
CANADA / JUDGMENT

Clayton v. Lower Nicola Indian Band

2013 BCSC 162

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 162 Clayton v. Lower Nicola Indian Band

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clayton v. Lower Nicola Indian Band,

2013 BCSC 162

Date: 20130204

Docket: 86527

Registry: Kelowna

Between:

Veronica Gail Clayton

also known as Teri Clayton

Plaintiff

And

Lower Nicola Indian Band, Aaron Sam

and Yvonne Basil

Defendants

And

Don Moses

Third Party

Before: The Honourable Mr. Justice Betton

Reasons for Judgment

Counsel for the Plaintiff:

B. Hardwick

Counsel for the Defendant, Lower Nicola Indian Band:

R. Grant

Counsel for the Third Party, D. Moses:

M. O'Neill

No other appearances

Place and Date of Trial/Hearing:

Kelowna, B.C.

April 26-27, 2012

Place and Date of Judgment:

Kelowna, B.C.

February 4, 2013

Introduction

- [1] By way of summary trial pursuant to Rule 9-7 of the Supreme Court Civil Rules, the plaintiff seeks to enforce a settlement agreement in respect of her claim for wrongful dismissal against the Lower Nicola Indian Band.
- [2] The plaintiff negotiated the settlement with the then chief of the Lower Nicola Indian Band ("LNIB"), the third party, Don Moses. The agreement was signed on September 30, 2010.
- [3] The LNIB says that Chief Moses had no authority to enter into the settlement agreement, and it is therefore not binding on them.

Background

- [4] The LNIB is an Indian band as defined in the Indian Act, R.S.C. 1985, c. I-5. The plaintiff commenced employment as executive director of the LNIB on January 14, 2008. She had a written employment contract. Mr. Moses was chief up to and including October 1, 2010, the day band elections were to be held. Mr. Moses was elected chief three years earlier and took the position effective October 6, 2007. He was not running for re-election as chief or council member in the 2010 election. A new chief and council were elected and took office effective October 2, 2010.

- [5] Governance of the LNIB was in accordance with the Lower Nicola Indian Band Chief and Council Policy and Guidelines ("LNIB Policy and Guidelines"). That document included the following:

Interpretative Provision

6. For administrative purposes only, the Executive Director may provide such interpretations of this policy as may be required from time to time and to apply those administrative interpretations unless otherwise directed by Chief and Council. In the absence of the Executive Director, the Chief may provide such interpretations.
7. In any case of disagreement of the interpretation of this policy, the Council, through quorum, shall have the final decision.

...

Amendments

9. In areas not presently covered by this policy, the Council shall, through quorum, provide interim decisions which shall be recorded as amendments to this policy.
10. In all other cases, amendments to this policy shall be proposed by a member of Council seconded and ratified by a quorum.

...

Powers, Duties & Obligations of the Chief

23. In addition the duties and obligations contained in paragraphs 11. to 22. the Chief has the powers, duties, and obligations to:
 - a. Convene all meetings of Council in accordance with established procedures.
 - b. Act as the political representative and spokesperson of the LNIB & Council.
 - c. Sign documents on behalf of Council in so far as they are not inconsistent with decisions of Council.
 - d. Appoint Council to the various portfolios, departments and committee positions.
 - e. Make decisions when required on behalf of Council when such decisions are necessary for good government.
 - f. Act in a supervisory capacity to all Council member's [sic] activities.

...

Quorum of Council

28. A quorum of Council shall be five (5) members in good standing.

- [6] Mr. Moses' term as chief was a complicated one, involving considerable conflict with the some of the LNIB council. There were essentially two factions which, it appears, agreed on very little.
- [7] That conflict manifested itself in a variety of ways. Several council members commenced an action in Federal Court in 2009 challenging Mr. Moses' initiation of an elders' investigative committee and his actions resulting from the report of that committee. The report dealt with alleged financial irregularities within the band council. In early 2010, council members passed a band council resolution suspending Mr. Moses as chief. That process was challenged by Mr. Moses by way of judicial review in the Federal Court of Canada, which went to hearing on June 4, 2010.
- [8] The conflict extended to dealings with the plaintiff. The LNIB band council voted to terminate the plaintiff's employment on December 16, 2009. On December 22, 2009, Mr. Moses rescinded that termination and placed the plaintiff on paid leave pending an investigation into her performance and conduct as executive director. On January 8, 2010, LNIB again dismissed the plaintiff. Her claim for wrongful termination was commenced March 2, 2010.
- [9] Mr. Moses and some members of council had differing views as to whether or not the LNIB had cause to terminate the plaintiff. Mr. Moses believed that there was no such cause for termination.
- [10] Beginning in June 2010, Mr. Moses entered into negotiations with the plaintiff for possible settlement. On August 24, 2010, Mr. Moses sent a without prejudice e-mail to the plaintiff, which opened with the words "Subject to the approval of the LNIB Council".
- [11] The LNIB retained legal counsel for advice on the plaintiff's claim against the LNIB. Mr. Moses did not agree with that counsel's advice.
- [12] The band council quorum as required by the LNIB Policy and Guidelines was five.
- [13] Band council meetings occurred August 30, 31 and September 7, 2010. No more than four council members attended those meetings.
- [14] Mr. Moses endeavoured to have meetings on September 13th, 23rd and 28th to discuss the issues relating to the possible settlement of the plaintiff's claim. No quorum of council members attended.
- [15] In an e-mail to Mr. Moses dated September 28, 2010, the plaintiff noted, "[s]ince there will be a new Chief and Council in place next week, and there is not much time left for us to settle, I will wait to hear from you tomorrow since there would be paperwork to be signed."
- [16] At the September 7, 2010 band council meeting, settlement with the plaintiff was approved by the council members present; the vote being 4:0. There was no quorum, however.

[17] Mr. Moses took steps to reduce the quorum from five to three council members. At the September 21, 2010 council meeting, the settlement was approved by a 3:0 vote.

[18] Mr. Moses and the plaintiff signed the settlement agreement on October 1, 2010.

Issues and Positions of the Parties

[19] The participants in the summary trial included the plaintiff, the LNIB and Mr. Moses. All agreed that the single issue dealt with here is appropriate for disposition by way of Rule 9-7.

[20] Specifically, that issue is whether Mr. Moses had the authority to enter into the settlement agreement.

[21] The plaintiff argues that the settlement agreement should be enforced because Mr. Moses had actual authority to enter into the settlement, or alternatively because he had ostensible authority.

Actual Authority

[22] The plaintiff and third party say that s. 23(e) of the LNIB Policy and Guidelines gave Mr. Moses, as chief at the relevant time, the authority to enter into the settlement agreement. It is argued that the conflict within the council was such that chief and council were unable to properly address the issue, justifying the utilization of the authority created by s. 23(e) to bind the LNIB to the settlement.

[23] They say that s. 23(e) was used to reduce the quorum from five to three and that the settlement was approved by council. Alternatively, they argue that Mr. Moses used the provision as a direct source of authority to bind the band to the settlement without council approval.

[24] The plaintiff says that the settlement agreement represented a legitimate compromise resolution for both parties where there was a real risk to the band of having to pay a greater amount if the matter proceeded to trial. She says that this fact supports the argument that the settlement was necessary for "good governance".

[25] On this issue, the LNIB argues that there was no proper basis to use s. 23(e) either to reduce the quorum of council required to approve the settlement from five to three, or alternatively to enter into the settlement without council approval.

[26] The LNIB points out that there is nothing in evidence to indicate an existing deadline to reach a settlement. The only temporal consideration was the pending elections that ensured Mr. Moses would no longer be chief as of October 2, 2010. That change meant that the new chief and council may not approve the settlement. That fact, the LNIB argues, is not a justification for entering into the settlement; it does not cause the settlement to be "required on behalf of council" or "necessary for good government".

- [27] It says that, in effect, Mr. Moses reached his own conclusions regarding the merit of the termination of the plaintiff and the need to settle the claim against LNIB and was concerned that the new chief and council would be of a different mind.
- [28] In addition, the LNIB says that in fact Mr. Moses purported to use s. 23(e) to reduce the quorum from five to three after there had been a 4:0 vote in favour of the settlement. He then sought to rely on that prior 4:0 vote to say that council had approved the settlement. It says that any suggestion that s. 23(e) was relied on to directly enter into the settlement in the absence of council approval was only raised by Mr. Moses after the fact.

Ostensible Authority

- [29] The plaintiff says that if Mr. Moses did not have the actual authority, he had the apparent or ostensible authority, and in the result, the LNIB should be bound by the settlement agreement.
- [30] The LNIB says that principles of apparent or ostensible authority that allow a party to be bound by a contract even though the representative who purported to enter into the contract lacked the actual authority to do so do not extend to Indian bands. In addition, it says that even if the concept of ostensible authority is applicable to these facts, the plaintiff cannot rely upon it because she was well aware of the divisions among council members regarding the issue, and the plaintiff did not have council's support for the settlement.

Analysis

Actual Authority

- [31] Whether Mr. Moses had actual authority, in his capacity as chief, to enter into the settlement agreement with the plaintiff depends on the interpretation of the power given by s. 23(e) of the LNIB Policy and Guidelines.
- [32] On the evidence, two alternative arguments are presented in which s. 23(e) is said to have been utilized as set out in para. 23 above.
- [33] The first is the argument that it was used to reduce the quorum from five to three and that the quorum of three then approved the settlement agreement.
- [34] The second is that Mr. Moses, in his capacity as chief, simply entered into the settlement agreement without council approval on the strength of this authority under s. 23(e).
- [35] In both scenarios, there is an underlying issue of whether the goal of effecting the settlement agreement was a decision required on behalf of council as being necessary for good government.
- [36] I will deal with that underlying issue first before commenting on the two arguments regarding the use of s. 23(e).

- [37] It is obvious from the evidence that Mr. Moses was not of the same mind as some of his council members with respect to the decision to terminate the plaintiff. I draw no conclusion in this decision as to which "side" is right.
- [38] Both counsel, in the course of their arguments as to whether or not the decision to enter into the settlement agreement was necessary for good government, commented on the merit of the settlement terms. In that respect, I go no further than to say that the settlement represented a true compromise from opening positions. It is not possible for me to say on the evidence before me what the plaintiff's entitlement to damages, if any, is. What is clear is that this was not a settlement so obviously favourable to the LNIB that it clearly and obviously needed to be seized upon without delay.
- [39] I also note that there was no specific time pressure or deadline for acceptance. The only apparent time pressure came from the fact that Mr. Moses had only a short time before his term as chief was to end. He was not seeking re-election, and the LNIB's will to compromise may well have ended with Mr. Moses' term as chief.
- [40] Counsel for the LNIB did not challenge the bona fides of Mr. Moses. It conceded that he believed the settlement was in the interest of the LNIB.
- [41] It is my general observation that these circumstances do not fall into the category of "required" decisions which were "necessary for good government". Read in context, s. 23(e) grants a power or authority to the chief in situations where an action must be taken, and there is an inability for council to take that action.
- [42] Counsel for the plaintiff points out that the evidence of Mr. Moses indicates that the band council was dysfunctional or, perhaps more accurately, not functioning. Reference was made to various council members not attending meetings so that this issue and business in general could not be dealt with. I must limit my assessment of the use of s. 23(e) to this particular issue and assess whether it required reliance on this potential source of authority.
- [43] There were elections scheduled within weeks of the time negotiations were nearing a tentative agreement and within days of when Mr. Moses and the plaintiff had reached an agreement subject to council approval. In my view, in those circumstances, good government would in fact dictate that the matter be left for the new chief and council to deal with. Presumably the elections would remedy the strife that had plagued the LNIB council. The fact that the new chief and council may have had a different view as to the merit of settling the case does not serve to make the decision necessary for good government.
- [44] Simply because the chief felt strongly that the settlement should occur does not make it necessary for good government. Democratic processes by their nature lead to decisions that are not met with universal approval, and even the chief needed to accept that his was but one view.

- [45] The council had divided into two camps, and one was apparently unwilling to even attend meetings. Such a situation may have created a need for the chief to rely on s. 23(e) for decisions that could not wait. Here, however, there were two important facts. The first is the absence of a deadline for the settlement to be concluded. The second was that the elections were within days. These two facts draw me to the conclusion that using s. 23(e) in either of the methods addressed here cannot be justified.
- [46] I turn now to the different scenarios referred to in paras. 32-34 above.
- [47] First was the decision to reduce the quorum from five to three. The evidence from Mr. Moses in this regard is somewhat contradictory. In his first affidavit, he indicated that settlement was first brought to the LNIB council on September 7th, where it was approved by a 4:0 vote. At the time, the quorum was five. On that same date, he indicates that he advised the plaintiff that the settlement had been approved by chief and council, and that an LNIB council resolution had been passed. He then states that on September 21, 2010, the settlement was brought before the LNIB council again and was approved by a 3:0 vote, and that a "[q]uorum of three was in effect on this date".
- [48] In his second affidavit, he refers to a council meeting on September 28, 2010, where three council members again failed to attend, prompting him to conclude that they had abandoned their positions as councillors and that it was incumbent upon him to exercise his authority under s. 23(e) and (f) of the LNIB Policy and Guidelines to reduce the quorum. He goes on to indicate that on September 30th, he "issued notices to chief and council that [he] was reducing the quorum to three from five" and retroactively recognized that the band council resolution authorizing the settlement, which had been executed by three members had been validly executed.
- [49] Paragraph 59 of Moses' Affidavit #2 reads:
59. I continue to believe that I validly exercised my powers as Chief under section 23 of the Chief and Council Policy and Guidelines, and that I did so in the best interests of the Band. I felt, and continue to feel, that it was incumbent upon the 2007-2010 Chief and Council to clean up the mess associated with the unjustified termination of Ms. Clayton and not to leave that to a new Chief and Council who would not intimately be aware of the circumstances (including the spurious allegations of cause). I continue to be of the view that the amount of the settlement was reasonable having regard [sic] to the potential expense of defending against it, the jeopardy posed by the unjustified cause allegations, the allegations of defamation and the amount paid by the LNIB in comparable settlements in the past.
- [50] It is of note that in a letter, dated November 11, 2010, by Mr. Moses to the LNIB Elders Investigation Committee, he said the following:

40. As the fired ED's offer was acceptable to Chief Don Moses, Councillor Connie Joe, and Councillor Harold Joe, the Agreement to settle out-of-court was signed by the three but this did not constitute a quorum of Council which is five.
41. Although encouraged to sign the Agreement to save court costs and damages claimed by the fired ED, the following Councillors refused to sign: Aaron Sam, Molly Toodlican, Lucinda Seward, and Joanne Lafferty.
42. The Agreement is null and void and of no legal effect without the signatures of a quorum of Council.

This statement shows that even Mr. Moses knew that his purported steps to reduce the quorum had not been effective.

- [51] The LNIB Policy and Guidelines provisions set out above at para. 5, and specifically ss. 7, 9, 10 and 28, must be renewed.
- [52] Since the quorum is specifically referenced in s. 28, s. 10 would dictate that amendments to the quorum must be ratified by a quorum. In my view, the proper interpretation of s. 23(e) must be constrained by those specific provisions.
- [53] The additional problem is that even if a quorum was legitimately reduced to three, there was no council resolution following that reduction in favour of the settlement. Instead, there was simply a decree that a prior vote, when the quorum remained at five, would be accepted.
- [54] I turn next to the argument that the authority created by 23(e) was used directly as the basis to sign the settlement agreement. It is clear from the affidavits of Mr. Moses that this was not, in fact, what he had in mind when the agreement was reached. Rather, his evidence is that he was relying on the 3:0 vote prior to his determination that he would reduce the quorum from five to three.
- [55] I agree with counsel for LNIB that it is not possible to characterize the execution of this settlement agreement as having been on the basis of that authority when it was not the authority that in fact was relied upon at the time. It is not open to Mr. Moses to rewrite history.
- [56] Further, and in any event, for the reasons outlined in paras. 41-45 above, the use of the power could not be justified even if he had relied upon it at the time.
- [57] Accordingly, it is my conclusion that Mr. Moses as chief of the LNIB at the time of the execution of the agreement lacked the actual authority to enter into the settlement agreement.

Apparent or Ostensible Authority

[58] There is a question of whether or not apparent or ostensible authority exists on behalf of an Indian band. Section 2(3)(b) of the Indian Act provides as follows:

- (3) Unless the context otherwise requires or this Act otherwise provides,
 - (b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

[59] Two lines of authority have developed addressing the interpretation of s. 2(3) of the Indian Act, and the authority to exercise powers granted to aboriginal bands. Each interpretation leads to very different results.

[60] The first begins with *Leonard v. Gottfriedson* (1980), 21 B.C.L.R. 326 (S.C.) and takes a strict interpretation of s. 2(3). It therefore requires any powers conferred on an aboriginal band

by the Indian Act to be exercised by way of a band council resolution ("BCR")[1] to be valid. The Court's "strict interpretation" of s. 2(3) has since been followed in cases such as: *Vollant v. Sioui*, 2006 FC 487 (F.C.); *Heron Seismic Services v. Muscowpetung Indian Band* (1990), 74 D.L.R. (4th) 308 (Sask.Q.B.), *aff'd* (1992), 86 D.L.R. (4th) 767 (Sask.C.A.); and *Nicola Band v. Trans-Canada Displays Ltd.*, 2000 BCSC 1209 ["Trans-Canada"].

[61] The court in *Leonard* reasoned at pp. 336-7:

It appears to me also that the position under the Indian Act is analogous to the exercise of powers of a municipal corporation. Such powers are, speaking generally, to be exercised in close conformity with the provisions of the incorporating statute. The rationale for such limitation with respect to the exercise of powers is that they are being exercised in the interests of the welfare of the inhabitants who are thus to be protected (see e.g. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed., vol. 1, p. 391 et seq.).

...

The Act is clearly of a tenor indicating the need and intent to benefit and protect the Indian Bands and their individual members coming under its provisions. It is to be read, interpreted and applied in that light. Just as the exercise of a power by a municipality is required to be exercised in strict accord with the statute to protect the interests of the inhabitants, so, it seems to me, and on the same principle, the council's powers under the Indian Act are to be exercised strictly in accord with the Act in the interests of the benefit and protection of the Indians.

[Emphasis added.]

[62] The second has emerged more recently originating with *Basque v. Woodstock Indian Band* (1996), 175 N.B.R. (2d) 241 (C.A.). However, it is most clearly stated (and arguably expanded) in *Maloney v. Eskasoni Indian Band*, 2009 NSSC 177. Under this interpretation, powers granted to aboriginal bands may be exercised by BCR or pursuant to actual or ostensible

authority to act on the band's behalf. Specifically, this line of authority concludes that a party can have actual authority to act on behalf of a band based on the circumstances of their conduct, with particular focus on: (i) whether the band council expressly mandated the person to act on its behalf; (ii) whether a course of conduct indicates the person was given authority to act on the band's behalf; and (iii) whether subsequent conduct of the band council ratified or approved of the exercise of power.

[63] Under this line of cases, ostensible authority is also demonstrable by: (i) a representation or holding out of the agent's authority by the band council (or someone with actual authority granted by the band); (ii) third party reliance on that representation; and (iii) an alteration of the third party's position as a result of that reliance.

[64] *Re: Hansard Spruce Mills*, [1954] 4 D.L.R. 590 (B.C.S.C.) articulates the circumstances where it is appropriate to depart from the reasoning of a judge of this court as follows:

...I have no power to overrule a brother Judge, I can only differ from him, and the effect of my doing so is not to settle but rather to unsettle the law, because, following such a difference of opinion, the unhappy litigant is confronted with conflicting opinions emanating from the same Court and therefore of the same legal weight. This is a state of affairs which cannot develop in the Court of Appeal.

Therefore, to epitomize what I have already written in the *Cairney* case, I say this: I will only go against a judgment of another Judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

[65] There are B.C. cases that have concluded that bands can be bound in contract through the exercise of ostensible authority. Neither, however, specifically refers to *Leonard* or s. 2(3) of the Indian Act.

[66] In *Solomon v. Alexis Creek Indian Band*, 2007 BCSC 459, the B.C. Supreme Court held that a band manager had ostensible authority to approve the plaintiff's salary, despite the fact that the employment policy required the council to establish salaries for each position with the provision for an annual review of each employee's salary: para. 38.

- [67] In *Chartrand v. The Kwakiutl Band*, 2003 BCSC 1490, the B.C. Supreme Court held that a woman had been properly hired by a letter from the chief counsellor, rather than by a subsequent BCR that may have had different terms. The court reasoned in the context of an application to reconsider a summary proceeding:
- [40] Unless the band establishes that Ms. Chartrand knew that she was hired in defiance of a rule, Ms. Chartrand would likely be entitled to rely on the actions of council and its chief councillor. The evidence suggests they had the ostensible authority to hire her.
- ...
- [44] In effect, the band's argument is that it should not be bound by the February 5, 2002 letter, but instead bound by the terms of the council's resolution as recorded by Mr. David T. Hunt. This would be the result only if Ms. Chartrand agreed to the terms of the band council resolution, and knew that Ms. Sundberg lacked the authority to sign the February 5, 2002 letter on behalf of the council.
- [45] If Ms. Chartrand reasonably believed that Ms. Sundberg had the authority to sign the February 5, 2002 letter agreement, it would be binding...
- [68] Thus, the doctrine of ostensible authority has been applied in British Columbia, but that occurred without considering s. 2(3) of the Indian Act, or *Leonard*. As a result, I do not view these cases as affecting the weight to be given to *Leonard*. Mr. Justice Moir at para. 208 of *Maloney* described *Leonard* as "the seminal authority for the broad application of s. 2(3)(b) against contracts made without Band Council approval".
- [69] In *Maloney*, the court's conclusion as to the proper interpretation of s. 2(3)(b) of the Act is summarized at para. 233:
- [233] The line of cases starting with the decision of the New Brunswick Court of Appeal in *Basque v. Woodstock Indian Band* is more consistent with the text of s. 2(3)(b) read in context. That is, the provision allows for Eskasoni Band Council to authorize the Chief to exercise the implied power to contract. It places no hold on the authority that Council can give to the Chief, and it does not require any formality for the expression of a majority consent at a duly convened Band Council meeting.
- [70] Although much has been said regarding the proper approach to interpretation of statutes by the Supreme Court of Canada since *Leonard*, I do not find a basis on those authorities to say the interpretation of *Rae J.* in *Leonard* is wrong.
- [71] The Supreme Court of Canada has generally endorsed the statement of Professor Driedger in its comments in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42. It is stated as follows in *Bell*:
- [26] In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27...

[72] In *Maloney*, Moir J. refers to the legislative scheme at some length, but concludes at para. 226:

[226] As I read it, the statute does not expressly deal with the general laws of contract and it does not expressly authorize band councils to enter into contracts. It leaves unanswered the question of whether a contract must carry the authority of bands or band councils. It leaves that to inference.

[Emphasis added.]

[73] He goes on at paras. 230-232:

[230] The plain meaning of these provisions captures both express and implied powers. However, the plain meaning does not justify the imposition of formalistic limits on how express or implied powers are exercised. The Act does not tell us how the implied power to contract is to be exercised, except that it must be done "pursuant to the consent of a majority of councillors of the band present at a meeting".

[231] The required consent can be given by approving a contract specifically tabled at a council meeting. But, equally, it can be given by authorizing, at a council meeting, someone to negotiate a contract and report the results. Such a contract is also "pursuant" to the required consent.

[232] Further, neither s. 2(3) nor any other provision in the Act, or in the regulations about the conduct of meetings, tells us how the consent is to be ascertained at the duly called meeting.

[74] In the end, it is my conclusion that these are simply different interpretations of the Act. This does not satisfy any of the criteria set out in *Hansard* for differing from the decision of this court in *Leonard*, as it relates to the concept of ostensible authority.

[75] I must add that, to the extent that the comments in *Maloney* indicate that actual authority can be given to an individual to act on a band's behalf, I agree. For example, had the LNIB in compliance with s. 2(3) of the Indian Act expressly mandated Mr. Moses to negotiate the

settlement with the plaintiff on its behalf, he would have had the actual authority to do so. I do not express any view or conclusion as to whether actual authority could be obtained by the other means discussed in *Maloney*, that is, through a course of conduct or by a BCR after the action in question.

Concept of Ostensible Authority

[76] I note that even if I were to conclude otherwise and adopt the interpretation in *Maloney* in respect of ostensible authority, the conditions necessary for a finding of ostensible authority do not exist in this case. The court in *Maloney* first laid out the test at para. 251, stating:

[251] A person may be bound by the words or deeds of an apparent agent. Ostensible agency is created by making a representation, through words or conduct, that leads another to believe that the apparent agent has actual authority: *Keddie v. Canada Life Assurance Co.*, [1999] B.C.J. No. 2165 (C.A.) at para. 28. According to *Hely-Hutchinson v. Brayhead Ltd.*, [1968] 1 Q.B. 549 (C.A.), in the case of a corporation, ostensible authority may be established:

...by inference from the conduct of the board of directors in the particular case by, for instance, placing the agent in a position where he can hold himself out as their agent and acquiescing in his activities, so that it can be said they have in effect caused the representation to be made. They are responsible for it and, in the contemplation of law, they are to be taken to have made the representation to the outside contractor.

Justice Hall put it this way in *Horne v. Capital District Health Authority*, [2005] N.S.J. No. 85 (S.C.) at para. 28:

First, there must be a representation or holding out by the principal by a statement or conduct indicating the agent's authority to act for him or her; second, there must be a reliance on the representation by the third party; and third, there must have been an alteration to the third party's position as a result of the reliance.

[Emphasis added.]

[77] Here, there is no evidence that the LNIB band council represented or held out by statement or conduct that Chief Moses had the authority to act for it. Without that, even if there could be ostensible authority, it has not been established.

[78] Accordingly, the settlement agreement cannot be enforced against the LNIB. Mr. Moses, as the then chief of the LNIB, did not have actual or ostensible authority to bind the band to the settlement agreement.

"D.A. Betton, J."

The Honourable Mr. Justice Betton

- [1] This term is sometimes used in the case law to refer to a specific form of document used by some band councils. For the purposes of this decision, it simply means that all decisions must be voted on by the band council, and accepted by a majority of the council present at the meeting (assuming there is a quorum).
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