

CANADA / JUDGMENT

Webb v. Genaille

2023 BCCA 372

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 372 Webb v. Genaille COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Webb v. Genaille, 2023 BCCA 372 Date: 20230926 Docket: CA48695 Between: Norma Webb in her individual capacity and in her representative capacity as Chief of the Peters Indian Band, Victoria Peters in her individual capacity and in her representative capacity as Councillor of the Peters Indian Band, and Leanne Peters in her individual capacity and in her representative capacity as Councillor of the Peters Indian Band Appellants (Defendants) And Andrew Genaille on his own behalf and in his individual capacity as a member of the Peters Indian Band and Lisa Genaille on her own behalf and in her individual capacity as a member of the Peters Indian Band Respondents (Plaintiffs) Before: The Honourable Madam Justice Horsman (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated October 28, 2022 (Genaille v. Peters First Nation, 2022 BCSC 1890, Vancouver Docket S1611436). Oral Reasons for Judgment Counsel for the Appellants: M.J. Hewitt K.F. Alibhai Counsel for the Respondents, appearing via videoconference: D. Wu Counsel for the Proposed Interveners, Band Members Alliance and Advocacy Association of Canada: I.M. Knapp Place and Date of Hearing: Vancouver, British Columbia September 22, 2023 Place and Date of Judgment: Vancouver, British Columbia September 26, 2023 Summary: The Band Members Alliance and Advocacy Association of Canada applies for an extension of time to bring an application to intervene on this appeal, and for an order granting it leave to intervene. The parties to the appeal are all members of Peters First Nation. At trial, the appellants, the Chief of the Band and two councillors, were found liable for breach of fiduciary duty owed to Band members in relation to various acts of financial management. On appeal, the appellants will argue that the trial judge erred in finding that Band councils owe fiduciary duties to individual Band members. This is the issue on which the applicant seeks to provide submissions. The applicant is a not-for-profit society with a mandate to assist Indigenous people in seeking good governance and financial accountability from Band governments. Held: Application dismissed. The appeal involves an issue of public law that legitimately engages the applicant's interests. However, the applicant's proposed submissions duplicate those made in the respondents' factum. As such, the applicant has not demonstrated that it has a unique and different perspective that would assist the Court in its resolution of the issue.

- [1] HORSMAN J.A.: This is an application by the Band Members Alliance and Advocacy Association of Canada ("BMAAAC") for intervener status in an appeal from a judgment of Justice Lamb, indexed at 2022 BCSC 1890. The appeal is scheduled to be heard on November 20, 2023.
- [2] Given that BMAAAC brings this application for intervener status outside of the time limits prescribed by the Court of Appeal Rules, B.C. Reg. 120/2022 [Rules], it also applies for an extension of time to bring this application.

Background

- [3] The parties to the appeal are all members of Peters First Nation, which is a small Band--as defined in s. 2(1) of the Indian Act, R.S.C. 1985, c. I-5--located east of Chilliwack B.C., consisting of 72 members (the "Band"). The Band is governed by a Chief and two councillors who are elected every two years (the "Band Council"). The Band controls and manages its own finances pursuant to s. 69 of the Indian Act and the Indian Band Revenue Moneys Order, SOR/90-297.
- [4] The appellant, Norma Webb, is the Chief of the Band. The other two appellants, Victoria Peters and Leanne Peters, are respectively a current and a former councillor of the Band (the "Councillors"). Chief Webb and Victoria Peters are sisters, and Leanne Peters is their niece. The respondents, Andrew Genaille and Lisa Genaille, are members of the Band. The trial
- [5] The respondents brought an action against the Band Council. They alleged that the Band Council breached their fiduciary duty to members of the Band by reaping personal gains and giving benefits to their immediate families without complying with conflict of interest protocols.
- [6] In an earlier case involving another Band, this Court held that Band councils do have a fiduciary responsibility not to act in a conflict of interest, unless otherwise expressly provided. If there are express provisions to allow council members to act in the face of a conflict of interest, those express provisions must be strictly complied with: *Louie v. Louie*, 2015 BCCA 247 at para. 24. In that case, this Court found that the members of Council acted to the detriment of the Band in deciding to pay themselves \$5,000 each out of Band revenues, and this was therefore in breach of fiduciary duties owed to the Band: *Louie* at para. 30.
- [7] In the present case, the only express guideline governing spending by the Band Council is found in the Band's Financial Administration Law, which recognizes that the Band Council has "fiduciary responsibilities which include the management and protection of all Peters Band property, including Peters Band funds, in the best interests [of] its members and for future generations".

- [8] The respondent Band members asserted that the Band Council failed to strictly comply with their own guidelines. They claimed that Band Council's breach of fiduciary duty was not confined to a single transaction or payment, but rather arose from their systemic failure to follow their own conflict of interest bylaw or any conflict of interest guidelines.
- [9] The trial judge found that the appellants breached their fiduciary duty to Band members and the Financial Administration Law by:
- a) employing themselves as Band staff and setting their own remuneration;
 - b) paying themselves to attend meetings and by setting rates for such attendances;
 - c) paying themselves lump sum amounts for travel and telephone expenses;
 - d) deciding their own entitlement to Band funds and program funding; namely, by granting themselves funding under the Family Assistance program in the absence of a clear guideline or approval by band members; and
 - e) failing to provide equal access to Band members, as required by Article 7 of the Financial Administration Law.
- [10] Additionally, the trial judge declared as follows:
- a) Victoria Peters breached the Financial Administration Law by determining her own entitlement to program funding;
 - b) Victoria Peters breached her fiduciary duty to Band members and she breached the Financial Administration Law by receiving honoraria and travel expenses from funds received by the Band pursuant to a Mutual Benefits Agreement; and
 - c) The appellants breached the Financial Administration Law by hiring Mark Peters--their immediate family member--as CEO of Peters First Nation 3 Feathers Development Corporation without giving other Band members an opportunity to apply for the position.
- [11] In the result, the trial judge ordered that the appellants disgorge to the Band meeting fees, honoraria and expenses paid to the themselves from certain Band funds. She also ordered that punitive damages be paid to the Band in the following amounts:
- a) \$50,000 by Victoria Peters;
 - b) \$25,000 by Chief Norma Webb; and
 - c) \$10,000 by Leanne Peters. The issues on appeal
- [12] The appellants' factum alleges two errors by the trial judge:
- (1) First, it is alleged that she erred in law in finding that the appellants owed a fiduciary duty to individual Band members regarding the financial management of the Band;

- (2) Second, it is alleged that she erred in law, or alternatively made a palpable and overriding error of fact, in awarding punitive damages.
- [13] BMAAAC's interest in the appeal is with respect to the first issue. The appellants will argue on appeal that the trial judge's conclusion that a fiduciary duty is owed fails to give effect to the decision of the Supreme Court of Canada in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 [Elder Advocates]. In *Elder Advocates*, the Court held that there is limited scope for imposing a fiduciary duty on government--in that case the Government of Alberta--towards individual citizens in the exercise of public powers. In reliance on *Elder Advocates*, the appellants argue that Band councils generally do not owe a fiduciary duty to individual Band members. The proposed intervenor
- [14] BMAAAC is a federally incorporated non-profit society with a mandate "to assist individual Indigenous people in seeking good governance and financial accountability from elected band governments".
- [15] BMAAAC was formed in 2019, and has since assisted in various legal proceedings including appearing as an intervenor in *Bertrand v. Acho Dene Koe First Nation*, 2021 FC 287 and in the Supreme Court of Canada in the appeal of *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 5, leave to appeal to SCC granted 39856 (28 April 2022).
- [16] BMAAAC says that it has significant interest in the issues raised on this appeal, as an organization dedicated to "helping individual band members seek accountability and fairness from their band council". BMAAAC's interest in the appeal focusses on the argument made at paras. 53-60 of the appellants' factum that Band councils are, in principle, indistinguishable from Crown and municipal governments in the context of fiduciary law.
- [17] In its Memorandum of Argument at paras. 30-31, BMAAAC outlines the following submissions it wishes to make if granted leave to intervene:
- a) there are "practical differences" between aboriginal governments and other Canadian governments;
 - b) there are "practical challenges" which individual Indigenous people face in holding their elected officials to account;
 - c) unduly narrowing the standing of individual Band members to bring claims for breach of fiduciary duty would constrain access to justice for Indigenous individuals; and
 - d) Indigenous individuals are vulnerable members of Canadian society.
- [18] BMAAAC says it will bring a valuable and broader perspective to these issues as a national organization with a history of assisting Band members in respect of disputes with their Chiefs and Councils. Discussion Extension of time

- [19] I will first briefly address BMAAAC's application for an extension of time to bring its application for intervener status. In accordance with R. 61(2) of the Rules, BMAAAC was required to file and serve its notice of application for intervener status and a memorandum of argument no later than 14 days after the appellants filed their factum. The appellant filed their factum on May 31, 2023. Counsel for BMAAAC notified both the respondents and the appellants of its intention to apply to intervene on June 12, 2023. However, BMAAAC's did not file its memorandum of argument and notice of application until June 26, 2023. Its primary reason for the delay was that the principal of the organization was out of the jurisdiction.
- [20] I have considered the factors in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260, 1987 CanLII 2608 (C.A.). I can see no prejudice in allowing BMAAAC an extension of time to bring this application and I am of the view that it is in the interests of justice to grant the extension of time. Leave to intervene

Legal framework

- [21] Section 30(f) of the Act provides a justice jurisdiction to grant leave to intervene in an appeal. Rule 61 of the Rules governs applications for intervener status and allows the court to impose conditions. Generally speaking, an intervener will not be permitted to present oral argument unless a justice orders otherwise.
- [22] BMAAAC concedes that they do not have a direct interest in this appeal, but rather seek leave to intervene on a public interest basis. The factors to consider in determining applications to intervene in the public interest were set out in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 at para. 14 (Chambers):
- a) Does the proposed intervenor have a broad representative base?
 - b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?
 - c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
 - d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?
- [23] An intervenor should not expand the scope of the proceeding by raising new or immaterial issues: *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 19 (Chambers). An intervenor's submissions may ultimately support one party's position, but that is not their purpose. The intervenor's role is to make principled submissions on pertinent points of law: *Friedmann* at para. 28.

- [24] Where an application is made to intervene on public interest grounds, courts are concerned with ensuring important points are not overlooked, rather than the interests of the prospective intervener: *A.B. v. C.D.*, 2019 BCCA 297 at para. 33 (Chambers). Interveners must show that it is in the public interest, or the court's interest, that they be heard: *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 at para. 8 (Chambers). Discussion
- [25] Certain factors relevant to BMAAAC's request for intervention are not in dispute. The appellants do not take issue with BMAAAC's contention that it is an organization with a broad representative basis. BMAAAC does not seek leave to adduce new evidence on appeal, and its proposed submissions do not seek to expand the scope of the appeal.
- [26] The two issues of contention on this application are:
- a) whether there is a public law issue that legitimately engages BMAAAC's interests; and
 - b) whether BMAAAC has a unique and distinct perspective on the issues, or whether its proposed submissions are, as the appellants maintain, simply duplicative of arguments already advanced by the respondents.
- [27] The appellants say that a fiduciary duty is a private law duty, and thus, no public law issue arises on this appeal. However, the appellants intend to argue on appeal that Band councils should be equated with Crown and municipal governments for the purpose of determining whether fiduciary duties are owed. In *Elder Advocates*, the Court held that it is only in limited and special circumstances that a government will owe a fiduciary duty to an individual in the exercise of public law functions: at para. 37. This is the principle that the appellants seek to apply to Band councils. Thus, the issue that the appellants have raised on appeal does have a public law aspect. The issue is of general importance to governance in Indigenous communities in Canada. There is no question that the issue legitimately engages BMAAAC's interest.
- [28] The arguments on BMAAAC's intervener application primarily focussed on the question of whether BMAAAC has a "unique and different perspective" on the issues that will assist the Court.
- [29] BMAAAC contrasts its perspective with that of the respondent Band members, who only have experience dealing with their own Band. BMAAAC says it has considerable experience helping Indigenous peoples across Canada address conflicts with their governments. Thus, BMAAAC says it can offer the court a broader perspective on the issues in this case, beyond that which an individual band member could provide.
- [30] I accept that BMAAAC does have a different and broader experience than the respondent Band members. However, I am not persuaded that this translates, in this case, to a different perspective on the issue of public law on which BMAAAC seeks to intervene. As the appellants point out, BMAAAC's proposed submissions essentially duplicate the points made at paras. 56-58, 64-66 and 72 of the respondents' factum. The respondents argue that: Band members are uniquely vulnerable to a Band council; comparisons between Band councils

and Crown and municipal governments do not account for the numerous differences between such entities; and acceding to the appellants' argument would shield self-dealing and serious conflicts of interest, and leave Band members without a remedy. The respondents are represented on this appeal by sophisticated counsel with significant public law expertise, who are undoubtedly capable of advancing these arguments.

[31] While BMAAAC says that, if granted leave to intervene, it will take care not to duplicate the arguments of the respondents, it is difficult to see how duplication can be avoided given BMAAAC's proposed submissions.

[32] BMAAAC says, by way of an attempt to distinguish itself from the respondents, that it can address the "practical differences" between Indigenous governments and other Canadian governments, and the "practical challenges" which individual Indigenous people face in holding their elected officials to account. However, BMAAAC confirmed at the hearing of this application that it did not seek leave to adduce evidence on the appeal, but would rather confine its submissions to the current record and, perhaps, to notorious facts that could properly be the subject of judicial notice. That being the case, I am not persuaded that BMAAAC's proposed emphasis on practical considerations reflects a unique and distinct perspective on the fiduciary duty issue that is different from that of the other respondents. I am not satisfied that it would be of assistance to the division hearing this appeal to receive submissions from BMAAAC that are already canvassed in the respondents' factum.

[33] Accordingly, I decline leave to BMAAAC to intervene on this appeal.

Disposition

[34] BMAAAC's application for an extension of time to file its intervener application is allowed, but the application is dismissed.

[35] I make no order as to costs. "The Honourable Madam Justice Horsman"

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