The Canadian Abridgment eDigests -- Aboriginal Law

2014-2
January 13, 2014

ABL.I.10.b

Subject Title: Aboriginal law

Classification Number: I.10.b

Constitutional issues -- Land claims agreements -- Miscellaneous

Parties executed Land Claims Agreement (LCA) in May 2004 which mandated parties to participate in development and implementation of Land Use Plan for 75,520 square kilometres of Labrador territory addressed in LCA -- In July 2011 Land Use Plan was adopted in principle by both parties -- Commissioner was appointed hearings, following which he recommendations in November 2011 report -- Regional Planning Authority pursuant to LCA consulted with parties regarding commissioner's report in December 2011 -- Applicant First Nations government asserted that comments made by respondent Province to Regional Planning Authority reopened issues regarding LCP which had previously been adopted in principle and that Province had violated LCA -- Applicant brought application for orders in nature of certiorari, prohibition, and mandamus -- Application granted -- Order for mandamus issued -- Failure of Province to approve Land Use Plan was not breach of LCA, however Province's actions did not meet standard expected of duty of honour of Crown and province was therefore in breach of spirit and intent of LCA -- Applicant was entitled to declaration that LCA was constitutionally protected document that had force of law -- Requirements for mandamus were established in that Province had public duty to act owed to applicant, applicant made demand to Province to comply with provisions of LCA, and by delaying its decision without keeping applicant apprised of process and reasonable expectation of start of consultation, Province failed to do so.

Nunatsiavut Government v. Newfoundland and Labrador (Minister of the Department of Municipal Affairs) (2013), 2013 NLTD(G) 142, 2013 CarswellNfld 395, Gillian D. Butler J. (N.L. T.D.) [Newfoundland & Labrador]

ABL.II.7.a

Subject Title: Aboriginal law

Classification Number: II.7.a

Reserves and real property -- Leases -- Reserve lands

Assessment -- Real property, located on reserve held for respondent First Nation, was leased to respondent golf and country club for 75-year term -- Lease contained express condition that golf and country club qua lessor was only permitted to use leased lands as golf course -- By agreement applicant Musqueam Indian Band Board of Review acquired assessment review powers pursuant to First Nation's assessment by-law -- British Columbia Assessment Authority assessed golf and country club's lands for municipal tax purposes -- Authority proposed to assess lands as residential development lands, highest and best use of lands off-reserve -- Golf and country club and First Nation sought appellate review before Board of Review -- Board of Review stated case

for Supreme Court, requesting determination of how lands were to be assessed -- Lands were properly assessed as golf course -- While on its face highest and best use of lands in fee simple was residential development lands, express restriction in lease was properly taken into consideration in assessment of lands -- As golf and country club qua lessor, or any successor lessor taking leasehold interest on like terms, could not in fact use lands for residential development, for duration of any such lease lands were only available for golf course use -- Accordingly "real" highest and best use of lands was only use to which they could be put, and lands were still golf course and were properly assessed as such.

Musqueam Indian Band Board of Review v. Musqueam Indian Band (2013), 2013 CarswellBC 2336, 2013 BCSC 1362, Maisonville J. (B.C. S.C.); additional reasons at (2013), 2013 CarswellBC 3636, 2013 BCSC 2214, Maisonville J. (B.C. S.C.) [British Columbia]

ABL.III.5.d

Subject Title: Aboriginal law

Classification Number: III.5.d

Government of Aboriginal people -- Councils -- Procedure

Membership as prerequisite to taking Council office -- In 1990, legislature enacted Métis Settlements Act (MSA) -- Pursuant to s. 90(1)(a) of MSA, adult member of, inter alia, Peavine Métis settlement ("Peavine") is terminated as registered member of settlement where said adult member elects status pursuant to terms of Indian Act -- By operation of s. 97(3) of MSA, Registrar for MSA must remove adult member from membership list if, inter alia, said adult undergoes s. 90(1)(a) MSA election -- In 2001, by judgment of Court of Queen's Bench Registrar was ordered to compile fresh as amended Peavine membership list -- Registrar determined that respondent JKC had made s. 90(1)(a) election and struck JKC off of Peavine membership list -- No appeal was taken from 2001 judgment -- In 2007, parties including JKC brought application for, inter alia, declaration that MSA was unconstitutional -- Application was dismissed and JKC and others appealed -- Appeal was allowed, s. 90(1)(a) and other provisions of MSA were declared to be unconstitutional, Court of Appeal ordered JKC to be restored to Peavine membership list, and Crown in Right of province appealed to Supreme Court of Canada -- Appeal was allowed and judgment of applications judge was restored, without express reference to order of Court of Appeal returning JKC to Peavine membership list -- Applicant JIG, member of Peavine Métis settlement, asked Registrar to again strike JKC from membership list, and Registrar declined to act -- Subsequently JKC was elected to Peavine Métis settlement Council -- JIG brought application for declaration that JKC was disqualified from sitting on settlement Council -- Application granted -- Any member of Métis settlement had standing to bring court challenge to Council membership qualifications -- Terms of Act and Peavine settlement tradition were clear that persons not members of settlement were not entitled to sit on Council -- While JKC's name was presently on Council membership list, this was so only because of judgment of Court of Appeal which had been subsequently reversed -- Clearly JKC could not advance subsequently-reversed appellate constitutional judgment as collateral attack on 2001 judgment, from which JKC took no appeal -- Application was accordingly properly granted and JKC declared not to be member of Peavine Métis settlement and disqualified from sitting on settlement Council.

Gauchier v. Cunningham (2013), 2013 CarswellAlta 2480, 2013 ABQB 713, M.D. Gates J. (Alta. Q.B.) [Alberta]

ABL.V.4

Subject Title: Aboriginal law

Classification Number: V.4

Family law -- Children in need of protection

Mother, who was not of First Nations descent, had three children: N, O and B -- N and O's father was of First Nations descent -- B's father was not of First Nations descent -- Child protection proceedings were initiated by Mi'kmaw Family and Children's Services of Nova Scotia (MFCS) -- All three children were found to be in need of protection -- B's father brought application for order separating his case from matter involving N and O -- Trial judge granted application and found that MFCS did not have standing to involve itself in proceedings involving non-First Nations children -- MFCS appealed -- Appeal dismissed -- Trial judge did not err in exercise of her discretion when she ordered severance -- Trial judge explicitly and repeatedly recognized overarching principle of choosing course of action that looked to what would be in best interests of children -- Not severing cases would have caused harm to children -- Trial judge did not ignore important factors, emphasize insignificant factors, or give insufficient weight to relevant considerations -- Further, it was not appropriate to answer question of whether trial judge erred in finding that MFCS did not have standing.

Mi'kmaw Family and Children's Services of Nova Scotia v. O. (H.) (2013), 2013 CarswellNS 942, 2013 NSCA 141, MacDonald C.J.N.S., Oland J.A., Saunders J.A. (N.S. C.A.) [Nova Scotia]

ABL.VII.1

Subject Title: Aboriginal law

Classification Number: VII.1

Employment law -- Bands and First Nations as employers

Plaintiff brought action for damages in lieu of reasonable notice of dismissal -- Trial judge dismissed action, finding that evidence fell short of establishing plaintiff's claim of employment contract with defendant First Nation -- Trial judge found plaintiff had not proven that he had been hired and worked as band manager while holding elected office of band chief -- Plaintiff appealed -- Appeal dismissed -- Credibility finding and evidential assessment, which undergirded action's dismissal, had to stand because they were untainted by palpable and overriding error -- Appeal invited court to retry case, which was at odds with its reviewing role -- Trial judge's reasons easily met functionality test and were beyond reproach.

Atwin v. Kingsclear First Nation (2013), 2013 NBCA 66, 2013 CarswellNB 641, 2013 CarswellNB 640, Bradley V. Green J.A., J. Ernest Drapeau C.J.N.B., M.E.L. Larlee J.A. (N.B. C.A.) [New Brunswick]

ABL.VII.1

Subject Title: Aboriginal law

Classification Number: VII.1

Employment law -- Bands and First Nations as employers

Indian band established negotiations office ("office") to negotiate contracts on its behalf with Manitoba Hydro with respect to significant hydro-electric projects -- Employee was member of Indian band all his life and was employed as member of office; he was terminated by Chief and Council of Indian band -- Employee filed unjust dismissal and wage claims under Labour Code; adjudicator/referee was appointed to hear and determine both unjust dismissal complaint and eventual wage order appeal -- Indian band served adjudicator/referee with Notice of Constitutional Question pursuant to s. 57 of Federal Courts Act which challenged his jurisdiction to hear claims; adjudicator/referee applied functional test and found he did have jurisdiction -- Indian band brought application for judicial review of decision -- Application granted -- Adjudicator/referee's finding that Indian band was employer was reasonable finding of mixed fact and law and was entitled to deference -- However, adjudicator/referee erred in his characterization of normal and habitual activities of office by focusing on fact that beneficiaries of its activities were members of Indian band -- Sole consideration was nature of habitual activities undertaken by entity and habitual activities of office were to negotiate with Hydro, provincial Crown corporation established and regulated by provincial statute -- Apart from fact that some of negotiated provisions acknowledged adverse effects that some projects had on members of Indian band, there was nothing federal about office's work.

Fox Lake Cree Nation v. Anderson (2013), 2013 CarswellNat 4772, 2013 FC 1276, Russel W. Zinn J. (F.C.) [Federal]

ABL.X.7

Subject Title: Aboriginal law

Classification Number: X.7

Practice and procedure -- Miscellaneous

Costs -- Lands which formed part of reserve land of First Nation band were leased by golf club -- British Columbia Assessment Authority assessed golf club's lands for municipal tax purposes -- Band appealed to Musqueam Indian Band Board of Review -- Board brought stated case, which involved two questions of law -- Hearing on costs was held -- Band was ordered to pay costs at Scale B -- Order as to costs was appropriate -- Consideration of award of costs in situation involving stated case was not unusual or rare.

Musqueam Indian Band Board of Review v. Musqueam Indian Band (2013), 2013 CarswellBC 3636, 2013 BCSC 2214, Maisonville J. (B.C. S.C.); additional reasons to (2013), 2013 CarswellBC 2336, 2013 BCSC 1362, Maisonville J. (B.C. S.C.) [British Columbia]

ABL.XI

Subject Title: Aboriginal law

Classification Number: XI

Miscellaneous

Removal of administrator -- Applicant was appointed as administrator of estate of his uncle, B -- B was status Indian who died without will -- In addition to some minor assets, main assets of B's estate were two undivided parcels of land -- Nearly 16 years after appointment of applicant as administrator, B's estate and land remained undivided among heirs -- Delegate of Minister of Indian and Northern Affairs ordered that applicant be removed as administrator -- Applicant appealed -- Appeal dismissed -- It was apparent that Minister, on numerous occasions and acting on complaints, communicated concerns to applicant over his failure to administer B's estate -- Between receipt of complaint and removal of applicant as administrator, Minister allowed applicant additional year to achieve consensus among heirs -- Applicant failed to both distribute estate assets and follow orders of Minister -- Accordingly, removal of applicant as administrator amounted to reasonable use of Minister's discretion under Indian Act.

Longboat v. Canada (Attorney General) (2013), 2013 CarswellNat 4211, 2013 FC 1168, 2013 CarswellNat 4841, 2013 CF 1168, Glennys L. McVeigh J. (F.C.) [Federal]
