action also seeks production of the Navigant Report, which is subject to a claim of litigation privilege (see *infra*, paras. 48-56). Her subsequent request for approval to bring that action was denied: *Piikani Nation v Raymond James Ltd.*, 2017 ABQB 140 at para. 30 (see *infra*, paras. 57-61).
- [6] A recent decision of the Court of King’s Bench of Alberta states that as of July 2024, the two initial actions have grown to over 30 actions in Alberta involving similar parties and similar issues, although Ms. Kostic is not a party in all of them (*Piikani Nation v Kostic*, 2024 ABKB 137 at para 8 [*Piikani* 2024]).
- [7] The AGC notes that Ms. Kostic has also brought a negligence claim against Miller Thomson LLP (Action No. 1501-11111) as well as a counterclaim against multiple parties (Action No. 2101-06345, filed April 1, 2022) in Alberta in relation to the initial action. She has also petitioned for leave to bring several other applications and claims, including against eight lawyers who acted against her, but was unsuccessful (*Piikani Nation v Raymond James Ltd*, 2017 ABQB 9; see also *Piikani Nation v Kostic* 2018).
- [8] Most significantly in the context of Ms. Kostic’s stay motion, the AGC submits that in the Alberta litigation, Ms. Kostic has repeatedly argued, reargued and appealed regarding her alleged entitlement to indemnification from Piikani Nation, Raymond James Limited [RJL], CIBC Trust Company and CIBC World Markets Inc. [collectively CIBC] with the following results:
- a. Piikani Nation – The indemnity provisions in Ms. Kostic’s business agreement (T-1098-24 – Business Agreement at s 6 found in the Kostic Motion Record, pp. 571-575/726) with Piikani Nation have been confined to a “breach of the Piikani Nation’s representations and warranties,” and “any material breach of the terms of this Agreement by the Piikani

Nation” (Piikani Nation v Raymond James Ltd, 2017 ABQB 140 at paras 21-24; Piikani Nation v Raymond James Ltd, 2017 ABQB 681 at paras 10-18; Piikani Nation v Kostic 2018 at para 72). They have no application to claims “that have nothing to do with any breach by the Piikani Nation” (Piikani Nation v Kostic 2018 at para 73).

- b. RJL and CIBC – Ms. Kostic’s claims for defence costs and indemnification have been reserved to the trial of Piikani Action No. 0601-13081 (Kostic v CIBC Trust Corporation, 2018 ABCA 355 at para 2 and para 44 [Kostic v CIBC 2018]; Piikani 2024 at para 107, para 110, para 114 and para 118).
- [9] The AGC also sets out Ms. Kostic’s activity in this Court, beginning in 2020, and in the Federal Court of Appeal. The AGC indicates that, as demonstrated in the chart appended to its written representations as Schedule A, between 2020 and 2023, Ms. Kostic initiated one action (T-680-20), two applications (T-348-21 and T-713-22), and two appeals (A-116-23 and A-272-23). She also implicated herself in eight other judicial review applications commenced by other applicants (T-1344-20, T-1224-21, T-1850-21, T-714-22, T-2317-22, T-267-23, T-319-23, and T-320-23) and at least two other appeals (A-115-22 and A-117-23), most of which have now been struck, dismissed or removed from the record.

Legislation

Federal Courts Act, RS 1985, c F-7

50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter

- (a) on the ground that the claim is being proceeded with in another court or jurisdiction; or
- (b) where for any other reason it is in the interest of justice that the proceedings be stayed.

Test for a stay [10] In her motion, Ms. Kostic does not refer to s 50(1); however, it is apparent from her stay motion that it is only s 50(1)(b) that potentially has application in these circumstances.

- [11] Generally speaking, the test to be applied when seeking a stay is as set out in RJR-MacDonald Inc v Canada (Attorney General), [1994] 1 SCR 311 [RJR-MacDonald] and R v Canadian Broadcasting Corp, 2018 SCC 5 at para 12 [Canadian Broadcasting Corp]. Specifically, that the moving party must demonstrate that: (1) there is a serious issue to be tried, (2) they would suffer irreparable harm that is not quantifiable and non-compensable in damages if the stay were not granted, and (3) the balance of convenience favours granting the stay. The test is conjunctive and all three criteria must be satisfied to obtain interlocutory relief (see, for example, Canadian Broadcasting Corp at para 12). The onus is on the party bringing the motion to establish that the test has been met (RJR-MacDonald at 314-315). In all cases, the fundamental question is whether the granting of an injunction or stay is just and equitable in all of the circumstances of the matter (Google Inc v Equustek Solutions Inc, 2017 SCC 34 at para 25).

[12] However, as I previously addressed in *Kostic v Canada*, 2023 FC 306 at paras 48-52 [*Kostic* 2023], also a stay motion brought by Ms. Kostic, the test differs when a motion seeks to have the Court stay one of its own proceedings.

[13] In that regard, the Federal Court of Appeal in *Viterra Inc v Grain Workers' Union* (*International Longshoremen's Warehousemen's Union, Local 333*), 2021 FCA 41, the Federal Court of Appeal held:

23 As the parties both recognize, the test for this Court to grant a stay of one of its own proceedings, as opposed to a proceeding in another forum, is less demanding than the RJR test: it is "whether, in all of the circumstances, the interests of justice support the appeal being delayed": *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 at paras. 5, 14. However, in considering the interests of justice, the Court may take into account some of the same considerations as those referred to in *RJR : Clayton v Canada (Attorney General)*, 2018 FCA 1 at para. 26. The Court will also be guided by the principle set out in rule 3 of the Federal Courts Rules, SOR/98-106: that of securing "the just, most expeditious and least expensive determination of every proceeding on its merits": *Coote v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 12.

[14] In *Clayton v Canada (Attorney General)*, 2018 FCA 1 [*Clayton*], the Federal Court of Appeal held that there is a distinction between s 50(1)(a) and (b) and that an "interest of justice" test applies to the latter:

[24] To begin, it is important to distinguish between "a court staying other bodies' proceedings pending an appeal or other matter, or for an injunction" and a stay that is, in reality, "a long-term adjournment": *Epicept Corp. v. Canada (Minister of Health)*, 2011 FCA 209 at para. 14, 425 N.R. 353. Building on this distinction, in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, 426 N.R. 167 (*Mylan*), this Court set out an "interest of justice" test governing whether the Court should stay its own proceedings. In that case, Justice Stratas held, at paragraph 5, that:

[5] ... This Court deciding not to exercise its jurisdiction until some time later. When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less. (Emphasis in original)

- [15] The Federal Court of Appeal in Clayton found that while the prothonotary in that case considered the threefold criteria from RJR-MacDonald, as opposed to the “interest of justice” test, it was an error of no consequence:
- [26] In considering “the interest of justice”, courts may take into account some of the same considerations as in RJR-MacDonald – whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests. Here, while the prothonotary did not use the precise nomenclature of the “interest of justice” test, he directed himself to considerations relevant to the exercise of discretion under the test.
- [27] In the present case, the question of whether to issue a stay under paragraph 50(1)(b) of the Federal Courts Act devolved to simply one of when it was appropriate for the judicial review application to be heard. The prothonotary examined this question in detail, considered and weighed the relevant factors, and made no palpable and overriding error in refusing to exercise his discretion to stay the application for judicial review.
- [16] Accordingly, the interest of justice test is to be applied in this matter, as Ms. Kostic seeks to have this Court stay the Vexatious Litigant Application filed by the AGC. That is, she seeks to have this Court stay its own proceeding (see also *ArcelorMittal Exploitation minière Canada SENC c Canada (Procureur général)*, 2021 FC 998 at para 2 [Arcelor]; *Jackson v Piikani First Nation*, 2021 FC 246 at para 11).
- [17] In *Arcelor*, Justice McHaffie described some of the considerations that come into play when applying the interest of justice test:
- [19] For motions of this type, “broad discretionary considerations” and the factual circumstances presented to the Court come to bear in the Court’s decision (Mylan at para 5; *Coote v Lawyers’ Professional Indemnity Company*, 2013 FCA 143 at paras 11–12). These considerations include the public interest in having proceedings move fairly and with due dispatch; the general principle of applying the Rules to secure a just, expeditious and cost-effective determination of a proceeding; the length of the stay being sought; the reason for seeking the stay; the potential for wasting resources; and the prejudice or inconvenience to the parties should the stay be granted or refused (Mylan at para 5; *Coote* at paras 12–13; *Clayton v Canada (Attorney General)*, 2018 FCA 1 at paras 7, 28; *Federal Courts Rules*, s 3).

Preliminary Matters i. Relief Sought [18] In the Notice of Motion, Ms. Kostic lists her “expanded” grounds for her motion. However, this list actually appears to set out the relief that she seeks in the stay motion:

THE GROUNDS FOR THE MOTION expanded:

- a) An Order(s) or Declaration(s) in T-1098-24 and to be considered/filed in all live Appeals:
 - 1. Stay of Application and any Costs Enforcement;

2. Constitutional Motion be heard second;
3. staying of action T-680-20 FCA Appeals A-272-23 ("the Kostic action") and any related actions pending the determination of the relief sought herein, if required;
4. Leave Nunc Pro Tunc, for any step and leave per Rule 55 if required;
5. Agency prepayment costs, Insurance obligations, Disclosed Principal employers contractual and equitable legal obligations for Save Harmless and that Save Harmless /Indemnity/ Insurance/agency prepayments/warranties/representations/ and/or advanced costs be first determined.
6. Alternatively, i) and ii) and iii) stayed pending an independent application against all indemnitors to enforce all breaches by them and that the Appellate Court determined was breached in 2017.
7. Assurances in advance to having a fair trial/hearing without any possibility of past, present relationships between the judiciary and the parties to prevent a repeat of the undisclosed conflicts that the Honourable Justices who made decisions in this court failed to observe or disclose, that it had directly with the AGC et al and other officers or parties named as defendants in these proceedings and all related proceedings. Moreover, in compliance with the Judicial Council and oath required that the justices recuse themselves but did not but should have exercised their immediate recusals to avoid the test namely that an appearance real or perceived is all that is required.
8. An Order prohibiting Gowlings and Ms. Hanert Kostic's former legal counsel from acting in this or any other proceedings. Alternatively, to hearing Kostic's disqualification and other motion(s) filed within her appeals, none of them still unheard and first request and Notice provided to the court by Kostic was in 2020 to present day.
9. An Interim Order NUNC Pro Tunc for Prepayment of Costs and to Stay of any costs pending the final outcome and/or pending the final outcome of the Save harmless and Indemnity motion for this Motion. Motion materials TBF concurrently and with supplemental pending materials.
10. AN Interim Order Nunc Pro Tunc for Constitutional Question(s) motion. Motion materials TBF concurrently and with supplemental pending materials
11. A declaration that disclosed employee agent Kostic is entitled to all immunity available to her, Limit of Liability, Prepayment of costs and save harmless relief, insurance relief that remains in breach and unperformed, since 2006 to present and is equally in breach of earlier court Orders or agreements executed.

12. A declaration that Councilor Janet L Potts and elected Councilor during the relevant time in question and all issues unlawfully advanced since 2006 is entitled to all save harmless or immunity relief that remains in breach and unperformed, as is equally in breach of earlier court Orders, agreements executed and Piikani Legislation, the Indian Act, Treaty and Human Rights.
13. Further Alternative Order to remove Counsel for Piikani pending the final Police and law societies report, alternatively to produce the mandatory required valid and legal BCR and required minutes proving his actual or ostensible authority is in accordance with Statutes, Piikani Bylaws and roles and responsibilities, the rules of court. This is not privileged it is trite.
14. Final alternative Order compelling the AGC, other Respondents and/or Civil Enforcement to produce a certified Financial record of all proceeds and its disbursements and failure to report to Fintrac, to help the court make final Orders and its conclusions based on the accurate facts to end these never-ending wasted judicial proceedings with a proper and full record.

(Emphasis original)

[19] Ms. Kostic filed a 28-page, single-spaced, 174-paragraph affidavit dated May 21, 2024 in support of her motion. Inclusive of exhibits, the motion record is 726 pages in total. In her affidavit, Ms. Kostic states that she is seeking

- a) An Order:
- i) Stay of Application and any Costs Enforcement;
- ii) Constitutional Motion be heard;
- iii) staying of action T-680-20 FCA Appeals A-272-23 (“the Kostic action”) and any related actions pending the determination of the relief sought herein, if required;
- iv) Leave Nunc Pro Tunc, for any step and leave per Rule 55 if required;
- v) Save Harmless and Indemnity/Insurance/agency prepayments and/or advanced costs be first determined.

and Order(s) Nunc Pro Tunc:

- (a) Stay of all steps, pending Final determination and Order(s);
- (b) For an extension of time to finalize this motion record
- (c) immediate removal of Ms. Hanert and any of her privies from continued representation in any Piikani or related matters
- (d) Reliance to all pleadings and proceedings in other actions with Leave

- (e) Consolidation or concurrent hearing of all related actions which raise the identical and same issues and claim similar relief, if independent action required.

vi) Costs;

vii) Any additional relief available and granted by this court.

(Emphasis original)

- [20] It is sufficient to say here that while in her stay motion Ms. Kostic is entitled to seek relief by way of a stay of the proceeding that she has challenged in this Court – the Vexatious Litigant Application – the relief that she seeks in her Notice of Motion far exceeds the reach of the subject motion.
- [21] For example, in her written submissions she refers to “constitutional questions arising,” including whether the “legal proceedings initiated by” the AGC “infringe upon her constitutional rights to fair treatment, right to be heard, disability and due process.” The Notice of Motion appears to suggest that these constitutional questions should be dealt with after the stay motion but before the Vexatious Litigant Application. However, it is unclear how these proposed constitutional questions are connected to the Vexatious Litigant Application, how they are to come before the Court or why they should be heard prior to the Vexatious Litigant Application.
- [22] As to staying an appeal or appeals before the Federal Court of Appeal, that relief is beyond the jurisdiction of this Court (Federal Courts Act, s 28(3)). Ms. Kostic also seeks a stay of “any related actions” but has not named them. And, in any event, Ms. Kostic provides no explanation as to why those actions should be stayed.
- [23] As to seeking assurances in advance to having a fair trial/hearing, this appears to be an allegation of conflict of interest by members of this Court. To the extent that Ms. Kostic is seeking to have me, or other judges of this Court, recuse themselves from hearing this motion, she would need to bring a formal motion in that regard. I note that Ms. Kostic did not pursue this issue at the hearing of her stay motion beyond taking issue with the AGC’s view that such unfounded allegations are vexatious. As to Ms. Kostic’s request for an order prohibiting Gowlings and Ms. Hanert from acting in this or any other proceedings, this appears to be an issue entirely distinct from the test to be met in order for Ms. Kostic to succeed in the stay motion, as are the requested orders to remove counsel for Piikani Nation and to compel production of financial records. Similarly, the declaratory relief sought is distinct from and unrelated to the stay motion.
- [24] In short, the only relief that is appropriate to this motion is, if it is successful, the granting of the stay of the Vexatious Litigant Application and, potentially, associated costs of the motion.

ii. Admissibility of the Reply Affidavit, Reply Record and Reply Book of Authorities [25] In her written representations that accompanied her Motion Record, Ms. Kostic makes reference to the possibility of filing a supplemental affidavit.

[26] In its responding written submissions, the AGC argues that Ms. Kostic should not be permitted to file supplemental affidavits and that this Court's consideration of her motion should be confined to her motion record served on May 22, 2024 and filed on June 5, 2024. The AGC notes that Rule 364(2)(c) requires that motion records "shall contain...all affidavits and other materials served by the moving party for use on the motion." And while supplemental affidavits can be filed in specific circumstances, the AGC submits that leave is required to do so. Ms. Kostic served her motion record over six weeks ago and, at the time the AGC filed its responding record on July 4, 2024, she had not filed or sought leave to file a supplemental affidavit. The AGC submits that to permit reliance on a supplemental affidavit at this late stage would cause unwarranted delay.

[27] Ms. Kostic did not seek to file a supplemental affidavit.

[28] Instead, on June 28, 2024, she sought to file a single-spaced, 183-paragraph "Reply Affidavit," which, together with attachments, comprises 650 pages of materials. The final page of this new affidavit indicates that it was sworn on June 27, 2024. The Reply Affidavit was sworn before the AGC filed its responding motion record. Accordingly, I have difficulty seeing how it can have been made in response to same. A brief review of the proposed Reply Affidavit confirms that is not responsive to the AGC's responding stay submissions.

[29] On July 8, 2024, the evening before the hearing of the stay motion, Ms. Kostic sought to file a "Reply Record." This is a 20-page, single-spaced, 95-paragraph document that comprises argument in response to the AGC's written representations responding to the stay motion. On the morning of the hearing, Ms. Kostic attempted to file a "Reply Book of Authorities," which is primarily concerned with the law concerning indemnity.

[30] At the hearing, the AGC submitted that while not much turns on these materials as they do not address the stay motion, the AGC objected to the admission of these new documents on the basis that there is no right of reply contemplated by the Federal Courts Rules, SOR/98-106 [Rules] for motions not in writing; the new submissions were not submitted in a timely manner; and, admission of the documents would result in the delay of the stay motion (although I note that neither party sought an adjournment).

[31] Ms. Kostic submitted that she thought she had sought leave and, as it was not denied, that she was free to make further submissions.

[32] At the hearing, I advised that Ms. Kostic could refer to the submissions if she chose to do so but that I would make a determination on their admissibility in my decision.

- [33] I have now determined that the Reply Affidavit and the Reply Record are not to be accepted for filing and I have instructed the Registry accordingly. The Reply Book of Authorities can be accepted for filing, as Ms. Kostic referred to several decisions contained therein in the course of her oral submissions to support that a serious issue arises from the issues of indemnity and save harmless raised in her stay motion.
- [34] My reasons for declining to permit the filing of the Reply Affidavit and the Reply Record are, first, that the Rules do not contemplate the filing of “reply affidavits” or reply motion records, nor did Ms. Kostic seek leave of the Court to file these materials or even alert the AGC or the Court of her intention to do so. Second, the effect of attempting to file the Reply Record on the eve of the hearing prevented the AGC from properly reviewing and addressing same. Third, Ms. Kostic has previously brought stay motions before this Court (see *Kostic* 2023) in which she has represented herself. She is well aware of the test to be met and that the onus was on her to provide evidence supporting her motion within her Motion Record. Ms. Kostic could and should have anticipated that the AGC’s responding submissions would address serious issue, irreparable harm and the balance of convenience/public interest and could and should have provided, in her Motion Record, all of her supporting documentary evidence addressing same. She also provides no reason why such information was not provided with her Motion Record. For example, she provides no explanation why the doctor’s letter she refers to in her affidavit filed in support of her motion was not provided at that time. In these circumstances, I find that it was not open to Ms. Kostic to attempt to file the Reply Affidavit and Reply Record.
- [35] Finally, as indicated above, upon brief review of the proposed Reply Affidavit, it is apparent that it is not responsive to the AGC’s response to the stay motion and seems to be a near replica of the original affidavit. Any variations to its content and attached exhibits (or the many exhibits listed but not referenced in the body of the affidavit materials) are not identified as such in that document. As to Ms. Kostic’s original affidavit filed with her motion record, it is of note that she describes this as an “omnibus affidavit”:

X. RELIEF

- 165) I swear this omnibus affidavit in further support of my Notice of Motion in T-1098-24, in further support of my Notice of Appeal(s) past, present and any Appeal in T-680-20. Also, in support and to be added and intervene as an added party to Appeal A-115-22 pursuant to the Favel order. Also, for the various other relief sought herein the Notice of motion record.
- 166) Also, for a future Order, or at minimum in support of, if available at this time to be granted interim Injunctive status with full participant standing and as an added party in any and all related Appeals under A-115-22; and in any other related actions in order to preserve all of my defences, to provide submissions both orally and in writing to oppose, to preserve my pending damage awards hearings; to preserve any and all legal rights available to me and for all the relief requested in my Motion records.

Ancillary other relief:

- 167) In support of a future Order to “permanently Staying” or to “Stay the Appeal” of the RAB’s July 7th, 2021, or T-1224-21 Judgment of the Honorable Justice Grammond Decision, April 22, 2022, FC 591 pending the final determination of pending appeals in action for judicial review and appeal in action T-348-21, T-713-22 and actions T-267-23; T-319-23 and T-320-23. Alternatively, to have all appeals and actions heard together or concurrently.
- 168) In support of a future Order determining the issues in dispute under my unheard judicial action T-348-21 as amended and attached as Exhibit “9” to my previously filed motion records to be heard and decided together or concurrently with submissions by my counsel, Mr. Zinner in that action.
- 169) The Plaintiff be awarded the costs in an amount to be determined by the Court of this Motion for no improper purpose.
- 170) I swear this affidavit in support of all relief claimed under my Motion record herein, in my supplemental affidavits, in further support of my Appeal, my Constitutional and Stay Motions, and for any related action or Appeal and Stay Motion and reliance on the materials and written submissions jointly as argument and evidence related to each.
- 171) I swear this affidavit in support of all relief claimed herein.
- [36] This may explain why much of the content of her original affidavit appears to have no relation to the stay motion now before me.

The stay motion Ms. Kostic’s Position [37] Ms. Kostic’s written submissions comprise 158 single-spaced paragraphs, most of which do not address or support the motion that she has brought and are not relevant to the question of whether or not a stay should be granted. Her submissions include:

- that in upholding her legal rights as a former employee of CIBC and RJL, it is essential to consider landmark cases that have shaped the legal landscape regarding agency agreements: “Drawing from key precedents in the UK, USA, and Canada can provide valuable insights into the protection of individuals in similar circumstances.” She submits that this is “highly relevant as the AGC assisted in inducing [sic] breaches to her agreements and legal rights, and breached its own fiduciary obligations to band members and to Kostic who acted on Canada’s, INAC, the Crown and AGC false representations and its intentional breaches to the STA, income reinvestment, loss that occurred from their pressure and influence that Kostic has been held hostage to account for despite not being a participant in any breach whatsoever made by the AGC et al and other defendants added along the way.”

Ms. Kostic does not explain how the AGC assisted in inducing breaches or how this is relevant to the stay motion;

- that the legal challenges she faces raise constitutional questions and touch upon matters of public interest. She submits that it is imperative to ensure that her rights are protected and that she receives the necessary support from her former employers, including CIBC, AIG and RJL, during this critical time. These constitutional questions are: whether her treatment in the legal proceedings initiated by the AGC infringe upon her constitutional rights to fair treatment, the right to be heard, disability and due process; and, “To what extent do the actions of AGC et al, that it caused/induced by its own breaches with Piikani et al, CIBC et al, AIG, and RJL and others in providing support for Ms. Kostic's defense align with constitutional obligations related to upholding the rights of individuals in legal proceedings?”

As indicated above, it is unclear how these constitutional questions are connected to the Vexatious Litigant Application. There are also no motions raising constitutional questions currently before this Court;

- many paragraphs that describe alleged errors of an unspecified judge in an unspecified decision;
- that public interest considerations are in play because her case raises public interest concerns regarding the protection of individuals in agency relationships and the responsibilities of employers towards their former employees. She submits that upholding her legal rights and entitlements is not only crucial for her well-being but also sets a precedent for ensuring fairness and accountability within agency frameworks. Further, for nearly two decades she has been denied constitutional protections, access to timely justice and basic rights. She submits that this extends beyond her interests to any other individual or marginalised group she has advocated for in her two-decade quest for truth, justice, redress and reconciliation in upholding those protections under the rule of law domestically and internationally;
- that justices of this Court who have made decisions in proceedings in which she has or has claimed an interest failed to and did not disclose their prior relationships with the alleged offenders, state actors, privies, agents, government officials, officers or law firms, such as with AGC, Bennett Jones, CIBC or any of the other named defendants in the proceedings, giving rise to the appearance of bias and lack of procedural fairness, fair trial and due process. Further, “The AGC attempts to prevent, deny or obstruct valid and requested independent public investigations under joint/individual law society complaints that are filed by Councilors Brian Jackson, Janet L. Potts and Liliana Kostic against these offenders for the various breaches, Fintrac violations, potential and exposed real FBI violations, Trust reporting violations, multiple unlawful government decision making, law society breaches inter alia by all officers engaged, unjustly benefiting or participating.” She submits that she “must obtain an Order to ensure that any further proceedings will be unbiased, be fair, impartial and be unbiased and to be determined in advance of any hearing to be clear of any bias real or perceived and must factor any and all evidence she has submitted or will submit nunc pro tunc in the future of these issues before making and factoring into any future

decisions”;

- that “the court” failed to acknowledge her full immunity as a disclosed employee agent acting on behalf of principals like CIBC, WG and RJL. This failure to recognize her immunity led to an incomplete assessment of her rights to indemnification and save-harmless relief;
- submissions as to “Landmark Cases Supporting Appeal A-272-23, 271,23,A-115-22,T-348-21” and assertions that errors of law were made in prior rulings by the Federal Court and Court of Appeal;
- as a ground for a stay and the relief requested, citations concerning the creation of express trusts, compliance with trust obligations, tracing of funds and “Most importantly and significantly to muzzle her evidence and knowledge that CIBC made racist and discriminatory statements both against Piikani, would extend Kostic Stay Motion and interim relief T-1098-24 beyond Piikani to all Indigenous individuals and was directly made against Kostic. This is sufficiently plead in her claim T-680-20. This was recorded cogent evidence that Kostic’s counsel provided CIBC et al in 2004, namely Bennett Jones a behind the scenes actor with deep ties to the judiciary” ;
- that “Simply put AGC, CIBC, Piikani, AIG, RJL, Gowlings, Ms. Hanert, JSS and others are parties who are in breach, who at law cannot benefit from their own breaches but have managed to influence this court to overlook well established legal precedent which deprived CIBC, Piikani and others from asserting given their own breaches”;
- that “The recent vexatious legal action brought by the Attorney General of Canada (AGC) against Kostic raises serious concerns about attempts to silence truth-seeking efforts and impede investigations into the disappearance of over 39 million trust and related comingled band funds. This scheme, seemingly aimed at muzzling Kostic and hindering the pursuit of accountability, obstructs the path to uncovering the truth and holding responsible parties accountable for their actions. The implications of this situation on Kostic, band members, and the quest for justice are profound and demand urgent attention”;
- many submissions concerning Ms. Kostic’s view on the facts, arguments and merits of the litigation in which she is involved; and
- submissions concerning upholding fiduciary duties in Indigenous governance and balancing band interest and accountability as well as the importance of whistle blower protections.

[38] The submissions make many other wide-ranging assertions that are unconnected to the test that must be met in order to succeed in the stay motion and that appear to be submissions on the merits of the various actions, applications and motions that are or were before the courts.

- [39] That said, the salient basis of Ms. Kostic's stay motion appears to be that the Vexatious Litigant Application should be stayed until such time as she has brought a motion "for save harmless, indemnities, and insurance enforcement that is now triggered and entitlement to be enforced, as there is evidence of breach by all relevant parties." According to Ms. Kostic, she is entitled to save harmless and "indemnities rights" from her former employers, "CIBC, RJL and Insurers CIBC and AIG, and RJL," as triggered by the current legal proceedings. She submits that failure to honour these obligations constitutes a breach of contract and legal duty owed to her and further bad faith claims beyond those set out in T-680-20.
- [40] In Ms. Kostic's view, immediate support from or by her former employers is crucial to protect her legal rights and ensure a fair resolution of the ongoing legal challenges (presumably by way of providing and funding her response to the Vexatious Litigant Application and other litigation as well as by indemnifying and holding her harmless). She states that "[w]ithout the immediate intervention of the stay motion, Kostic faces real or actual prejudice and harm, both in terms of the legal process and her personal well-being. It is essential to prevent such harm by granting the stay."
- [41] She concludes that the stay motion is a critical legal remedy to address the urgent legal challenges that she faces to protect her constitutional rights and ensure fairness and justice in the ongoing legal proceedings.

The AGC's position [42] The AGC submits that Ms. Kostic has not met the tripartite test for a stay or demonstrated special or compelling circumstances that would warrant the granting of this extraordinary remedy.

- [43] The AGC submits that the Vexatious Litigant Application raises a serious issue to be tried while, in contrast, the stay motion fails to do so. Palpable vexatiousness is further demonstrated by Ms. Kostic's conduct in her stay motion. This includes her unsubstantiated allegations of impropriety against Canada, this Court and others. The AGC also submits that Ms. Kostic's attempt to obtain indemnification in this Court is a collateral attack on the decisions of the Alberta courts and a vexatious attempt to forum shop.
- [44] Further, that there is a lack of evidence, as well as logic and common sense, weighing against her contention of an alleged indemnity agreement. She has failed to put forward even a modest degree of evidence to show a serious issue with respect to any indemnity agreements or that they would have any application to the Vexatious Litigant Application. Without this, the Court cannot find that there is a serious issue to be tried. Accordingly, Ms. Kostic's proposed future motion for indemnity relief is properly characterized as frivolous and wanting. Further, logic dictates against the existence of a serious issue to be tried. The indemnity provisions in Ms. Kostic's Business Agreement with Piikani Nation clearly do not apply, as Canada's Vexatious Litigant Application has "nothing to do with any breach by the Piikani Nation" (Piikani Nation v Kostic 2018 at para 73). And, while Ms. Kostic has not put forward any indemnity terms with RJL or CIBC for this Court to consider, it would be highly unusual and remarkable for such terms to provide for indemnification in respect of

vexatious litigation conduct on the part of an indemnitee.

- [45] As to irreparable harm, the AGC submits that Ms. Kostic has not explained how she will be irreparably harmed by the continuation of the Vexatious Litigant Application. Nor has she adduced the requisite degree of clear and convincing evidence to support such a claim. Given her emphasis on the alleged indemnity agreements, the AGC assumes that Ms. Kostic's claim of irreparable harm involves her desire either to have legal counsel respond to the Vexatious Litigant Application or to avoid the financial cost of engaging legal counsel, but submits that these do not amount to irreparable harm. Further, Ms. Kostic's past involvement in this Court demonstrates that she can and has previously engaged legal counsel and has also represented herself. Nor does having the issue of indemnification of legal fees remain a triable issue amount to irreparable harm.
- [46] The AGC submits that the balance of convenience favours Canada and a denial of the requested stay of proceedings. Granting a stay would afford Ms. Kostic time to continue vexatiously inflicting harm on the Court, Canada and many other affected parties by way of costly and time-consuming new proceedings, unsubstantiated allegations, scandalous language and non-compliance with rules and orders. However, Ms. Kostic will not suffer any harm if a stay is refused. Without a stay, she can still retain counsel to represent her in the Vexatious Litigant Application or choose to represent herself. There is no evidence to support that she cannot absorb those fees, nor would such a cost be irreparable. And although she has not demonstrated a serious issue to be tried with respect to the existence of any applicable indemnity agreement(s) in the context of this motion, Ms. Kostic also retains the ability to pursue that argument against RJL and CIBC at the future trial of Piikani Action No. 0601-13081 (Kostic v CIBC 2018 at para 2).

Analysis i. Serious Issue/Public Interest [47] The first branch of the tripartite test for a stay or an injunction, serious issue, will be met if the applicant meets the low threshold of establishing that the matter is neither frivolous nor vexatious (RJR-MacDonald at 337; Janssen Inc v Abbvie Corporation et al, 2014 FCA 112 at para 23).

- [48] While most of Ms. Kostic's written and oral submissions were concerned with her views on the law of "agent indemnity" and her arguments as to how this is applicable to matters before this Court, as well as matters that were or are before the Alberta Courts, that issue was not before me in the stay motion.
- [49] However, in terms of the stay motion, I understand Ms. Kostic's position to be, essentially, that a serious issue arises due to outstanding issues arising from her Business Agreement with Piikani Nation and other account agreements concerning alleged contractual and other obligations to indemnify and save her harmless which, in her view, would extend to representing her with respect to the Vexatious Litigant Application. She says that she is not required to "put her hand in her own pocket" to respond to that application.

- [50] In that regard, in her Motion Record, Ms. Kostic includes letters dated May 17, 2024 to AIG in which she describes a “fresh request,” concerning the Vexatious Litigant Application, that AIG honour its obligations under an insurance policy renewed in December 2006 and seeks prepayment of costs, defence costs, save harmless and indemnity; to RJL seeking same and also including “obligations under Agency”; and, to CIBC entities on that basis.
- [51] It is of note that this is not the first time Ms. Kostic has made arguments concerning the determination of any rights she may have to indemnity and to be saved harmless. Very recently, in *Piikani 2024*, Justice Graesser, the case management judge for a number of matters brought by Ms. Kostic in that Court, considered a request for a fiat (requirement for leave) by Ms. Kostic to permit the filing of an application for indemnification and save harmless remedies against CIBC World Markets (formerly CIBC Wood Gundy), the Piikani Nation and RJL in that and other lawsuits involving Ms. Kostic. The fiat stipulated that only applications with a reasonable prospect of success were to be permitted to proceed.
- [52] Justice Graesser set out some of the background to the matter before him. This included that Mr. Gabor Zinner, Ms. Kostic’s then counsel, had previously brought an application for indemnification and save harmless relief, including payment of defence costs, against the Piikani Nation, CIBC Trust and RJL. On appeal from the decision of the applications judge (*Kostic v CIBC Corporation*, 2017 ABQB 747), the Alberta Court of Appeal [ABCA] in *Kostic v CIBC Trust Corporation*, 2018 ABCA 355 [*Kostic v CIBC 2018*], identified the issue before it to be whether Ms. Kostic (respondent/cross-appellant) was entitled to have her defence costs paid by CIBC Trust Corporation (appellant/cross-respondent) by virtue of the “indemnify and save harmless” provisions in various account agreements between CIBC and Ms. Kostic’s previous employers in relation to a lawsuit commenced against her by the Piikani Nation.
- [53] The ABCA held that the appeal and cross-appeal were each allowed in part. Ms. Kostic was not entitled to have her defence costs paid at that stage of the proceedings. Her claims for defence costs (past and future) and indemnity from CIBC as regards her employment with RJL and CIBC World Markets Inc. (operating as Wood Gundy) were to be determined at the trial of Court of Queen’s Bench Action No 0601-13081.
- [54] Following that decision, Ms. Kostic asked the ABCA to allow her to reargue the appeal. In *Kostic v CIBC Trust*, 2019 ABCA 29 [*Kostic ABCA 2019*], the ABCA dismissed her application. Ms. Kostic sought leave to appeal those decisions to the Supreme Court of Canada. Leave was denied in 2019 CanLII 37469 (SCC).
- [55] Regardless, in February 2023, Mr. Zinner requested a fiat granting leave to file a new application for save harmless relief. As described by Justice Graesser in *Piikani 2024*:
- [21] The potential application seeks a declaration that the Indemnitors are obliged to “indemnify, defend and save Kostic harmless in respect of any and all past and future losses, liabilities, damages, costs, charges and expenses, including legal fees” arising from:
- i. The Nation’s claim against Ms. Kostic in this action (“Action 0601”);

- ii. All actions identified in ACJ Rooke's "Omnibus Order" dated February 5, 2013, as updated by his order transferring case management of those and other actions to Justice de Wit dated September 16, 2022, "to the extent that Ms. Kostic requires defence and save harmless relief in respect of matters alleged about her conduct arising from her employment as a disclosed agent at CIBC Wood Gundy and at RJL";
- iii. Various Federal Court actions "to the extent that Kostic requires defence and save harmless relief in respect of matters alleged about her conduct arising from her employment as a disclosed agent at CIBC Wood Gundy and at RJL";
- iv. The Piikani Removal Appeal Board Tribunal hearings and appeals thereof;
- v. Such further actions and or applications as may be launched where Kostic requires defence and save harmless relief in respect of matters alleged for conduct arising from her employment as a disclosed agent at CIBC Wood Gundy and RJL; and
- vi. "Such pre-emptive or other action required by Kostic to defend against, and to bring a halt to, past and future slander, defamation and malicious prosecution, many repeating the allegations first made (in) this Action No. 0601-13081".

[22] As the source for this indemnification and save harmless relief by the Nation, Ms. Kostic cites Clause 6.2 of the Business Agreement dated November 18, 2002 (amended on November 22, 2004) between her and the Nation.

[23] Ms. Kostic also references her employment with CIBC Wood Gundy and being their "disclosed agent" with CIBC Trust as the basis for her entitlement to indemnification and save harmless relief by CIBC Wood Gundy.

[24] Ms. Kostic also relies on Clause 1.18(e) of the Account Agreement between CIBC Trust and CIBC Wood Gundy, apparently signed in November 2002, as the basis for indemnification by CIBC Trust.

[25] Ms. Kostic further references a policy of insurance allegedly purchased in 2001, as another basis for her entitlement to indemnification by CIBC Wood Gundy and CIBC Trust.

[26] For indemnification by RJL, she relies on her employment with RJL and being their "disclosed agent". She submits that agents are entitled to be indemnified by their principal.

[27] Regarding indemnification by CIBC Trust arising from its account agreements with RJL, Ms. Kostic references Clauses 19, 22 and 37 of the Terms and Conditions Booklet provided to the CIBC Trust by RJL in November 2004 and August 2005. In those terms, CIBC Trust is to "indemnify and save RJL and its employees harmless from any loss, liabilities, costs and expenses (including legal fees) resulting from their actions resulting from our acting in accordance with the authority referred to in section 21."

- [56] Justice Graesser set out the contractual terms relied upon by Ms. Kostic, being ss 5.1, 5.3, 6.1 and 6.2 of the Business Agreement (although Mr. Zinner had ultimately advised that Ms. Kostic had decided not to pursue indemnification against the Piikani Nation at that time, causing the fiat application as it related to Piikani Nation to be adjourned sine die and requiring a new application to be made if she ever sought to pursue it); s 18(e) of the Account Agreement between CIBC Trust and CIBC Wood Gundy; and ss 19, 21 and 22 of the RJL Account document.
- [57] Justice Graesser found that he could dispose of some of Ms. Kostic's arguments based on the ABCA's decisions in *Kostic v CIBC* 2018 and *Kostic ABCA* 2019.
- [58] He noted that in *Kostic ABCA* 2019, the ABCA summarized its prior decision in *Kostic v CIBC* 2018 (at paras 2-10). In the 2018 decision, the ABCA majority had allowed CIBC's appeal based on two grounds. First, the "pleadings rule," being that a determination of whether a duty to defend arises in the insurance context is based upon the allegations in the pleadings, stating that:
- [6] The majority continued that the task of a judge when determining whether to impose a duty to defend is to examine the pleadings, the documents referred to in the pleadings, and the insurance policy "to determine whether the claims in the pleadings, if proven, would fall within the coverage of the insurance policy": para 26. In this case, the majority held that it is not apparent from the pleadings that Kostic would be entitled to an indemnity from CIBC pursuant to the Raymond James Agreements if the allegations in the Statement of Claim were proved against her, holding at para 27:
- ... the duty to defend could only arise if trading authorizations had been given or if a joint account had been opened in which both Piikani Nation and CIBC could deal. These are highly disputed matters, neither of which were facts alleged in the Amended Statement of Claim in the 2006 Action.
- [7] No obligation to indemnify clearly arose on a review of the pleadings and the Account Agreements, and accordingly no duty to pay ongoing defence costs was triggered: para 28.
- [59] And, second, on the "Trial within a Trial" rule, being that a court considering an application concerning the duty to defend may not look to "premature" evidence – evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation. In the 2019 decision, the ABCA said of its earlier finding:
- [9] The majority concluded that Kostic's claim for indemnity and defence costs "requires the determination of numerous highly contested facts which will be at issue at the trial in the 2006 Action": para 31. They pointed to the following finding of the case management judge: "... the terms of the [Agreements] do not provide defence costs on their own, but only apply to Kostic to the extent that they are supported by the facts under which they operated": 2017 ABQB 747 at para 45. The case management judge noted that evidence of Kostic's activities under the Agreements was "spread across the record" and is "not always consistent", but he

nevertheless proceeded to make preliminary findings with respect to Kostic's right to defence costs. For example, he found that joint accounts, in which CIBC and Piikani Nation could both deal, were established, and resulted in a liability for CIBC to provide defence costs. The majority held that the case management judge erred in purporting to make these preliminary findings without a full record and, in doing so, undertook a "trial within a trial" cautioned against in *Monenco*: para 34.

[10] The majority concluded:

[35] In our view, this was not an appropriate case to find that a duty to defend existed. It could not be determined on the basis of the allegations advanced against Kostic by the Piikani Nation in the 2006 Action that Kostic would be entitled to indemnity from CIBC if the allegations against her were established.

[36] Reaching that conclusion required "a trial within a trial" in which the case management judge had to "look to 'premature' evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation": *Monenco* at para 37.

[37] The court in *Stewart Title* acknowledged that pretrial applications to determine whether a duty to defend existed was "proper as long as a court takes care not to make findings that would compromise or affect the underlying litigation [citations omitted]": (para 5). It is not possible to determine that a duty to defend exists in this case without making such findings.

[60] Thus, Justice Graesser found that it was abundantly clear that the ABCA had already dealt with Ms. Kostic's arguments under the terms of the account agreements with both CIBC Wood Gundy/World Markets and RJL. It was also abundantly clear that Ms. Kostic, through Mr. Zinner, was still trying to reargue the case based largely on *Stewart Title* (the argument being a party entitled to save harmless relief should never have to put his hand in his pocket in respect of a claim covered by an indemnity agreement, which appears to be what Ms. Kostic was referencing when appearing before me), but Justice Graesser found that those were not viable arguments at that stage. He stated in *Piikani 2024*:

[104] The Court of Appeal's findings made it clear that there were insufficient facts on which to make determinations of the scope of any indemnity and save harmless obligations. The majority expressly did not determine the issue of whether defence costs are part of "save harmless" obligations and they did not follow *Stewart Title*. The dissenting judge did follow *Stewart Title*, but that finding is of no present assistance to Ms. Kostic.

.....

[107] Whether a matter of *res judicata* or abuse of process, there is no basis for me to permit any application relating to the interpretation and application the account agreements between CIBC Trust and CIBC Wood Gundy, and between CIBC Trust and RJL. Those are matters for trial, whether they relate to indemnity and save harmless relief, or defence costs.

.....

[110] There is undoubtedly a discretion on the part of a judge to allow a re-argument to prevent miscarriages of justice, but that does not arise here. At trial, Ms. Kostic will be able to raise any arguments that are properly disclosed in or arise from the pleadings. There is no determination that she is not entitled to indemnification or save harmless relief or defence costs. Those issues will ultimately be determined with a proper factual foundation following evidence and submissions at trial.

[61] And, although Ms. Kostic made other arguments when seeking the fiat, being that common law principles in employment and agency relationships imply indemnification and save harmless relief (which Ms. Kostic appeared to also argue when appearing before me), Justice Graesser found that these were also issues that would be determined after evidence at trial, not by way of summary determination.

[62] Justice Graesser concluded his reasons in Piikani 2024 by stating that:

- Any of Ms. Kostic's arguments regarding the wording of agreements between RJL and CIBC Trust, or CIBC Wood Gundy and CIBC Trust, had already been dealt with by the ABCA ruling that indemnity, save harmless relief and defence cost issues must be determined at trial, or following a successful claim against Ms. Kostic.
- As for Ms. Kostic's arguments relating to common law principles applicable to employment and agency relationships, those arguments could only be determined with appropriate fact findings. They too would have to be determined at trial, or following a successful claim against Ms. Kostic by the Piikani Nation or others.
- As to Ms. Kostic's claims that she was entitled to indemnification by CIBC Trust and RJL for claims she is making herself, those had been addressed in 2017 ABQB 747, which found that to the extent that Ms. Kostic has any right to defence costs, any such right only applies to those actions for which Ms. Kostic was, directly, a defendant and potential liable to direct relief (which did not include costs liability for actions that Kostic took on her own), and not to defence costs any actions or steps that she took as a plaintiff or claimant, or as an "interested party," in any other Piikani-related actions.

[63] Further, that in Piikani Nation v Kostic 2018, the Court of Appeal had commented on the potential scope of indemnification claims at para 73:

[73] Ms. Kostic argues that a duty to defend, or fund defence costs, may well exceed the duty to indemnify. That may be so, but there cannot be a duty to defend arising out of the Business Agreement for claims that have nothing to do with any breach by the Piikani Nation of the Business Agreement.

[64] Justice Graesser held that:

- [140] Claims for indemnification in actions or applications commenced by Ms. Kostic are too undefined and speculative to warrant pretrial consideration of any rights to indemnification, save harmless relief, or defence costs by Ms. Kostic.
- [141] No Fiat is or will be granted to permit Ms. Kostic to pursue any pre-trial indemnification, save harmless relief, or for payment of defence costs.
- [142] I emphasize that I am making no finding that Ms. Kostic is not entitled to indemnification, save harmless relief or payment of defence costs in relation to any matter that is currently before the courts. A determination of that will depend on the facts and circumstances of any claims against Ms. Kostic following trial, or in costs awards in any such actions.
- [65] I would first note that, in this matter, Ms. Kostic in her submissions does not actually identify and address the indemnity and other provisions upon which she relies (although a copy of the Business Agreement is listed in and is attached to her affidavit), which does not assist the Court in determining if they give rise to a serious issue.
- [66] Further, and more significantly, Ms. Kostic has not established how the alleged duty to defend, indemnity and hold harmless provisions said to be contained in the agreements upon which she relies would extend to encompass her response to the Vexatious Litigant Application. That application has nothing to do with any contractual or other obligations of Piikani Nation, the CIBC entities or RJL. It arises from the manner in which Ms. Kostic has conducted her litigation in this Court. This brings also into question whether a serious issue arises.
- [67] That said, Ms. Kostic has raised this issue on at least three prior occasions in other venues and, in each instance, the Alberta courts have found that it can only be resolved at trial. Given this, I accept that it gives rise to a serious issue. However, even if the issues of indemnity and save harmless give rise to a serious issue, it is unlikely that they can be resolved by way of a discrete application to precede the Vexatious Litigant Application as Ms. Kostic appears to propose. Rather, they will likely have to be determined based on factual findings made in the underlying action in this Court, if indeed the subject agreements and their impact in terms of indemnity and save harmless are encompassed by that action (which question is not addressed by Ms. Kostic in her submissions). This is a public interest consideration, as it ultimately concerns the length of the stay and potential prejudice to the AGC and other parties to the Kostic litigation if the stay is granted.
- [68] As the AGC describes in its submissions, to date Ms. Kostic has been prolific in her filings in this Court. These filings, like her motion in this matter, tend to be extremely lengthy and to include voluminous materials that are largely unrelated to the subject matter of the proceeding at hand. They tend to make broad allegations of wrongdoing by the responding parties, their counsel, the AGC, the Court and others. I would add that they also typically consume considerable resources of the generally multiple responding parties and of the Court. Ms. Kostic's conduct of this stay motion is representative of these concerns. Without some form of control over her filings, it is probable that this course of conduct will continue.

Accordingly, in my view, it is not in the public interest that the Vexatious Litigant Application be stayed until an application pertaining to the indemnity and save harmless issues is brought and heard, or the underlying action is finally resolved.

[69] It is also a concern that the very issues that Ms. Kostic proposes to have disposed of by way of an application in this Court preceding the Vexatious Litigant Application – duty to defend, indemnity and save harmless – will be resolved at trial in the Alberta courts. While those determinations would not be binding on this Court, this does give rise to questions of forum shopping, comity, res judicata, duplicative resource utilization in the two Courts, collateral attack on the determinations of the Alberta courts that the indemnity and related issues can only be resolved at trial and, ultimately, the potential of conflicting determinations. This too is a public interest concern.

ii. Irreparable Harm [70] As held in *RJR-MacDonald*, irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other, such as when one party will be put out of business (*RJR-MacDonald* at 341). The moving party must demonstrate, on a balance of probabilities, that the harm that they would suffer is irreparable. Mere assertions do not suffice. Irreparable harm cannot be inferred. It must be established by clear and compelling evidence (*Choson Kallah Fund of Toronto v Canada (National Revenue)*, 2008 FCA 311 at paras 4-5). Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 15 [*Gateway City*], citing *Glooscap Heritage Society v Minister of National Revenue*, 2012 FCA 255 at paragraph 31 [*Glooscap*]). Instead, “there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted” (*Gateway City* at para 16, citing *Glooscap* at para 31).

[71] In terms of irreparable harm, given that Ms. Kostic’s assertion that she is entitled to indemnity and to be saved harmless in proceedings she has brought in this Court has also been asserted in her Alberta proceedings, the granting of a stay in this matter does not give rise to irreparable harm. The claim will proceed and will be resolved in the Alberta courts.

[72] Further, when appearing before me, Ms. Kostic submitted that if the stay is not granted, she will be “forever silenced.” This appears to be based on a view that if the Vexatious Litigant Application is heard and granted, then Ms. Kostic will be precluded from having the indemnity and save harmless issues heard by this Court. However, this does not reflect the actual effect of a finding that a party is a vexatious litigant. As held in *Canada v Olumide*, 2017 FCA 42, “[a] declaration that a litigant is vexatious does not bar the litigant’s access to the courts. Rather, it only regulates the litigant’s access to the courts: the litigant need only get leave before starting or continuing a proceeding” (at para 27). Further:

[28] In 2000, our Court put this well:

An order under subsection 40(1) does not put an end to a legal claim or the right to pursue a legal claim. Subsection 40(1) applies only to litigants who have used unrestricted access to the courts in a manner that is vexatious (as that term is understood in law), and the only legal effect of any order under subsection 40(1) is to ensure that the claims of such litigants are pursued in an orderly fashion, under a greater degree of Court supervision than applies to other litigants.

(Canada (Attorney General) v. Mishra, [2000] F.C.A. no 1734, 101 A.C.W.S. (3d) 72.)

[29] Seen in this way, section 40 is not so drastic. A litigant can still access the courts by bringing a proceeding but only if the Court grants leave. Faced with a request for leave, the Court must act judicially and promptly, considering the legal standards, the evidence filed in support of the granting of leave, and the purposes of section 40. The Court could well grant leave to a vexatious litigant who has a bona fide reason to assert a claim that is not frivolous and vexatious within the meaning of the case law on pleadings.

[73] Accordingly, I do not agree that Ms. Kostic's indemnity and save harmless issues will be forever silenced in this Court if the stay motion is granted and that she will, therefore, be irreparably harmed. The underlying action will continue (if Ms. Kostic's appeal of the motion striking same is successful (A-273-23)). And, if she were to bring an application seeking to have the indemnity and save harmless issues dealt with by way of a discrete application, then she would – depending on the conditions imposed by a potential vexatious litigant order – likely require leave of the Court before filing same. This is similar to the fiat requirement she currently faces in the Alberta King's Bench.

[74] Ms. Kostic also says she will be prejudiced if she has to “put her hand in her pocket.” While I appreciate that Ms. Kostic would prefer to have her response to the Vexatious Litigant Application defended by counsel who are paid from a source other than herself, Ms. Kostic has not provided any evidence to support her claim that she lacks the financial means to retain counsel to respond to the application. She has retained counsel in other matters and has also previously represented herself in matters she has brought in this Court (see, for example, Kostic 2023). She does not explain why responding to the Vexatious Litigant Application gives rise to different financial or representational concerns or demonstrate how this would cause her irreparable harm. In any event, this is a monetary concern that cannot support a claim of irreparable harm. There is also no evidence that Piikani Nation, the CIBC entities, RJL or their respective insurers could not reimburse Ms. Kostic if, at the end of the day, she is successful with respect to her claim to be entitled to defence, indemnity and save harmless benefits.

[75] In her affidavit, Ms. Kostic states that granting the stay would help in reducing the escalation of her health problems, PTSD, anxiety, stress and emotional trauma that her treating specialist is very concerned about. She states that he ordered her to take a two-month break from all proceedings “and anything that exacerbates her failing health and allow for a fair and just determination of liability and costs.” She made similar submissions when appearing before me. In her affidavit, she states that a copy of this letter from her specialist is to be

attached to her supplemental affidavit. However, Ms. Kostic did not file a supplementary affidavit nor has she explained why this letter could not have been provided as an exhibit to the affidavit that she did file. In the result, there is no medical evidence before me that Ms. Kostic is unable to or would suffer irreparable harm if she were to represent herself in responding to the Vexatious Litigant Application (as she has done in this stay motion as well as other proceedings before this Court). She was also aware from a prior stay motion of the need to file such medical evidence to support a claim of irreparable harm (see *Kostic* 2023 at para 93).

[76] Viewed in whole, Ms. Kostic has failed to provide clear and convincing evidence that she will suffer irreparable harm if the stay is not granted.

iii. Balance of Convenience/Public Interest [77] The balance of convenience branch of the tripartite test involves a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction or a stay, pending a decision on the merits. The factors to be considered in assessing the balance of convenience will vary with each case and there may be other special factors to be taken into consideration in the particular circumstances of individual cases. The public interest includes both the concerns of society generally and the particular interests of identifiable groups (*RJR-MacDonald* at 342-344).

[78] The AGC submits that Canada will suffer the greater harm if the stay is not refused. This is because Canada is currently exposed to Ms. Kostic's palpable vexatiousness. Canada's exposure in this regard will continue unabated until such time as Ms. Kostic may become the subject of a vexatious litigant order with meaningful controls on her future access to this Court. The only way to mitigate this exposure is to deny the requested stay of proceedings and to allow Canada's Vexatious Litigant Application to proceed with haste.

[79] The AGC submits that, conversely, Ms. Kostic will not suffer any harm if a stay of proceedings is refused. Without a stay, she can still choose to represent herself, which she is capable of doing, or to retain legal counsel to respond to the Vexatious Litigant Application. And, although she has not demonstrated a serious issue to be tried with respect to the existence of any applicable indemnity agreement(s) in the context of the stay motion, Ms. Kostic also retains the ability to pursue that argument against RJL and CIBC at the future trial of Piikani Action No. 0601-13081.

[80] In my view, the balance of convenience branch of the tripartite test and the question of the public interest are closely related.

[81] I have addressed the public interest in my reasons above and have found that it is in the public interest that the stay not be granted. I add that, in my view, it is in the public interest that the Vexatious Litigant Application proceed with due dispatch. Further, that it is not unfair to Ms. Kostic, nor will she be prejudiced, if that application is heard before her proposed application to determine the duty of defence, indemnity and hold harmless issues that she has raised, or her action in this Court, is determined on its merits. Conversely, if the stay is not granted, the AGC and responding parties face the real likelihood of Ms. Kostic

filing further applications and motions without potentially appropriate controls, resulting in wasted resources, until her application or underlying action is determined. There are no special circumstances in this case. On the same reasoning, I find that the balance of convenience favours the AGC.

Conclusion [82] In conclusion, I find that, in all of the circumstances, the interests of justice do not support the granting of the stay motion.

Costs [83] The AGC seeks its costs. When appearing before me, the AGC proposed the lump sum award of costs in the amount of \$5000. The AGC noted that in T-680-20, costs (following the successful motion to strike the Amended Amended Statement of Claim and Counterclaim in their entirety and without leave to amend, currently under appeal (A-273-23)) in the amount of \$10,000 were awarded against Ms. Kostic in favour of each of the listed defendants to that action. However, that the matter now before me was less time consuming; therefore, the lower figure proposed was appropriate. I note that in *Kostic v Canada*, 2023 FC 1077 (T-713-22), a motion to strike a notice of application, enhanced costs in the amount of \$7500 were awarded against Ms. Kostic.

[84] Ms. Kostic submitted that counsel for the AGC was not personally incurring costs and therefore nor should she.

[85] Pursuant to Rule 400, the Court has full discretionary power over the amount and allocation of costs. In this matter, I have determined that costs of the stay motion will be relief considered as part of the Vexatious Litigant Application, at the discretion of the Judge hearing same.

ORDER IN T-1098-24

THIS COURT ORDERS that

the motion seeking to stay the Vexatious Litigant Application is denied, and

costs of the stay motion will be relief considered as part of the Vexatious Litigant Application, at the discretion of the Judge hearing same.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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T-1098-24

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THE ATTORNEY GENERAL OF CANADA v LILIANA KOSTIC

PLACE OF HEARING:

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July 9, 2024

Order and reasons:

STRICKLAND J.

DATED:

august 8, 2024

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(RESPONDENT ON MOTION)

Liliana Kostic

FOR THE RESPONDENT

(APPLICANT ON MOTION)

(ON HER OWN BEHALF)

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Prepared on 26 October 2026 · Esheria