

Federal Court



Cour fédérale

Date: 20230411

Docket: T-680-20

Citation: 2023 FC 508

Ottawa, Ontario, April 11, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

LILIANA KOSTIC

Plaintiff

and

HIS MAJESTY THE KING IN RIGHT OF CANADA, AND ALBERTA THE ATTORNEY GENERAL OF CANADA (“CANADA” or “INAC”); THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA; AND ITS AGENTS

Defendants

and

PIIKANI NATION AND THE BAND NATION AS REPRESENTED BY THE CHIEF AND COUNCIL (“C and C”); ~~ROD NORTH PEIGAN; JANET POTTS; DANIEL NORTH MAN;~~ (TERMS OF THE CHIEF AND COUNCIL 2001-2021 ONWARDS)

Defendants

and

~~STANLEY GRIER; DOANE K CROWSHOE (“DCS”); ERWIN BASTIEN (“EB”); TROY KNOWLTON; WESLEY CROWSHOE; RIEL PROVOST-HOULE; THEODORE PROVOST; CHE LITTLE LEAF MATUSIAK~~

Defendants

and

MICHAEL PFLEUGEUR [(“M. PFLEUGEUR”) BAND EMPLOYEE TERM 2010-2017]

Defendants

and

PIIKANI INVESTMENT CORPORATION (“PIC”); AND ITS DIRECTORS (Directors terms 2003-2021 onwards) And DIRECTORS & ITS LEGAL COUNSEL (2003 ON WARDS) CHIEF STANLEY GRIER [(“SG”) SHAREHOLDER TRUSTEE 2015-22]; ERWIN BASTIEN; TROY KNOWLTON; WESLEY CROWSHOE; THEODORE PROVOST; CHE LITTLE LEAF-MATUSIAK ~~CHIEF REGGIE CROW SHOE [(SHAREHOLDER TRUSTEE 2007-11]; FABIAN NORTH PEIGAN; KAREN CROW SHOE; SAM KHAJEEI; PIERRE-GILLES BETTINA; VERONA WHITE COW; EMILY GRIER & RANA LAW; BLAKE CASSELS & GRAYDON LLP; RICK YELLOW HORN; DALE MCMULLEN;~~

Defendants

and

PIIKANI RESOURCE DEVELOPMENT LIMITED (“PRDL”); & ITS DIRECTORS 2008 – ONWARDS PRESIDENT- DOANE K CROW SHOE (“DCS”); CHIEF STANLEY GRIER [(“SG”) SHAREHOLDER TRUSTEES 2015-22]; TROY KNOWLTON; RIEL PROVOST-HOULE; ERWIN BASTIEN (“EB”); THEODORE PROVOST; CHE LITTLE LEAF-MATUSIAK; PAUL BLAHA; JASON EDWORTHY; SHAWNA MORNING BULL; MIKE ZUBACH

Defendants

and

CANADIAN IMPERIAL BANK OF COMMERCE (“CIBC”); CIBC TRUST CORPORATION (“CIBC TRUST”) and CIBC WOOD GUNDY/CIBC WORLD MARKETS AND ITS AGENTS (“CIBC WG”)

Defendants

and

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP.; ROBERT HAWKES; GLEN SOLOMON (JSS BARRISTERS, “JSS”)

Defendants

and

BRUCE ALGER (“ALGER”); ALGER & ASSOCIATES INC.; ~~THE GRANT THORNTON GROUP OF COMPANIES; GRANT THORNTON LTD.; GRANT THORNTON INC.~~; AND ALGER INC.

Defendants

and

CARON AND PARTNERS LLP; RICHARD GILBORN; DANIEL GILBORN (“CP”)

Defendants

and

MILLER THOMPSON LLP; JEFFREY THOM

Defendants

and

GOWLING WLG (CANADA) LLP; CAIREEN HANERT (“CH”)

Defendants

and

MCLENNAN ROSS LLP; (“MR”)

Defendants

and

JOHN DOES 1-10

Defendants

AND BETWEEN

DALE MCMULLEN

**Plaintiff by Counterclaim
(Defendant by Counterclaim)**

and

**CANADIAN IMPERIAL BANK OF COMMERCE, CIBC TRUST CORPORATION,
CIBC WORLD MARKETS, and BLAKE CASSELS & GRAYDON LLP**

Defendants by Counterclaim

and

PIKANI NATION and PIKANI NATION CHIEF & COUNCIL

Defendants by Counterclaim

ORDER AND REASONS

[1] This is an appeal by Ms. Liliana Kostic, Plaintiff and Defendant by Counterclaim [Kostic], said to be of three Orders of an Associate Judge, dated May 19, 20 and 21, 2021. The appeal is brought pursuant to Rule 51(1) of the *Federal Courts Rules* SOR/98-106 [Rules].

Procedural Background

[2] The events giving rise to the underlying action [Action] and related matters, both in this Court and in the Court of King's Bench of Alberta [ACKB], initially occurred nearly 20 years ago. The related claims and litigation have subsequently exponentially evolved.

[3] In a nutshell, according to the Amended Amended Statement of Claim [AASOC] filed by Kostic in this matter, in 2002, Piikani Nation [Piikani], Canada, and Alberta settled litigation by way of a settlement agreement which provided Piikani with settlement funds of \$64.3 million. Kostic was appointed by Piikani to manage portions of the settlement funds, which she did until January 2007 when her engagement was terminated. In November 2006, Piikani commenced an action against Kostic in the ACKB (Action No. 0601-13081). The AASOC states that this matter is ongoing, but also states that the fraud allegations against her were dismissed in April 2014. In the ACKB, Kostic initiated a third party claim in Action No. 0601-13081, a wrongful termination claim against Piikani (Action No. 0801-05039), and a wide ranging claim (Action No. 1601-01693) against many of the same parties named in this action.

i. Statement of Claim

[4] On June 29, 2020, Kostic initiated this Action by the filing of a 192-page Statement of Claim [SOC] which, as will be discussed below, has subsequently been twice amended. The SOC names some nearly 50 persons and entities including Canada, Piikani, Piikani Chief and Council, law firms, lawyers, a chartered bank, and a trust corporation as defendants. In the AASOC, Kostic asserts some 37 heads of wrongdoing and 24 wrongful acts against the various defendants in various combinations whom she describes as engaging in unlawful means conspiracy and breach of trust, dishonest and knowing assistance in breach of trust, each with their own acts of omission or commission set out to intentionally shift blame and attention to Kostic, to cause damage and injury to her in a scheme to conceal their own wrongdoing. She seeks some \$25 million in general, special, exemplary, aggravated and punitive damages.

[5] On June 30, 2020, this Court ordered that the Action would proceed as a specially managed proceeding and, by Order dated July 6, 2020, Associate Judge (Prothonotary) Molgat was assigned as the Case Management Judge [CMJ] for the Action.

[6] A letter dated July 16, 2020, sent by the Attorney General of Canada on behalf of various Defendants, advised the Court that more than 30 defendants represented by legal counsel [Represented Defendants (who consist of: His Majesty the King in Right of Canada, the Attorney General of Canada, the Minister of Indian Affairs and Northern Development Canada, Piikani Nation, Piikani Nation as represented by Chief and Council, Chief Stanley Grier, Erwin Bastien, Troy Knowlton, Wesley Crowshoe, Theodore Provost, Che Little Leaf-Matusiak, Karen Crowshoe, Riel Provost-Houle, Doane K Crow Shoe, Piikani Investment Corporation and its directors (Sam Khajeei, Bettina Pierre-Giles, Verona White Cow), Emily Grier, Rana Law, Blake Cassels & Graydon LLP, Piikani Resource Development Limited and its directors (Doane Crow Shoe, Erwin Bastien, Troy Knowlton, Riel Provost-Houle, Mike Zubach, Jason Edworthy), Canadian Imperial Bank of Commerce, CIBC Trust Corporation, CIBC Wood Gundy/CIBC World Markets, Jensen Shawa Solomon Duguid Hawkes LLP, Robert Hawkes, Glenn Solomon, Bruce Alger, Alger & Associates Inc., Caron and Partners LLP, Richard Gilborn, Daniel Gilborn, Michael Pflieger, Miller Thomson LLP, Jeffrey Thom, Gowling WLG (Canada) LLP, Caireen Hanert and McLennan Ross LLP)] intended to bring preliminary motions to strike or stay the SOC and sought a case management conference [CMC]. That letter is included in the Represented Defendants' responding motion record in this appeal.

[7] On September 9, 2020, the CMJ issued an Oral Direction suspending all timelines prescribed by the Rules for the conduct of this Action until the establishment of a timetable by direction or order of the Court.

[8] On October 2, 2020, following a case management conference held on October 1, 2020, the CMJ issued an Oral Direction requiring, among other things, that the Represented Defendants file written confirmation of their intention to defend this Action by October 9, 2020, and that Kostic serve and file her amended SOC by December 1, 2020. This Direction is found in the Represented Defendants' motion record.

[9] Between October 5 and October 9, 2020, the Represented Defendants filed letters with the Court confirming their intent to defend the Action.

[10] On November 24, 2020, Kostic wrote to the Court requesting an extension of the December 1, 2020 deadline to serve and file an amended SOC to the end of January 2021.

[11] By Oral Direction issued on November 27, 2020, the CMJ directed, since Kostic's request was not opposed, that the deadline for her to serve and file her amended SOC was extended to January 29, 2021. This Direction is found in the Represented Defendants' motion record.

[12] On January 27, 2021, Kostic wrote to the Court and requested a further extension of the deadline to serve and file her amended SOC to February 16, 2020.

[13] By Oral Direction dated February 25, 2021, the CMJ directed that the amended SOC could be accepted for filing.

[14] On the same date, Kostic served and filed an Amended Statement of Claim [ASOC], consisting of 211 pages and 1330 paragraphs.

[15] On March 25, 2021, following a CMC held the previous day, the CMJ issued a Direction which, among other things, considered Kostic's request to have the opportunity to further amend the ASOC to narrow, perfect and reduce the scope of the action and, in that regard, directed that Kostic serve and file her Further Amended Statement of Claim by no later than April 26, 2021 [March 25, 2021 Direction]. The CMJ stated in the Direction that "In view of the Court's Directions dated October 2, 2020 and November 27, 2020, this date is peremptory on the Plaintiff". The Direction also scheduled the next CMC in the Action for May 19, 2021, and required the parties to submit a jointly proposed timetable for the next steps in the Action by May 10, 2021. That Direction is found in the Represented Defendants' appeal motion record.

[16] Kostic served and filed her Amended Amended Statement of Claim [AASOC] on April 26, 2021. It consists of 215 pages and 1322 paragraphs.

[17] The next day, and despite the CMJ's March 25, 2021 Direction, Kostic requested a further extension of time, to at least June 29, 2021, in order to file a further amended amended statement of claim.

[18] On April 28, 2021, counsel for Bruce Alger and Alger & Associates [Alger Defendants], with the concurrence of various other counsel for various other Represented Defendants, wrote to the Court opposing any further extensions of time to amend the AASOC. Kostic responded by letter dated April 28, 2021.

[19] To date, given the pending motions to strike, which are governed by Rule 221, and the suspension of the timelines by the September 9, 2020 Direction, none of the Represented Defendants have filed defences to the AASOC, nor to the prior versions of the claim. Their motions to strike are based, variously, on the lack of jurisdiction of this Court to hear the Action, Kostic's lack of standing, that the matter is being progressed in another court, the vexatious nature of the proceeding, and abuse of process. Only Mr. Dale McMullen, Defendant and Plaintiff by Counterclaim [McMullen], has filed a Statement of Defence.

[20] On May 7, 2021, the CMJ issued a Direction stating that “[t]o the extent that the Plaintiff has by way of the latest amendment to the Statement of Claim deleted or otherwise removed any Defendant(s), the Plaintiff shall serve and file Notice(s) of Discontinuance with proof of service by no later than May 14, 2021”. This Direction is contained in the Represented Defendants’ responding appeal motion record.

ii. Order of Motions

[21] Further to the March 25, 2021 Direction, by letter dated May 10, 2021, the Represented Defendants provided a proposed agenda for the CMC scheduled for May 19, 2021 and their proposed timetable for next steps. The letter noted that Kostic and the unrepresented defendants

were provided an opportunity to review the materials but that Kostic had elected to submit her own agenda and the unrepresented defendants had not responded. The Represented Defendants submitted that the proposed motions to strike the AASOC should be prioritized and heard ahead of any other proposed or contemplated motions.

[22] By letter also dated May 10, 2021, Kostic submitted her proposed agenda. In her proposed agenda, Kostic submitted that certain judicial review proceedings brought in this Court, her proposed further amendments to the AASOC, as well as joinder and consolidation motions, should be addressed and scheduled prior to the scheduling and determining of other motions – which would include the proposed motions to strike by the Represented Defendants. Both letters are included in the Represented Defendants’ responding appeal motion record. McMullen also submitted a proposed CMC agenda.

[23] By Direction dated May 18, 2021, the CMJ addressed five items [May 18, 2021 Direction]. One of these items was that Kostic had attempted to file notices of discontinuance which, for the reasons specified in the direction, were defective. A copy of that Direction is attached in Annex A of this Order and was included in the Represented Defendants’ responding appeal motion record.

[24] On May 20, 2021, following a CMC held the previous day, the CMJ issued a Direction [May 20, 2021 Direction], primarily addressing Kostic’s noncompliance with Rule 206, but also addressing other matters arising from the May 19, 2021 CMC, including the motions timeline as submitted on behalf of the Represented Defendants and the addition of new defendants. A copy

of the May 20, 2021 Direction is included in Annex A of this Order, and the portions most relevant to this motion are set out below:

5. Regarding the proposed timetable submitted on May 19, 2021 for the motions by any Defendants to strike or stay, the AGC shall prepare a revised timetable to clarify and identify each “group” of represented Defendants that shall file a single joint motion record as proposed, with the exception of the Defendants represented by Emery Jamieson LLP who may file 2 separate motion records. The revised timetable shall be submitted to the Court in .pdf and Word format by no later than May 21, 2021.

.....

7. Issues concerning the addition of Defendants shall be addressed in the context of the proposed motions to strike or stay.

[25] In response to the May 20, 2021 Direction, counsel for the Attorney General of Canada provided a revised timetable on May 20, 2021, which, like the first proposed timeline, prioritized the disposition of the Represented Defendants’ motions to strike ahead of proposed motions by Kostic.

[26] On May 21, 2021, the CMJ ordered that the timelines for the procedural steps pertaining to the defendants’ motions to strike the AASOC or Counterclaim, or to stay the proceedings, would be as specified in that Order [May 21, 2021 Order]. This covered steps up until the filing of written representations and a joint motion record, by no later than December 15, 2021. It also required the parties to provide to the Court, by no later than December 17, 2021, a proposed timeline for service and filing of the responding motion records, and dates and times of common availability for a CMC in mid-December 2021. The May 21, 2021 Order is contained in the Represented Defendants’ responding appeal motion record.

[27] In the May 21, 2021 Order, the CMJ recited and considered the prior procedural events pertaining to the amending of the SOC, the submissions of the parties at and in connection with the May 19, 2021 CMC, and the prioritization of the defendants' motions to strike. The May 21, 2021 Order is found in Annex A of this Order but is also set out here in whole, as follows:

UPON the Plaintiff having commenced this action by way of a (192-page, 1244 para.) Statement of Claim [Claim] filed June 6, 2020 against some 46 Defendants;

CONSIDERING that by letter from the Attorney General of Canada [Canada] dated July 16, 2020, more than 30 Defendants represented by legal counsel communicated their intention to bring preliminary motions to strike or stay the action;

CONSIDERING the Defence and Counterclaim by Dale McMullen, filed July 29, 2021;

CONSIDERING the Court's Direction dated September 10, 2020;

CONSIDERING the (211-page, 1330 para.) Amended Claim filed February 25, 2021, and the (215-page, 1322 para.) Amended Amended Claim filed April 26, 2021, both accepted for filing despite their irregularity and without prejudice to the rights of any Defendant to address any irregularities therein;

CONSIDERING that the Plaintiff has, by letter dated April 27, 2021, requested a further extension of time "to at least June 29, 2021" to further amend the Claim to "remove Defendants" and "organize the Defendants into logical groupings" as well as to include further causes of action;

CONSIDERING that the Plaintiff's request is opposed by some 39 Defendants who are represented by 10 different law firms [Represented Defendants] in view of their proposed motions to strike or stay;

CONSIDERING that the Plaintiff has also proposed to bring a number of interlocutory motions including for a confidentiality order, to examine a trustee in bankruptcy, to freeze funds, for security for costs, to disqualify counsel, for default judgment and to consolidate this proceeding with T-348-21, as well as with T-38-20 (by Dale McMullen) and T-1344-20 (by Brian Jackson);

CONSIDERING that the Defendant/Plaintiff by Counterclaim, Dale McMullen, also wishes to amend his pleading and to bring

interlocutory motions including to enforce the terms of indemnity agreements between him and certain Defendants, to disqualify counsel, and for default judgment;

CONSIDERING that the Court is of the view that the stated intention and request by the Represented Defendants to bring motions to strike the Claim and Counterclaim or stay the proceedings constitutes a response to the Claim impacting the right to amend pursuant to Rules 200 and 201 of the *Federal Courts Rules*;

CONSIDERING the Court's Directions dated October 2, 2020, November 27, 2020, and March 25, 2021, and that the Plaintiff has already been provided with ample opportunity as requested to amend her Claim to "narrow, perfect and reduce the scope of the action";

CONSIDERING that the Court is of the view that any further amendments to the Claim or to the Counterclaim may be addressed in response to the motions to strike or stay, and that those motions ought to proceed to determination before any other proposed motions for various interlocutory relief;

CONSIDERING the proposed timetables submitted in accordance with the Court's Directions dated February 25, 2021 and March 25, 2021 by Canada on behalf of the Represented Defendants;

CONSIDERING that the Plaintiff and self-represented Defendants, including Dale McMullen, did not provide a response to the proposed timetables although invited to do so;

CONSIDERING the submissions of the parties at the case management conference held on May 19, 2021; that evidence pursuant to s.23 of the *Canada Evidence Act* is contemplated by certain Represented Defendants, and that they are of the view that their motions may be made in writing;

CONSIDERING the Court's Directions dated May 17, 2021 and May 20, 2021;

AND CONSIDERING Rule 385(1)(a) of the *Federal Courts Rules*;

THIS COURT ORDERS that the schedule for the motions by Defendants to strike the Statement of Claim or Counterclaim or stay the proceedings shall be as follows:

1. The Defendants shall serve and file their Notices of Motion, together with supporting affidavit(s) or other evidence (if any), [Motions] by no later than June 30, 2021.
2. Cross-examinations on Defendants' affidavits (if any) shall be completed by no later than July 30, 2021.
3. Respondents to the Motions [Respondents] shall serve and file their affidavits (if any) by no later than September 15, 2021.
4. Cross-examination on Respondents' affidavits (if any) shall be completed by no later than October 15, 2021.
5. The Defendants shall serve and file their Motion Records, including written representations, by no later than December 15, 2021.
6. Pleadings and evidence shall be contained in a Joint Motion Record filed by the Represented Defendants.
7. With the exception of those represented by Ms. Smith of Emery Jamieson LLP who may file 2 written representations of no more than 30 pages each, written representations by Represented Defendants shall be limited to a maximum of 30 pages for each group of Defendants represented by the same counsel or law firm.
8. The written representations of each Respondent to the Motions shall also be limited to a maximum of 30 pages.
9. The parties shall, by no later than December 17, 2021, discuss and provide the Court with:
 - (i) a proposed timetable for service and filing of the responding Motion Records by the Respondents, including written representations; and
 - (ii) dates and times of their common availability for a case management conference.

iii. Kostic appeal of the May 21, 2021 Order

[28] On May 31, 2021, the Registry received an 837-page motion record from Kostic seeking, among other things, to appeal what she describes as the Orders of May 19, 20 and 21. I note here in passing that there are no Orders dated May 19 and 20, 2021. Directions were issued on May 18 and May 20, 2021, as described above. By Direction of Justice Little dated June 10, 2021, the motion record was not accepted for filing because of identified defects. On June 23, 2021, Kostic submitted a 7433-page motion record seeking, among other things, to appeal what she described as Orders dated May 19, 20, and 21, 2021. By Direction dated September 15, 2021, Justice Heneghan directed that, for the reasons set out, the motion record would not be accepted for filing. Kostic resubmitted the appeal motion record on October 7, 2021.

[29] However, it was not until over a year later that the appeal motion was accepted for filing by a Direction dated November 30, 2022 issued by Associate Judge Tabib. In her Direction, Associate Judge Tabib noted the history of the attempts to file the motion and that the Registry had sought directions as to whether Kostic's motion record, "submitted for filing on October 7, 2021, but inadvertently not referred to the Court for direction until recently, can be accepted for filing", and directed that:

The Plaintiff's motion is submitted for filing over five months after the "orders" sought to be appealed, and is, on its face, late. However, the Court notes that the Plaintiff served and submitted for filing her initial motion record within the deadlines for appeal. The discrepancies noted were in respect of the content of the motion record, and not with the Notice of Motion itself, which should have been accepted for filing on its own to preserve the appeal deadlines (Rule 51 requires that the Notice of Motion, and not the record, be served and filed within 10 days of the order on appeal). The Notice of Motion will be deemed to have been filed on May 31, 2021, under reserve of any objection the Defendants may raise as to modifications between the version initially served and the version served on October 7, 2021.

The Notice of Motion also purports to appeal “orders” dated May 19 and 20, 2021, and is out of time for those orders (assuming they even exist). Any issues regarding timeliness and amenability to appeal of these other “orders” should properly be raised on the merit of the motion. The same goes for all other irregularities noted by the Registry: to the extent the record contains inadmissible evidence or materials for which leave should have been but was not sought, that may be raised by the parties in their responding record, or by the Court on its motion, and be addressed at the hearing of the motion.

[30] In the meantime, on December 17, 2021, counsel for the Attorney General of Canada, on behalf of the Represented Defendants, wrote to the CMJ, as required by the May 21, 2021 Order, proposing that Kostic and McMullen serve and file their motion records responding to the Represented Defendants’ motions to strike by February 15, 2021, and that Kostic and McMullen disagreed with that proposed timetable and would separately write to the Court in that regard. Further, that those parties were available for a CMC on January 24, 2022. Kostic responded on the same date confirming her availability on January 24, 2022, noting her outstanding appeal of the May 21, 2021 Order and, attaching a proposed timetable.

[31] On January 27, 2022, counsel for the Attorney General for Canada wrote to the CMJ, referencing their December 17, 2021 letter and Kostic’s letter in response, and requested that the Court fix a deadline for service and filing of the responding motion records and suggested, as a matter of expediency, that this be done without a CMC. However, if the Court found that a CMC was required, available dates for the Represented Defendants were identified.

[32] Between January 28, 2022 and November 2022, there are few entries in the Court’s record.

[33] On November 18, 2022, counsel for the Alger Defendants, with the concurrence of all of the Represented Defendants, wrote to the CMJ concerning the May 21, 2021 Order and advised that the Represented Defendants had complied with all of the required steps and deadlines, including, prior to December 15, 2021, serving and filing a Joint Motion Record and their respective Written Representations pertaining to the motions to strike the AASOC. The letter also referred to the December 17, 2021 letter submitted by counsel for the Attorney General of Canada on behalf of the Represented Defendants in response to the May 21, 2021 Order, the December 17, 2021 responding letter from Kostic, and the January 27, 2022 letter from counsel for the Attorney General of Canada on behalf of the Represented Defendants. Counsel for the Alger Defendants noted that there had been no response to those letters nor had the Represented Defendants been served with responding motion records of the motion respondents although, in the proposed timeline provided with her December 17, 2021 letter, Kostic had requested until September 2022 to do so. Counsel for the Alger Defendants noted that 11 months had passed since the Represented Defendants had provided their motion to strike materials to the responding parties and repeated the submission made in the January 27, 2022 letter from counsel for the Attorney General of Canada requesting that the Court fix a deadline for the filing and service of responding motion records and written representations by the motion respondents, and a deadline for the filing and service of reply submissions (if any) by the Represented Defendants.

[34] By Order dated November 29, 2022, the CMJ responded to the November 22, 2022 letter and the above referenced proposed timelines. With respect to the motions to strike by the Represented Defendants, she ordered that Kostic and McMullen serve and file their responding motion records, including written representations, by no later than February 15, 2023, and that

the Represented Defendants serve and file any written representations in reply by no later than February 28, 2023. A copy of the November 29, 2022 Order is contained in the Represented Defendants' responding appeal motion record.

[35] And, as noted above, on November 30, 2022, Associate Judge Tabib issued a direction deeming Kostic's Notice of Motion (which was contained within her motion record) appealing what Kostic described as May 19, 20 and 21, 2023 Orders, to be have been filed on October 7, 2021. This Direction is found in the Represented Defendants' responding appeal motion record.

[36] On December 19, 2022, Kostic wrote an 8-page letter to the CMJ. With respect to the appeal, she stated, "By way of reminder: I still await my filed Appeal Motion record that was accepted for filing November 30, 2022, so that I can schedule my May 30, 2021, Appeal. I also require a Direction from this Court how to schedule that". The letter states that her stay of the Action is required to avoid further prejudice pending the determination of related actions. The letter goes on to list various other concerns, comments, positions and arguments.

[37] By Direction dated January 4, 2023, the CMJ directed as follows:

The following correspondence has been referred to the Court: a 4-page letter from the Defendant/Plaintiff by Counterclaim, Dale McMullen, dated December 16, 2022 and an 8- page letter from the Plaintiff/Defendant by Counterclaim, Liliana Kostic, dated December 19, 2022. It is not clear under what Rule, Practice Direction or authority the parties are sending these letters to the Court. These parties are referred to the Consolidated General Practice Guidelines (June 8, 2022), Update #9 and Consolidated COVID-19 Practice Direction (October 24, 2022) as well as the numerous Directions and Orders issued by the Court in these proceedings. Please address the Court only when you seek specific relief which the Court can grant. And do so in a proper way in

accordance with the Rules and Practice Directions as well as the Orders and Directions issued. Regarding Mr. McMullen's letter: Unless the strict requirements of an Informal Request for Interlocutory Relief are met, the Court will not grant any form of relief requested by way of a simple letter. This includes requests for an extension of time. Regarding Ms. Kostic's letter and "reminder": The Registry does not routinely provide filed copies of documents. If a party wishes a copy of a filed document, they may obtain same by attending at a Registry Office or by making a written request. This request has been complied with. As to the request for a "Direction" on how to schedule her appeal motion for hearing, the Plaintiff is referred to Federal Courts Rules 34 and 35. The Court declines to address the balance of the Plaintiff's letter which consists of submissions in reply to communications from other parties. Written submissions will not be entertained by the Court unless they are made in accordance with the Rules, a Direction or Order.

[38] By Direction dated February 6, 2023, I addressed matters pertaining to the transcript of Kostic's cross-examination of McMullen, which cross-examination was held on July 29, 2021 [Transcript], and the setting down of two appeals of orders of the CMJ. One appeal was brought by McMullen and concerns scheduling deadlines and the availability of the Transcript. The other was the appeal to which this decision corresponds – that is, Kostic's appeal of the May 21, 2021 Order. My Direction advised that if extensions of time related to the Transcript availability were not sought by McMullen and/or Kostic prior to February 10, 2023, then both appeals would be set down to be heard in Calgary on March 9, 2023.

[39] On February 9, 2023, Kostic filed and served a document entitled "Motion Record of Liliana Kostic for a Stay of Proceedings or Alternate Relief – Pursuant to Memorandum of Judge Strickland in writing or orally" in which she sought to stay the May 21, 2021 Order of the CMJ pending the outcome of her appeal. By Direction dated February 15, 2023, I informed the parties that the stay motion was not responsive to my February 6, 2023 Direction (which sought to have

Kostic and McMullen address extensions of time needed with respect to the Transcript) and that Kostic was to inform the Court on or before February 15, 2023 whether she intended for the stay motion to proceed in writing or in person. Kostic advised that she sought an oral hearing of the stay motion which, by my direction of February 20, 2023, was confirmed as proceeding in person in Calgary at 9:30 am on February 28, 2023.

[40] On February 15, 2023, Kostic submitted a 662-page document entitled “Responding Motion of Liliana Kostic”. By Direction dated February 20, 2023, I advised that it was not apparent from this document to what motion it responded, although it might be in response to the November 29, 2022 and the January 5, 2022 Orders requiring Kostic to file responding motion records to the Represented Defendants’ and McMullen’s motions to strike by February 15, 2023. I also pointed out that the document contained written submissions in draft form. I directed that before the document could be considered for filing, Kostic must advise the Registry to which motion(s) the document responds and provide the final form of her written representations. As of the time of the hearing of this appeal, Kostic has not responded to that Direction.

The Appeal

[41] In her Notice of Motion, Kostic states that she seeks:

An Order and Declaration:

1. REVERSING the May 19, 20 and 21st, 2021 Order(s) of the Honourable Case Management **Prothonotary** Madam Sylvie Molgat and replacing it with an Order the Case Management Judge, herein referred to as “the Court” and or the “CMJ ” should have granted, be reversed or varied in whole or in part;
2. Permitting the Applicants proposed **AMENDMENTS TO HER STATEMENT OF CLAIM PRIOR TO ANY STRIKING**

MOTIONS in Action T-680-20 and for this motion to be heard and spoken to on expedited basis and;

3. for **Leave to admit NEW EVIDENCE**, nunc pro tunc and **ADMISSION of the new evidence**.

4. that the Applicant was not afforded **DUE PROCESS AND PROCEDURAL FAIRNESS**

5. permitting the Motion to **NOTE DEFENDANTS IN DEFAULT** who have not Defended the claim.

6. to **POSTPONE and reschedule THE LITIGATION PLAN** in this action pending the Appeals and Judicial review in action's T-1344-20 and T-348-20 and the plaintiff's proposed Motion to be added as a party in action T-38-20 with the other corollary relief;

7. that The Applicant be awarded the **COSTS** in a fixed amount of this Motion with three Fees multipliers; Contingency, Public interest Private Attorney General, and Vexatious Behaviour.

8. An Order for Interim costs and/or indemnity under the Plaintiff's save harmless and indemnity agreement(s).

[Emphasis in original.]

Preliminary Matters

i. Request for Adjournment

[42] When this appeal was called, Kostic stated that she wished to advise the Court that a serious a matter had arisen which warranted an adjournment of her appeal.

[43] Kostic stated she had recently become aware that information and records of hers had been stolen, including information subject to solicitor-client privilege. Kostic made repeated, very serious allegations as to the theft against Ms. Caireen Hanert, counsel for Piikani [Hanert].

Kostic also alleged that the police had been advised and they had informed her that this was a

very serious matter, that search warrants would likely be issued and charges could be laid. She asserted that a letter had very recently been sent by Mr. Bill Clem (possibly meaning William Klym), who she says is counsel representing her in other matters, to Hanert raising these allegations of theft. In Kostic's view, this event changed the entire complexion of the Action and the appeal before me, which therefore could not proceed.

[44] Kostic also asserted that in order for the appeal to now proceed, she would need to retain counsel given this alleged change of circumstances. And, in any event, that she was too distraught to continue, so the appeal would have to be adjourned, and to do otherwise would be in breach of procedural fairness.

[45] Canada opposed the adjournment given that Kostic had previously been advised by the Court of the clear path that she needed to follow if she intended to retain counsel to represent her at the appeal. Canada further submitted that even if the matter was adjourned, there was no certainty that Kostic would retain counsel, particularly in light of her ongoing breach of the Court's Order concerning the production of the Transcript. Moreover, the record being relied upon in the appeal was limited to the Court's Orders and Directions and as such, Kostic would not be prejudiced, as it would not involve consideration of the documents purportedly stolen. Additionally, Kostic's new allegation of stolen records was made in broad generalities, which did not engage with the substance of the appeal. Finally, Canada submitted that there was a serious risk of indefinite delay if the adjournment were granted on the basis of the alleged theft. The Action was commenced three years ago, yet has still only progressed to the point where the

motions to strike have been set down, even though some 30 of the defendants gave notice of their intention to bring those motions on July 16, 2020.

[46] McMullen generally supported an adjournment with appropriate time frames.

[47] Hanert, on behalf of Piikani, also opposed the adjournment. Given the very serious allegations leveled against her by Kostic, I allowed Hanert some latitude in providing background information. She advised that two weeks prior to the hearing of this appeal she had received a letter from Mr. Gabor Zinner [Zinner], who represents Kostic in other matters, raising the theft allegations and that she had responded at that time.

[48] After a brief recess to consider the submissions, I declined to grant the adjournment for the following reasons, which I explained at the hearing.

[49] First, as previously set out in my decision dismissing Kostic's request for a stay of this Action pending the outcome of this appeal (2023 FC 306), Kostic is a self-represented litigant.

[50] By my Direction dated February 15, 2023, Kostic was informed that, as no notice of solicitor had been filed pursuant to Rules 124(1) or 124(2), there would be no engagement by the Court with communications submitted on her behalf from persons not so appointed. By responding letter of same date, Kostic stated that she intended for Zinner to be retained to provide limited-scope representation and sought "leave pursuant to Rule 124(2)" and also sought "leave to file form 124(d)". By my Direction dated February 20, 2023, Kostic was informed that

that leave was not required under Rule 124(2) and that if she wished to have legal representation with respect to the Action, including with respect to the upcoming stay motion and two appeals of Orders of the CMJ, then she was required to file and serve her notice of limited-scope representation, which notice must be in compliance with Rule 124(2), by February 22, 2023. Further, that leave would not be granted, pursuant to Rule 123(3), to appoint a solicitor to provide limited-scope representation, before serving and filing the notice of limited-scope representation, upon appearance at the three motions set down to be heard on February 28, 2023, and March 9, 2023.

[51] On February 23, 2023, Kostic and Zinner sought to file a Rule 124 Form 124D Notice of Limited-Scope Representation. However, it was not in compliance with Rule 124(2).

[52] By my Direction dated February 23, 2023, I indicated that the Form 124D as served and submitted for filing by Kostic does not indicate what Zinner's mandate is – only that he may act “should assistance be required and agreed” – and failed to identify any specific motion, appeal or other matter for which Zinner has been retained to provide limited-scope representation. Kostic and Zinner were also reminded that leave would not be granted, pursuant to Rule 123(3), to appoint a solicitor to provide limited-scope representation, before serving and filing a compliant notice of limited-scope representation, upon appearance at the stay motion set down to be heard on February 28, 2023, *and the two appeal motions set down to be heard on March 9, 2023*. A compliant Notice of Limited-Scope Representation was not submitted for filing.

[53] Regardless, at the hearing of the stay motion, Kostic advised that Zinner was in attendance and sought to participate in the stay motion by speaking to one aspect of her motion—her health. She would otherwise represent herself. She submitted that she and Zinner did not understand the Rules pertaining to limited-scope representation or my Directions above. Given the past clear Directions, I declined to permit Zinner to seek leave to make submissions at the stay motion hearing with respect to one part of Kostic’s intended submissions.

[54] In light of all of this, I agree with Canada that Kostic was given a clear path to follow if she wished to retain counsel for the appeal.

[55] Further, Hanert informed the Court, in response to the adjournment request, that the theft allegation was raised by a letter to her from Zinner two weeks prior to the hearing of this appeal. In my view, the fact that Kostic now asserts that a different lawyer (also not counsel of record in this Action) more recently sent another notification of the allegation to Hanert does not support Kostic’s assertion that the issue has just come to light and, therefore, that she did not have time to retain counsel.

[56] I also note that the documentary evidence being relied upon by the Represented Defendants in this appeal is included in their responding motion record. It is limited to the AASOC, the Amended Statement of Claim, letters to the CMJ from the Represented Defendants dated July 16, 2020 and May 10, 2021, a letter from Kostic to the CMJ dated May 10, 2021, seven Directions issued by the CMJ and two Orders issued by the CMJ on May 21, 2021 and November 29, 2022. None of this is documentation “owned” by Kostic such that it could be

encompassed by the alleged documentation theft. Further, while Kostic was adamant that her allegation of theft essentially “changed everything”, I am not persuaded that the allegation impacts the outcome of the appeal before me – given that Kostic is appealing the May 21, 2021 Order of the CMJ which deals with the scheduling of motions.

[57] Kostic also asserted that the stress of the new theft allegation prevented her from representing herself at the appeal. When asked if she had any medical evidence that this was so, she referred to a letter from a psychologist that she had previously tried to submit at the stay motion hearing.

[58] At the stay motion hearing, Kostic sought to submit a document that she said was a medical record to support her claim of irreparable harm, which she also wanted to submit as a confidential, sealed document. Counsel for the Represented Defendants opposed this admission and request, which was being raised at the stay motion hearing for the first time. At that stay hearing, I advised Kostic that I was making no finding at that time as to the admissibility of the document. In my reasons, I declined to admit it for the reasons set out in that decision.

[59] Although she sought to rely on the same letter in support of her request for an adjournment of this appeal, as Kostic did not want to share that letter with the parties at the appeal, only I reviewed it. As to its content, to respect Kostic’s wishes, I will say only that it confirmed long-term mental health concerns and certain resultant recommendations. It was dated three weeks prior to the date of the appeal hearing and did not address the alleged new stressor or suggest that Kostic was unable to represent herself. While I am sympathetic to Kostic’s mental

health issues and recognise that this litigation is highly stressful, the litigation has been ongoing for many years. Further, she has known about the alleged theft for at least two weeks and could have retained counsel and/or requested an adjournment (by motion supported by affidavit evidence) during that time rather than raising it for the first time at the appeal, which was attended by many defendants and counsel.

[60] Further, the appeal concerns a scheduling order, more specifically, the timing of the some 30 motions to strike brought by the defendants. If the adjournment were granted, those motions would be delayed indefinitely while the allegations of theft are pursued.

[61] Balancing the concerns of Kostic and those of the Represented Defendants (as McMullen did not oppose the adjournment), I concluded that the interests of justice favoured proceeding with the appeal (see Rules 3 and 36; *Montana v Canada (National Revenue)*, 2017 FCA 194 at paras 4, 7, 10; *Mowi Canada West Inc v Canada (Fisheries, Oceans and Cost Guard)*, 2021 FC 900 at paras 11-12, 23).

[62] I advised Kostic if she felt too upset to make oral representations, she could rely on her written submissions. Kostic expressed great displeasure with my ruling and declined to make oral submissions. However, after Canada on behalf of the Represented Defendants, Piikani, and McMullen had made their oral submissions, Kostic responded and also made the arguments contained in her written submissions.

ii. Directions are not subject to appeal

[63] Kostic indicates in her notice of motion that she is appealing three orders of the CMJ, dated May 19, 20 and 21st, 2021. As indicated above, there are no orders dated May 19 or 20, 2021. There is a May 18, 2021 Direction, a May 20, 2021 Direction, and the May 21, 2021 Order.

[64] Rule 51(1) states that the order of an associate judge (prothonotary) may be appealed on motion to a judge of this Court. The jurisprudence is clear that “[n]o appeal lies from a direction” (*Peak Innovation Inc v Simpson Strong-Tie Co*, 2011 FCA 81 at para 2 citing *Froom v Canada Minister of Justice*, 2003 FCA 141; *Brake v Canada (Attorney General)*, 2017 FC 1093 at paras 18-23; *McMullen v Canada (Attorney General)*, 2020 FC 1081 at paras 8-10).

[65] Kostic does not assert that there is any uncertainty or issue with the nature of the directions. Indeed, when appearing before me her position was that she knew that no right of appeal lies from a direction of the Court but that the May 18, 2021 Direction and the May 20, 2021 Direction are intertwined with the May 21, 2021 Order or that the Order “reverses” the Directions that were favourable to Kostic.

[66] There is no merit to this submission.

[67] The May 18, 2021 Direction addressed five items. One of these was that Kostic had attempted to file notices of discontinuance which, for the reasons set out, were defective. Kostic was directed to correct, serve and file proper notices of discontinuance by May 25, 2021, if this was her intent. In the May 20, 2021 Direction, the CMJ stated that, further to her direction dated

May 18, 2021, Kostic was “only required to serve and file a Notice of Discontinuance in respect of any Defendant(s) against whom she is in fact wholly discontinuing the action. To the extent that the Plaintiff appears to have merely crossed out the name of certain Defendants from the style of cause without removing, deleting or otherwise abandoning her claims against those persons, they remain party Defendants in the action”. The Court’s record does not show that Kostic has filed any compliant notices of discontinuance: there anything preventing her from now doing so should she wish to properly discontinue against any of the defendants. Nor does anything in the challenged May 21, 2021 Order address the status of the discontinuances or “reverse” this aspect or any aspect of the May 18, 2021 Direction as Kostic seems to suggest.

[68] The May 20, 2021 Direction primarily addresses Kostic’s noncompliance with Rule 206, but also addresses other matters arising from the May 19, 2021 CMC. Specifically, regarding the proposed timetable submitted on May 19, 2021 for the motions by any defendants to strike or stay, the Attorney General of Canada was required to prepare a revised timetable to clarify and identify each “group” of Represented Defendants that would file a proposed single joint motion record with the exception of those represented by Emery Jamieson LLP who were permitted to file two separate motion records. The Attorney General of Canada complied with the direction, as reflected in the May 21, 2021 Order. Again, nothing in the May 21, 2021 Order reverses any aspect of the May 20, 2021 Direction.

[69] As there is no right of appeal of a direction, the reasons that follow will not address Kostic’s submissions that are concerned with those directions, such as the notices of discontinuance or Rule 206.

iii. Admissibility of Kostic Affidavit

[70] In support of this appeal, Kostic has submitted an 83-paragraph affidavit sworn on May 31, 2021 [Kostic Affidavit]. Much of the content of that affidavit is not relevant to the appeal before me as it addresses matters such as the notices of discontinuance and Rule 206, as discussed above. She also addresses at length her request to admit fresh evidence “for the purposes of this appeal”, being exhibits 1-13 of her affidavit, which includes a motion record filed in T-348-21, various affidavits filed in other matters and various notices of motions as well as over 5000 pages of materials filed in T-38-20. However, while the admissibility of that “fresh evidence” might arise in the context of the motions to strike, this motion is concerned with the appeal of the May 21, 2021 Order which does not concern the admissibility of that evidence. In other words, this is “add on” relief, not connected to the Order which is the subject of the appeal.

[71] In her affidavit, Kostic also provides her explanations for why she sought the first, second and third amendments to the SOC. She asserts that the “CMJ predetermined the dismissal application by not permitting my required and necessary amendments by directing that I can amend as my defence to the striking applications which I understand to be an error of law”. She states that she alerted the CMJ to the fact that she had obtained 5481 pages of motion records in T-38-20 days before the AASOC was due to be filed on April 26, 2021 and of the further requirement to amend, given the expanded allegations found within the 5481 pages, by letter and then again by “reminder” at the CMC. And, that “it is trite that Amendment precedes and application to strike” and that Zinner has a concurring view.

[72] The Represented Defendants submit that the appeal should be decided based on the evidentiary record that existed at the time of the May 19, 2021 CMC and that the Kostic Affidavit is not properly before the Court and should be disregarded. The Represented Defendants refer to *David Suzuki Foundation v Canada (Health)*, 2018 FC 379, at paragraphs 36-37 [*Suzuki*] for the principle that an appeal of an Associate Judge's Order is to be decided on the basis of what was before the Associate Judge and that only in exceptional circumstances will new evidence be admissible.

[73] The Represented Defendants submit that the only issue before the Court in this appeal is whether the CMJ made a reviewable error in directing the sequence and timing of the parties' proposed motions. The resolution of that procedural question does not require the Court to consider Kostic's personal account of what occurred. Accordingly, her evidence will not assist the Court in deciding the appeal. Further, as the filing of new evidence is inappropriate on appeal, the Kostic Affidavit has not been rebutted by any reply evidence as to what occurred at the CMC. The evidence is therefore incomplete and could be prejudicial to the Represented Defendants. The interests of justice also favour disregarding the Kostic Affidavit as to do otherwise risks converting a straightforward appeal into a trial about conflicting accounts of what happened during the CMC.

[74] I agree with the Represented Defendants that it is only in exceptional cases that new evidence should be admitted on appeal of an Associate Judge's order. This includes where the new evidence: (i) could not have been made available earlier; (ii) will serve the interests of

justice; (iii) will assist the Court; and (iv) will not seriously prejudice the other side (*Suzuki* at paras 36-38; *Johnson v Canadian Tennis Association*, 2022 FC 776 at para 31).

[75] That said, while the Represented Defendants frame the issue in this appeal as only whether the CMJ made a reviewable error in directing the sequence and timing of the parties' proposed motions, Kostic in her notice of motion and in her written submissions asserts that she was denied procedural fairness.

[76] However, reading the Kostic Affidavit in whole, I am not persuaded that it establishes that this is an exceptional case which would support its admission. Much of the affidavit is argument. Further, large segments of the affidavit, some of which include allegations of procedural unfairness, are concerned with matters not relevant to this appeal. The affidavit also contains bald assertions made without reference to any supporting objective evidence. And, while the Kostic Affidavit makes assertions as to events, as she perceived them, that occurred at the May 19, 2021 CMC, viewed overall and considering the objective record that is before the Court – such as Kostic's and the Represented Defendants' letters to the CMJ concerning the CMC and the directions and orders issued which reference the parties submissions – in my view, it will not assist the Court to accept the Kostic Affidavit as new evidence. I would also note that while the Represented Defendants have not filed evidence as to the events at the CMC, in their written submissions they do dispute Kostic's version of events.

[77] I am satisfied that the issues of procedural fairness that Kostic raises in her written submissions with respect to the issuance of the May 21, 2021 Order can be assessed by this Court without the admission of her affidavit as “new evidence”.

[78] Moreover, and in any event, the Kostic Affidavit is of very limited probative value.

Standard of Review

[79] The standard of review applicable to the appeal of a discretionary decision of an Associate Judge (Prothonotary) is well settled. It is the appellate standard of “palpable and overriding error”, as identified in *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*], for questions of fact, or mixed fact and law. Questions of law, and mixed questions where there is an extricable question of law, are to be reviewed on the standard of correctness (*Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 79; *Worldspan Marine Inc. v Sargeant III*, 2021 FCA 130 at para 48; *Canada (Attorney General) v Iris Technologies Inc.*, 2021 FCA 244 at para 33).

[80] Legal questions are questions about what the correct legal test is; factual questions are questions about what actually took place between the parties; and, mixed questions are questions about whether the facts satisfy the legal tests, or, put otherwise, whether they involve applying a legal standard to a set of facts (*Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 43).

[81] An appeal of a Associate Judge's decision that asserts a breach of natural and fundamental justice or a reasonable apprehension of bias involves issues that are reviewable on a standard of correctness (*Lessard-Gauvin v Canada (Attorney General)*, 2020 FC 730 at para 47; citing *Forefront Placement Ltd. v Canada (Employment and Social Development)*, 2018 FC 692 at para 41, citing *Pembina County Water Resource District v Manitoba (Government)*, 2017 FCA 92 at para 35 and *Coombs v Canada (Attorney General)*, 2014 FCA 222 at para 12; see also *Rodney Brass v Papequash*, 2019 FCA 245).

Alleged Errors

[82] Kostic does not explicitly identify the alleged errors in the CMJ's May 21, 2021 Order. However, having read the submissions in whole, and having heard her oral submissions, I understand these to primarily be that the CMJ:

- i. Erred by prioritizing the Represented Defendants' motions to strike over Kostic's desire to further amend her AASOC; and
- ii. Erred in prioritizing the Represented Defendants' motions to strike over a judicial review in T-1344-20, T-348-20 and her proposed motion to be added as a party in T-38-20.

[83] Kostic frames these errors primarily in the context of a breach of the duty of procedural fairness.

[84] Conversely, the Represented Defendants submit that the CMJ did not commit a palpable and overriding error in exercising her discretion by prioritizing the motions to strike, setting out a

path for their resolution and reserving the hearing of Kostic's proposed motions to a later date.

The Represented Defendants submit that their motions to strike have the potential to decide the action conclusively while Kostic's proposed motions will not but will merely defer the inevitable hearing of the motions to strike with resultant procedural inefficiencies.

No breach of procedural fairness

[85] Kostic's 200-paragraph written submissions are not well focused. However, in terms of her allegations of a lack of procedural fairness, these include that:

- "Denying the Amendment prior to the hearing the Striking application was defacto a final disposition and ended the substantive rights of the Applicant rendering the Order was wrong in Law thereby the Correctness standard applies";
- "Learned Honourable Justice Madam S. Molgat erred by not permitting amendments but permitting striking motions first. While the Plaintiff argues 'Procedural Fairness' and the applicable remedies available to the Appellant which she seems not to know or appreciate the difference in this complex claim";
- That the CMJ "Basically, unconsciously favoured all of the defendants and their interest disregarding all relief sought by the Plaintiff including delaying her 'indemnity agreement motions', disqualification of Counsel motions; and default motions this is a clear Unnecessary Cultural Bias of the court";
- That the CMJ "erred in not listening to the submissions and concerns that the Plaintiff Attempted to provide or if heard, ignored them anyway, favouring the Represented Counsel Defendants...";
- The CMJ failed "to recognize that the pleading are not closed and that amendments occur in advance of any striking applications, citing that the submissions did not equate to 'Exceptional Circumstances' but provides no reasons. The Learned Honourable Justice Madam S. Molgat was asked if she predetermined matters and stated that she did not' when asked if she had her mind made up before hearing these reasons show the same";
- "Procedural Fairness was not considered an 'exceptional Circumstance' despite at minimum 2 separate breaches of the defendants or some of them (at least) of Procedural Fairness. The facts and Direction as established in the case conference hearing(s) were completely ignored or altered by the time of entry of the Order creating further procedural unfairness to the plaintiff by the Learned Justice Madam S. Molgat";

- “Several of the Plaintiff’s issues and concerns were not heard although were on the Agenda(s) as required but were decided without any input or consideration to all of the evidence in full context. The Represented Defendants provided to the Plaintiff a schedule which only considered their own interest and reply which was reduced and accepted by Molgat the very next day before the Plaintiff even had an opportunity to review it carefully or at all”;
- The May 21, 2021 Order was “tainted by a lack of procedural fairness and due process by denying the Applicant a right to be heard” and that “not being heard was a defacto a final disposition and ended the substantive rights of the Applicant rendering the Order was wrong in Law”;
- “The Prothonotary’s words and tone towards the applicant, was frequently sharp, impatient and reproachful. In contrast the CMJ was tolerant, if not supportive, towards the respondents creating a reasonable apprehension of bias. This became evident during the case conferences and in the responses provided to the Applicant. In numerous instances the CJM was evasive, non-responsive to the evidence. When the Applicant pressed for responses to the unanswered questions the criticism was directed at her for repeating the questions as opposed to the Respondents and that of the CMJ who was evading them”;
- “A significant amount of deference was given to the CMJ to the Defendants as was in response to leading questions put by her but admitted into evidence just the same without comment of criticism”;
- “The CMJ accepted all of the evidence of the Respondents and disbelieved all of the evidence tendered by the Applicant or ignored the evidence in the December motion record when there was conflicting evidence. While it is certainly open to a trier of fact, in appropriate circumstances, to prefer the evidence of one party over another, it is submitted that the credibility judging exercise in this case was significantly flawed inasmuch as the CMJ accepted as truthful from the Respondents evidence which, it is submitted, was transparently implausible”;
- “The CMJ Order was clearly wrong, in the sense that the exercise of discretion by the Prothontary was based upon wrong principle or upon a misapprehension of the facts, or they raised and defacto decided questions vital to the final issue of the case and related cases which resulted in a denial of Natural justice and in an unfair disadvantage and detriment to the Applicant”;
- “The Applicant put the CMJ on notice at several case conferences regarding the finality to the Applicants Motion and question vital to the final issue of several cases if not heard prior to and determined prior to and determined prior to a striking hearing The CMJ erred by not considering that adjourning the Applicants Motion would have implications of finality for the Applicant”.

[86] Kostic also submits that she was denied the right to be heard at the March 19, 2021 CMC and was denied due process and procedural fairness because her requests were denied and she was “not adequately heard”.

Analysis

[87] It must be kept in mind that the May 21, 2021 Order under appeal is a scheduling order made by the Associate Judge appointed as the CMJ in this Action, which has been designated as a specially managed proceeding by the Orders of June 30, 2020 and July 6, 2020 pursuant to Rules 383 and 384.

[88] By direction dated September 9, 2020, the CMJ suspended all timelines prescribed by the Rules for the conduct of the Action until the establishment of a timetable or direction or order of the Court. Defences have not been filed by the Represented Defendants because of the suspension of the timelines and because they indicated on July 16, 2020 that they intended to bring motions to strike. They have done so in compliance with the timing requirements set out in the May 21, 2021 Order.

[89] Thus, while Kostic argues that it was an error of law not to permit her motion to amend the AASOC to proceed before the motions to strike because pleadings have not closed and it is trite law that all amendments must be permitted before motion to strike are heard, in these circumstances, I do not agree.

[90] Rule 200 states that a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto, or on the filing of written consent of the other parties. Rule 201 states that an amendment may be made under Rule 76 notwithstanding that the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of substantially the same facts as a cause of action in respect of the party seeking the amendment has already claimed relief in the action. However, Rule 385(1) addresses the powers of case management judges. This includes Rule 385(1)(a), which states that the CMJ may give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits and Rule 385(1)(b) which states that notwithstanding any period provided for in these Rules, the CMJ may fix the period for completions of subsequent steps in the proceeding. Rule 385(1)(a) echoes the general rule found in Rule 3, which states that the Rules are to be interpreted and applied so as to secure “the just, most expeditious and least expensive determination of every proceeding on its merits”.

[91] The recitals in the May 21, 2021 Order indicate that the CMJ was of the view that the intent of the Represented Defendants to bring motions to strike impacted the right to amend pursuant to Rules 200 and 201. The CMJ also noted that Kostic had already been provided with ample opportunity to amend her claim and the CMJ expressed the view that any further amendments to the claim “may be addressed in response to the motions to strike or stay, and those motions ought to proceed to determination before any other proposed motions for various interlocutory relief”.

[92] While I recognize that when a CMJ is exercising their discretion under Rule 385(1), they “must remain cognizant of Rule 55, which provides that, only in special circumstances may the Court ‘vary a rule or dispense with compliance with a rule’” (*Apotex Inc v Bayer Inc*, 2020 FCA 86 at para 40), in this case, the CMJ did not prohibit the further amending of the AASOC prior to the closing of the pleadings. Rather she indicated that the timing for doing so was to address this issue in response to the motions to strike. Similarly, in the May 20, 2021 Direction, the CMJ directed that issues concerning the addition of defendants were to be addressed in the context of the proposed motions to strike.

[93] Kostic is therefore not denied a right or prejudiced by the deferral, which is a scheduling (i.e. procedural) matter. Further, it is significant to recall that the motions to strike bring with them the possibility that, if granted, they may bring to an end all or a significant portion of the Action.

[94] In that regard, in *Onischuk v Canada Revenue Agency*, 2021 FC 486 [*Onischuk*] the applicant brought an action against a number of defendants. Justice Grammond dealt with two appeals of decisions of an Associate Judge (then called prothonotaries). The first decision under appeal was a case management order setting out the steps leading to the hearing of a motion to strike and prohibiting other steps from being taken before a decision was made on that motion. By the second decision, the prothonotary struck out the statement of claim and dismissed the action, as it did not show a reasonable cause of action and constituted an abuse of process.

[95] Justice Grammond dismissed both appeals finding that: “Prioritizing the motion to strike was well within the prothonotary’s case management powers. I find no error in the prothonotary’s findings that the statement of claim did not show a reasonable cause of action and constituted an abuse of process. Indeed, the prothonotary chose an appropriate manner of securing an expeditious determination of the case that is fair to both parties” (para 2).

[96] *Onischuk* is factually similar to the matter before me. There, the CMJ held a case management conference at which several issues were discussed, including whether it was possible to amend the statement of claim, in particular to add new parties to the proceeding, and the timing of various motions. The CMJ then issued a case management order that was the subject of the first appeal which focused on the CMJ’s decision to prioritize motions to strike brought by the defendants, to set a calendar for these motions, and to prohibit the parties from taking any other steps in the action until the disposition of these motions (para 7). There, although the applicant also sought to submit evidence that was not before the CMJ, Justice Grammond found that the evidence was inadmissible and would not be considered (para 13).

[97] Justice Grammond stated that the starting point for his analysis was the very broad powers granted by Rule 385(1)(a) and (b) which allow the CMJ to decide which motions will be heard in what order and to set a calendar for the filing of the parties’ motion records. They also allow the CMJ to prohibit the parties from taking other steps while a particular motion is decided.

[98] As to the timing of motions to strike, Justice Grammond held that the prothonotary did not err:

[18] A motion to strike is a tool that promotes judicial economy by “avoiding burdening the parties and the court system with claims that are doomed from the outset”: *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at paragraph 14. By its own nature, it should be brought and disposed of at the earliest possible stage of the proceedings. Moreover, if it is to accomplish its aim of ensuring the efficient use of judicial resources, prothonotaries must have the latitude to prohibit the parties from taking other steps until it is known whether the action survives this preliminary test. Indeed, in similar circumstances, the Federal Court of Appeal dismissed an appeal from a judge’s decision to prioritize the hearing of a motion to strike and noted that “It was within the Judge’s discretion to determine in what order the motions should be heard”: *Badawy v 1038482 Alberta Ltd.*, 2019 FCA 150 at paragraph 17.

[19] In this case, the prothonotary exercised her discretion reasonably. Even though her reasons are short, they are sufficient to understand why she made the order and they are compatible with the principles reviewed above.

[20] For the same reasons, the prothonotary did not exercise her discretion unreasonably by denying Ms. Onischuk the opportunity to amend the statement of claim. As I note later in these reasons, the defects of the statement of claim cannot be cured by amendment. Where a statement of claim appears to exhibit defects of this nature, it is entirely reasonable for a case management judge to direct that a motion to strike be considered first. The plaintiff is not entitled to make the statement of claim a moving target, by making repeated amendments in the hopes of deflecting the motion to strike.

.....

[31] Nothing in rule 3 is incompatible with the summary dismissal of an action by way of a motion to strike. Rule 3 implicitly embodies a principle of proportionality. In *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, the Supreme Court of Canada found that proportionality is not inimical to, and even requires more expeditious processes for the determination of legal claims, and that a full trial is not warranted in all cases. While the case dealt with a motion for summary judgment, the principles the Court laid out equally apply to motions to strike. Insofar as Ms.

Onischuk relies on the part of rule 3 that mentions a “determination ... on its merits,” I would observe that a motion to strike is a determination of the merits of the case, albeit after an abbreviated process. Moreover, nothing in the French version of rule 3, which refers to “*une solution au litige*,” suggests that a full trial is warranted in all cases.

[99] In sum, I do not agree that Kostic was denied procedural fairness because the CMJ determined that the motions to strike should proceed before her request to further amend the AASOC. While the pleadings were not closed, this was because the CMJ suspended the normal timelines and determined that the motions to strike should proceed in priority to Kostic’s various motions. Thus, defences were not required to be filed at this stage in the Action. Further, Kostic’s desire to further amend the AASOC was to be addressed by the judge hearing the motions to strike. That is, her right to amend in advance of the pleadings closing was deferred, not extinguished.

[100] I am also not persuaded that Kostic’s “right to be heard” was breached. Contrary to her submissions, prior to the May 19, 2021 CMC, the Represented Defendants submitted their proposed timelines but in the same correspondence, advised the CMJ that Kostic did not agree and would submit her own timeline. On May 19, 2021, Kostic submitted her proposed agenda which included her request that her motions and matters be scheduled as the first step and prior to the motions to strike. Kostic also participated in the May 19, 2021 CMC. While Kostic depicts that meeting as a trial in which her evidence was ignored and her credibility questioned, it is apparent from the May 21, 2021 Order that the CMJ was aware of and considered Kostic’s proposal to bring a number of interlocutory motions and to consolidate the Action with T-348-21 as well as with T-38-20 (brought by McMullen) and T-1344-20 (brought by Mr. Brian Jackson,

an self-represented defendant in this Action [Jackson]). The May 21, 2021 Order also states that Kostic and the self-represented defendants, including McMullen, did not provide a response to the proposed timetables although invited to do so. Ultimately, while Kostic does not agree with the CMJ decision to prioritize the motions to strike, this does not establish that her submissions were ignored or that she was denied procedural fairness.

[101] I also do not agree with Kostic that she was denied procedural fairness because her substantive rights were terminated by the May 21, 2021 Order. The CMJ did not decide the motions to strike. Further, Kostic has been given the opportunity to raise, in response to those motions, her wish to further amend the AASOC and to add defendants (see *Kostic-Natioyiiputakki v Canada*, 2022 FC 1702 at para 24 [*Kostic-Natioyiiputakki*]).

[102] It may be that her AASOC will, ultimately, be struck out. However, where a claim appears to exhibit defects that cannot be cured by amendment – which in this matter includes assertions of a lack of jurisdiction of the Court, that similar or the same proceedings are being pursued in another court, or that there is a lack of standing – as Justice Grammond stated in *Onischuk*, “it is entirely reasonable for a case management judge to direct that a motion to strike be considered first. The plaintiff is not entitled to make the statement of claim a moving target, by making repeated amendments in the hopes of deflecting the motion to strike” (para 20).

Further, there is no unfairness in striking out an action that has no chance of success:

[41] As I indicated earlier, a motion to strike is a tool to put an early end to proceedings that have no chance of success, in order to allocate scarce judicial resources to more meritorious cases. To achieve this purpose, motions to strike must be disposed of quickly. I understand that litigants facing a motion to strike would much prefer to “keep their cases alive,” but there is no unfairness

in striking out an action through the streamlined process of a motion.

[103] Similarly, in my view, there is no inherent unfairness arising from the CMJ's decision to schedule the Represented Defendants' motions to strike ahead of Kostic's various motions. Should those motions succeed, the Action will have been struck out in whole or in part, which will eliminate or greatly reduce the need to address Kostic's motions and the resources required to do so both by the 30 Represented Defendants, the other defendants, and the Court.

[104] Kostic also asserts that she was denied procedural fairness because of the way the CMJ treated her. These assertions seem to indirectly assert bias in the part of the CMJ as demonstrated by Kostic's assertions that the CMJ "unconscionably favoured" the defendants, had already made up her mind prior to the May 19, 2021 CMC, and did not listen to Kostic's submissions while affording the Represented Defendants much deference. The Represented Defendants submit that all parties were afforded ample time to convey their positions pertaining to the narrow procedural focus of the CMC and all parties were treated fairly and without bias or favouritism.

[105] The test for bias is well established and stems from the dissenting reasons of de Grandpré J. in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, at p 394:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude...."

[106] The onus is on the party alleging bias and is fact driven (*R v S (RD)*, [1997] 3 SCR 484 at paras 111, 113).

[107] In the context of decisions of CMJs, I again refer to *Onischuk*:

[42] Lastly, Ms. Onischuk impugns Prothonotary Ring's impartiality. Of course, judges of this Court, including prothonotaries, must be impartial. There is a presumption that judges act impartially: *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paragraph 25, [2015] 2 SCR 282. For this reason, "the threshold for a finding of real or perceived bias is high": *R v S (RD)*, [1997] 3 SCR 484 at paragraph 113.

[43] There is no bias, real or perceived, solely because a judge makes a decision unfavourable to a party: *Bruzzese v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1119 at paragraphs 27-37, [2017] 3 FCR 272. Even where a judge makes an error, "such an error might be a basis to allow the appeal, but it would not, without more, suggest bias": *Ahamed v Canada*, 2020 FCA 213 at paragraph 7.

[44] These principles are especially important in the context of case management. Case management judges are called upon to make multiple decisions with respect to the conduct of an action. This need is particularly acute with respect to "ungovernable litigants: those who flout procedural rules, ignore orders and directions of the Court, and relitigate previously-decided proceedings and motions": *Canada v Olumide*, 2017 FCA 42 at paragraph 22, [2018] 2 FCR 328. Case management judges do not show bias simply by discharging their duty of managing the proceeding in a fair and efficient manner or by requiring compliance with the *Federal Courts Rules*.

[45] Ms. Onischuk's allegations of bias are essentially based on her disagreement with case management decisions made by Prothonotary Ring, in particular those subject to the present appeals. There is no basis whatsoever for these allegations. These decisions were the result of the lack of merit of Ms. Onischuk's arguments, not of any bias or predisposition on the prothonotary's part.

[108] The CMJ may well have required Kostic to stay on point and focused at CMCs. However, doing so, like making a decision that is not favourable to Kostic, does not establish bias on the part of the CMJ.

[109] For all of these reasons, I find that Kostic has not established that she was denied procedural fairness with respect to the May 21, 2021 Order.

No Palpable and Overriding Error

[110] The May 21, 2021 Order is a scheduling order and is a discretionary decision to which the applicable standard of review is palpable and overriding error (*Kostic-Natioyiiputakki* at paras 13-14 citing *Housen* and *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 126). In *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157, the Court described “palpable” and “overriding”:

[61] Palpable and overriding error is a highly deferential standard of review: *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at paragraph 38; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. See *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 [*South Yukon*], at paragraph 46, cited with approval by the Supreme Court in *St-Germain*, above.

[62] “Palpable” means an error that is obvious. Many things can qualify as “palpable”. Examples include obvious illogic in the reasons (such as factual findings that cannot sit together), findings made without any admissible evidence or evidence received in accordance with the doctrine of judicial notice, findings based on improper inferences or logical error, and the failure to make findings due to a complete or near-complete disregard of evidence.

[63] But even if an error is palpable, the judgment below does not necessarily fall. The error must also be overriding.

[64] “Overriding” means an error that affects the outcome of the case. It may be that a particular fact should not have been found because there is no evidence to support it. If this palpably wrong fact is excluded but the outcome stands without it, the error is not “overriding”. The judgment of the first-instance court remains in place.

[111] Considerable deference is owed to scheduling orders (see, for example, *Hughes v Canada (Human Rights Commission)*, 2021 FC 728 at para 73).

[112] The Federal Court of Appeal has held that “because of their intimate knowledge of litigation and its dynamics, prothonotaries... are to be afforded ample scope in the exercise of their discretion when managing cases” (*j2 Global Communications v Protus IP Solutions Inc*, 2009 FCA 41 at para 16; see also *Rovi Guides, Inc v Videotron Ltd*, 2022 FC 981 at para 87).

[113] Although Kostic makes many, often largely incoherent, submissions in her written representations, in my view, the issue on appeal is ultimately whether the CMJ made a palpable and overriding error in prioritizing the Represented Defendants’ motions to strike over Kostic’s proposed amendments to the AASOC and her other proposed motions.

[114] In my view, Kostic has not met her burden of demonstrating a palpable and overriding error.

[115] First, she fails to provide sufficient, or in some cases any, particulars tying her allegations to facts that are supported by the evidentiary or court record to applicable laws. For example, she submits that one of the grounds for appeal is that the CMJ “erred in law, or mixed fact and law

by misapplying the legal test for Aboriginal Proceedings and the Statute of the Indian Act in respect of the Parties and the evidence in question which overlap with several related actions in this Court”. By way of elaboration of this ground she states that the CMJ failed “to identify all relevant factors necessary to apply the correct legal test for Aboriginal Proceedings and Applicable Governing Statutes [*sic*]”. However, she does not provide any specifics as to the purported test, how the assertion relates to the *Indian Act*, RSC, 1985, c I-5 or “applicable governing statutes” or otherwise indicate how the CMJ erred in applying this test or how this relates to alleged overlapping evidence. To the extent she asserts she was not provided flexibility to be afforded pursuant to the Court’s Practice Guidelines for Aboriginal Law Proceedings, she fails to explain how the CMJ made a palpable and overriding error in that regard.

[116] This pattern of unsupported allegations is repeated throughout her written submissions. For example, Kostic submits that “[i]t may be argued that the Prothonotary did not appreciate or consider the dire implications she created for the Applicant which decided and potentially ended her action or reversed her prior directions regarding discontinuances [*sic*]” but fails to provide particulars of the same. And, as discussed above, the CMJ did not decide the motions to strike—the May 21, 2021 Order explicitly states that further amendments to “the [statement of claim] or [c]ounterclaim may be addressed in response to the motions to strike or stay” and the May 20, 2021 Direction contemplates that Kostic’s desire to add new parties to the Action will also be dealt with at the motions to strike.

[117] I also agree with the Represented Defendants that Kostic has not provided any compelling reasons as to why her proposed motions need to be heard in advance of the

Represented Defendants' motions to strike. She makes many generalized submissions such as that the T-348-21 judicial review "seeks several declarations and/to quash or determine the validity of prior decisions made by the Piikani Chief and Council Defendants central to this action, which must be exhausted prior to any striking motion being heard *inter alia*". But offers no clear indication of as to the nature of the judicial review nor does she explain how the prior decisions are central to this Action or the status of the judicial review. Nor does she explain why it was a reviewable error to defer the requested consolidation with T-1344-20 and T-348-21 until after the determination of the Represented Defendants motions to strike. Instead, she asserts "[t]he impending appeals and Judicial review seek declarations that are required to be determined first, which will wholly alter what and contemplated 221 or otherwise striking applications of the Defendants look like. The evidence or parts thereto in question will forever bar the evidence from being misused in this and related actions once it is tested by the Court finally and forever". While Kostic may hold this belief, it does not establish that the CMJ committed and palpable and overriding error in setting out the schedule of events found in the May 21, 2021 Order.

[118] Moreover, it was within the CMJ's discretion to determine in what order the motions should be heard (*Onischuk* at paras 16-18).

[119] The May 21, 2021 Order demonstrates that the CMJ considered: Kostic's two prior amendments to her claim which, it must be noted, saw it expand from 192 pages and 1244 paragraphs to 215 pages and 1322 paragraphs; that some 39 of the Represented Defendants opposed Kostic's request to further amend the AASOC and sought to have their motions to strike

heard in priority to Kostic's proposed motions; that Kostic has had ample opportunity to amend her claim; that the pleadings had not closed but that the CMJ was of the view that the motions to strike constituted a response to the claim impacting the right to amend arising from Rules 200 and 201; as well as the submissions of the parties made at the CMC. The CMJ concluded that any further amendments to the claim or to the counterclaim may be addressed in response to the motions to strike and those motions ought to proceed to determination before any other proposed motions for various interlocutory relief.

[120] While Kostic asserts that the May 21, 2021 Order was clearly wrong as the CMJ's exercise of discretion "was based upon wrong principle or upon a misapprehension of facts", she has not met her onus of demonstrating this to be the case.

[121] As to the CMJ's determination that the Represented Defendants in their motions to strike and Kostic and McMullen in responding to those motions must all limit their written submissions to 30 pages, being the limit prescribed by Rule 70(4), Kostic frames this as a breach of procedural fairness. I do not agree. Case management judges are most familiar with the cases that they are managing and declining to expand the page limits imposed by the Rules is a purely discretionary determination made in that context. Kostic merely disagrees with this determination. She has not established that the CMJ committed a palpable and overriding error in so exercising her discretion.

[122] Finally, I acknowledge that the Represented Defendants also submit that in light of this Court's decision in T-1224-21, the portions the appeal concerning T-1344-20 and T-348-21 are

moot. However, in my view, I need not decide this as Kostic has not demonstrated that the CMJ committed a palpable and overriding error in exercising her discretion to permit the Represented Defendants' motion to strike proceed in priority to the matters proposed by Kostic.

McMullen Submissions

[123] McMullen filed written representations responding to this appeal and made oral submissions before me.

[124] In his written submissions, McMullen seeks an order dismissing Kostic's appeal, or alternatively, he seeks an order to stay the matter pursuant to Rule 50(1). Much of McMullen's written representations appear to provide background on the underlying Action. He submits that the CMJ did not err in issuing the "May 19, 2021 direction" nor is it reviewable. Further, that the CMJ did not err in granting the May 21, 2021 Order. Under the heading "other submissions", he makes submissions not related to Kostic's appeal in which he asserts that his procedural and other rights under the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 and the *International Covenant on Civil and Political Rights 1966*, CTS 1976/47 have been violated. However, these are not relevant to the appeal before me.

Jackson's Submissions

[125] Jackson filed the same written representations, entitled "Reply to stay and Appeal" in both the previously heard stay motion brought by Kostic and this appeal. His written submissions take issue with Canada's motion to strike the AASOC, provide what appears to be background

information and possibly responses to McMullen's written submissions. The relief sought includes that: the defendants' submissions should all be struck; several pending (unspecified) judicial reviews must be determined before any other steps occur; any amendments (unspecified) must be permitted to include all recent relevant and materials facts and causes of action including the addition of parties; McMullen's materials must be struck and records turned over to the police; defences should be filed and further delay avoided; an order be issued that this Court has exclusive jurisdiction to "determine all these issues"; and a retroactive save harmless and indemnity of a 2015-2022 agreement.

[126] The written submissions are not responsive to this appeal and Jackson did not appear at the hearing before me.

Conclusion

[127] For the reasons above I find that Kostic has failed to establish that the CMJ breached procedural fairness in issuing the May 21, 2021 Order or that the CMJ committed a palpable and overriding error by scheduling the Represented Defendants' motions to strike in priority to motions proposed by Kostic.

[128] The motion is dismissed.

Costs

[129] As to costs, I acknowledge that Kostic, sought an order for interim costs and or “indemnity under the Plaintiff’s save harmless and indemnity agreements(s)” as part of the relief claimed. However, as Kostic has not succeeded on her motion, she will not be awarded costs. I would also add that, in any event and as was the case in her stay motion, there is nothing in the motion record filed by Kostic with respect to this appeal which supports her bare request for indemnity.

[130] The Represented Defendants – who made one joint submission in responding to this appeal – seek costs but do not specify an amount. McMullen, who is self represented, states that he seeks dismissal of the appeal “with full indemnity costs to McMullen to be spoken to under separate Motion.” I assume that this refers to McMullen’s assertions pertaining to an alleged indemnity agreement. As I found in his appeal of the CMJ’s January 5, 2023 Order, the existence and enforceability the alleged indemnity agreement would appear to be a live issue elsewhere and any such relief is properly dealt with whenever the issue of costs and indemnity is determined. For purposes of this appeal, I will award costs in the cause to the Represented Defendants (collectively) and to McMullen.

ORDER IN T-680-20

THIS COURT ORDERS that:

1. The appeal is dismissed; and
2. The Represented Defendants shall collectively have their costs, and McMullen shall have his costs, both in the cause.

"Cecily Y. Strickland"

Judge

Annex A

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Federal Court



Cour fédérale

Ottawa, ON
K1A 0H9

May 18, 2021

BY EMAIL

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Dear Counsel:

RE: LILIANA KOSTIC v. HMTQ ET AL
Court File: T-680-20

This is to advise of the following Direction of Madam Prothonotary Molgat dated May 18, 2021;

“A number of documents submitted for filing by the Plaintiff have been referred to the Court pursuant to Rule 72 of the Federal Courts Rules [Rules]:

1. The Amended Statement of Claim submitted on February 25, 2021 and the Amended Amended Statement of Claim submitted on April 26, 2021 have been accepted for filing despite their irregularity, and without prejudice to any party’s right to address same. While the Rules provide for a party to amend a pleading before it is answered, this does not include substituting or adding a new party.

2. The Rules include a number of prescribed forms. It is not open to the Plaintiff to modify or otherwise amend any Court forms to suit her purposes. Doing so results in a document being irregular and potentially being rejected for filing.

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3. *The Notices of Discontinuance and Affidavit of Service recently submitted by the Plaintiff are rejected for filing;*
 - (i) *Except to add that a Notice of Discontinuance is on consent and on a without costs basis, the wording of Form 166 is to be respected. Reference to the style of cause and the capacity in which a person has been sued are not relevant to the discontinuance. A General Heading is also required;*
 - (ii) *Parties must be referred to using their full name; acronyms are not acceptable;*
 - (iii) *Where a Defendant has consented to a discontinuance without costs, proof of their consent must be submitted with the Notice of Discontinuance;*
 - (iv) *Form 146A provides for service by various means, including by electronic service, the wording of which must also be respected. Form 146A does not provide for any exhibits or attachments. If a single Affidavit of Service is submitted as proof of service on more than one party, each party served should be listed in a separate paragraph.*
4. *The Plaintiff shall correct the deficiencies identified in paragraph 3 by serving proper Notices of Discontinuance, and filing them with proof of service, by no later than May 25, 2021.*
5. *For the sake of clarity, the Court's Direction dated May 7, 2021 is hereby amended as follows:*
"To the extent that the Plaintiff has by way of the latest any amendment to the Statement Claim deleted or otherwise removed any Defendant(s), the Plaintiff shall serve and file Notice(s) of Discontinuance with proof of service by no later than May 25, 2021. Unless otherwise agreed by such Defendant(s), the usual costs consequences shall apply."

Yours truly,

Alexander Petranski

Alexander Petranski
Registry Officer

Federal Court



Cour fédérale

Date: 20210520

Docket: T-680-20

Ottawa, Ontario, May 20, 2021

PRESENT: Case Management Judge Sylvie M. Molgat

BETWEEN:

LILIANA KOSTIC

Plaintiff

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA and others**

Defendants

DIRECTION

UPON a Case Management Conference [CMC] held on May 19, 2021 to discuss issues arising from the Court's Directions dated March 25, 2021 and May 17, 2021, as well as a proposed timetable for next steps;

UPON the Court having set out a procedure by way of Direction dated March 25, 2021 [March Direction] to address the Plaintiff's non-compliance with Rule 206 of the *Federal Courts Rules* and avoid the "document dump" that the Plaintiff herself would propose to make, in light of the numerous documents referred to in her voluminous Statement of Claim [Claim], and that copies

Page: 2

of some documents may either already be in the possession of certain Defendants or, for whatever reason, not be required by them;

UPON the Plaintiff having served an affidavit of documents on May 6, 2021 and not a list of the documents referred to in her Claim as required by the March Direction;

UPON the requirements of Rule 206 having been further discussed and explained during the CMC in light of non-waiver by the represented Defendants, and the Plaintiff now confirming that she understands her obligations and that any extension granted to allow her to comply with those obligations will be final;

AND UPON it having been brought to the Court's attention that the Plaintiff has, by way of amendments to her Claim: (a) crossed out the names of certain Defendants, including Dale McMullen, from the style of cause while continuing to assert claims against them and to seek relief in the Claim; and (b) added certain new Defendants without leave of the Court;

THIS COURT DIRECTS that:

1. The time for the Plaintiff to provide her "Rule 206 List" which complies with the March Direction is hereby extended to May 31, 2021. This date shall be peremptory on the Plaintiff.
2. The Plaintiff shall provide the Rule 206 List to the Defendants by email, and the Defendants shall acknowledge receipt by return email within 24 hours. While a copy of the Plaintiff's Rule 206 List should also be transmitted to the Court, it need not be filed.

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3. In view of the above, the deadlines set out in paras. 3-4 of the March Direction are correspondingly extended as follows:
 - (i) The Defendants shall advise the Plaintiff of any documents they require copies of by no later than June 10, 2021;
 - (ii) The Plaintiff shall provide copies of any documents requested by June 21, 2021;
4. In the event that despite her best efforts the Plaintiff is unable to provide a copy of a document as a result of COVID-19 related restrictions in Alberta, she shall advise the Defendants and the Court by no later than June 21, 2021, identifying the document, setting out the reasons and a proposed timeline for the delivery of such document.
5. Regarding the proposed timetable submitted on May 19, 2021 for the motions by any Defendants to strike or stay, the AGC shall prepare a revised timetable to clarify and identify each “group” of represented Defendants that shall file a single joint motion record as proposed, with the exception of the Defendants represented by Emery Jamieson LLP who may file 2 separate motion records. The revised timetable shall be submitted to the Court in .pdf and Word format by no later than May 21, 2021.
6. Further to the Court’s Direction dated May 17, 2021, the Plaintiff is only required to serve and file a Notice of Discontinuance in respect of any Defendant(s) against whom she is in fact wholly discontinuing the action. To the extent that the Plaintiff appears to have merely crossed out the name of certain Defendants from the style of

Page: 4

cause without removing, deleting or otherwise abandoning her claims against those persons, they remain party Defendants in the action.

7. Issues concerning the addition of Defendants shall be addressed in the context of the proposed motions to strike or stay.
8. In view of the number of Defendants and confusion arising from the current style of cause, the parties may use a short style of cause in accordance with Rule 67(5) of the *Federal Courts Rules*.

"Sylvie M. Molgat"
Case Management Judge

Federal Court



Cour fédérale

Date: 20210521

Docket: T-680-20

Ottawa, Ontario, May 21, 2021

PRESENT: Case Management Judge Sylvie M. Molgat

BETWEEN:

LILIANA KOSTIC

Plaintiff

and

**HER MAJESTY THE QUEEN IN RIGHT OF
CANADA and others**

Defendants

ORDER

UPON the Plaintiff having commenced this action by way of a (192-page, 1244 para.) Statement of Claim [Claim] filed June 6, 2020 against some 46 Defendants;

CONSIDERING that by letter from the Attorney General of Canada [Canada] dated July 16, 2020, more than 30 Defendants represented by legal counsel communicated their intention to bring preliminary motions to strike or stay the action;

CONSIDERING the Defence and Counterclaim by Dale McMullen, filed July 29, 2021;

CONSIDERING the Court's Direction dated September 10, 2020;

CONSIDERING the (211-page, 1330 para.) Amended Claim filed February 25, 2021, and the (215-page, 1322 para.) Amended Amended Claim filed April 26, 2021, both accepted for filing despite their irregularity and without prejudice to the rights of any Defendant to address any irregularities therein;

CONSIDERING that the Plaintiff has, by letter dated April 27, 2021, requested a further extension of time "to at least June 29, 2021" to further amend the Claim to "remove Defendants" and "organize the Defendants into logical groupings" as well as to include further causes of action;

CONSIDERING that the Plaintiff's request is opposed by some 39 Defendants who are represented by 10 different law firms [Represented Defendants] in view of their proposed motions to strike or stay;

CONSIDERING that the Plaintiff has also proposed to bring a number of interlocutory motions including for a confidentiality order, to examine a trustee in bankruptcy, to freeze funds, for security for costs, to disqualify counsel, for default judgment and to consolidate this proceeding with T-348-21, as well as with T-38-20 (by Dale McMullen) and T-1344-20 (by Brian Jackson);

CONSIDERING that the Defendant/Plaintiff by Counterclaim, Dale McMullen, also wishes to amend his pleading and to bring interlocutory motions including to enforce the terms of indemnity agreements between him and certain Defendants, to disqualify counsel, and for default judgment;

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CONSIDERING that the Court is of the view that the stated intention and request by the Represented Defendants to bring motions to strike the Claim and Counterclaim or stay the proceedings constitutes a response to the Claim impacting the right to amend pursuant to Rules 200 and 201 of the *Federal Courts Rules*;

CONSIDERING the Court's Directions dated October 2, 2020, November 27, 2020, and March 25, 2021, and that the Plaintiff has already been provided with ample opportunity as requested to amend her Claim to "narrow, perfect and reduce the scope of the action";

CONSIDERING that the Court is of the view that any further amendments to the Claim or to the Counterclaim may be addressed in response to the motions to strike or stay, and that those motions ought to proceed to determination before any other proposed motions for various interlocutory relief;

CONSIDERING the proposed timetables submitted in accordance with the Court's Directions dated February 25, 2021 and March 25, 2021 by Canada on behalf of the Represented Defendants;

CONSIDERING that the Plaintiff and self-represented Defendants, including Dale McMullen, did not provide a response to the proposed timetables although invited to do so;

CONSIDERING the submissions of the parties at the case management conference held on May 19, 2021; that evidence pursuant to s.23 of the *Canada Evidence Act* is contemplated by certain Represented Defendants, and that they are of the view that their motions may be made in writing;

CONSIDERING the Court's Directions dated May 17, 2021 and May 20, 2021;

AND CONSIDERING Rule 385(1)(a) of the *Federal Courts Rules*;

THIS COURT ORDERS that the schedule for the motions by Defendants to strike the Statement of Claim or Counterclaim or stay the proceedings shall be as follows:

1. The Defendants shall serve and file their Notices of Motion, together with supporting affidavit(s) or other evidence (if any), [Motions] by no later than June 30, 2021.
2. Cross-examinations on Defendants' affidavits (if any) shall be completed by no later than July 30, 2021.
3. Respondents to the Motions [Respondents] shall serve and file their affidavits (if any) by no later than September 15, 2021.
4. Cross-examination on Respondents' affidavits (if any) shall be completed by no later than October 15, 2021.
5. The Defendants shall serve and file their Motion Records, including written representations, by no later than December 15, 2021.
6. Pleadings and evidence shall be contained in a Joint Motion Record filed by the Represented Defendants.
7. With the exception of those represented by Ms. Smith of Emery Jamieson LLP who may file 2 written representations of no more than 30 pages each, written

Page: 5

representations by Represented Defendants shall be limited to a maximum of 30 pages for each group of Defendants represented by the same counsel or law firm.

8. The written representations of each Respondent to the Motions shall also be limited to a maximum of 30 pages.
9. The parties shall, by no later than December 17, 2021, discuss and provide the Court with:
 - (i) a proposed timetable for service and filing of the responding Motion Records by the Respondents, including written representations; and
 - (ii) dates and times of their common availability for a case management conference.

"Sylvie M. Molgat"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-680-20

STYLE OF CAUSE:

LILIANA KOSTIC v HIS MAJESTY THE KING IN RIGHT OF CANADA, AND ALBERTA THE ATTORNEY GENERAL OF CANADA (“CANADA” or “INAC”); THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT CANADA; AND ITS AGENTS and PIIKANI NATION AND THE BAND NATION AS REPRESENTED BY THE CHIEF AND COUNCIL (“C and C”); ~~ROD NORTH PEIGAN; JANET POTTS; DANIEL NORTH MAN;~~ (TERMS OF THE CHIEF AND COUNCIL 2001-2021 ONWARDS) and ~~STANLEY GRIER; DOANE K CROWSHOE~~ (“DCS”); ~~ERWIN BASTIEN (“EB”); TROY KNOWLTON; WESLEY CROWSHOE; RIEL PROVOST HOULE; THEODORE PROVOST; CHE LITTLE LEAF MATUSIAK~~ and MICHAEL PFLEUGEUR [(“M. PFLEUGEUR”) BAND EMPLOYEE TERM 2010-2017] PIIKANI INVESTMENT CORPORATION (“PIC”); AND ITS DIRECTORS (Directors terms 2003-2021 onwards) And DIRECTORS & ITS LEGAL COUNSEL (2003 ON WARDS) CHIEF STANLEY GRIER [(“SG”) SHAREHOLDER TRUSTEE 2015-22]; ERWIN BASTIEN; TROY KNOWLTON; WESLEY CROWSHOE; THEODORE PROVOST; CHE LITTLE LEAF-MATUSIAK CHIEF REGGIE CROW SHOE [~~SHAREHOLDER TRUSTEE 2007-11~~]; FABIAN NORTH PEIGAN; KAREN CROW SHOE; SAM KHAJEEI; PIERRE-GILLES BETTINA; VERONA WHITE COW; EMILY GRIER & RANA LAW; BLAKE CASSELS & GRAYDON LLP; RICK YELLOW HORN; DALE MCMULLEN and PIIKANI RESOURCE DEVELOPMENT LIMITED (“PRDL”); & ITS DIRECTORS 2008 – ONWARDS PRESIDENT- DOANE K CROW SHOE (“DCS”); CHIEF STANLEY GRIER [(“SG”) SHAREHOLDER TRUSTEES 2015-22]; TROY KNOWLTON; RIEL PROVOST-HOULE; ERWIN BASTIEN (“EB”); THEODORE PROVOST; CHE LITTLE LEAF-MATUSIAK; PAUL BLAHA; JASON EDWORTHY; SHAWNA MORNING BULL;

MIKE ZUBACH and CANADIAN IMPERIAL BANK OF COMMERCE (“CIBC”); CIBC TRUST CORPORATION (“CIBC TRUST”) and CIBC WOOD GUNDY/CIBC WORLD MARKETS AND ITS AGENTS (“CIBC WG”) and JENSEN SHAWA SOLOMON DUGUID HAWKES LLP.; ROBERT HAWKES; GLEN SOLOMON (JSS BARRISTERS, “JSS”) and BRUCE ALGER (“ALGER”); ALGER & ASSOCIATES INC.; ~~THE GRANT THORNTON GROUP OF COMPANIES; GRANT THORNTON LTD.; GRANT THORNTON INC.~~; AND ALGER INC. and CARON AND PARTNERS LLP; RICHARD GILBORN; DANIEL GILBORN (“CP”) and MILLER THOMPSON LLP; JEFFREY THOM and GOWLING WLG (CANADA) LLP; CAIREEN HANERT (“CH”) and MCLENNAN ROSS LLP; (“MR”) and JOHN DOES 1-10 and DALE MCMULLEN and CANADIAN IMPERIAL BANK OF COMMERCE, CIBC TRUST CORPORATION, CIBC WORLD MARKETS, and BLAKE CASSELS & GRAYDON LLP and PIKANI NATION and PIKANI NATION CHIEF & COUNCIL

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: MARCH 9, 2023

ORDER AND REASONS: STRICKLAND J.

DATED: APRIL 11, 2023

APPEARANCES:

Liliana Kostic FOR LILIANA KOSTIC
(ON HER OWN BEHALF)

Dale McMullen FOR DALE MCMULLEN
(ON HIS OWN BEHALF)

Jordan Milne FOR THE DEFENDANTS
(HIS MAJESTY THE KING IN RIGHT OF CANADA,
ATTORNEY GENERAL OF CANADA, AND

MINISTER OF INDIAN AFFAIRS AND NORTHERN
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Caireen Hanert

FOR THE DEFENDANTS
(PIIKANI NATION PIIKANI NATION, PIIKANI
NATION CHIEF AND COUNCIL, STANLEY GRIER,
ERWIN BASTIEN, TROY KNOWLTON, WESLEY
CROW SHOE, THEODORE PROVOST, CHEF
LITTLE LEAF-MATUSIAK, RIEL HOULE AND
DOANE CROW SHOE)

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(CANADIAN IMPERIAL BANK OF COMMERCE,
CIBC TRUST CORPORATION AND CIBC WOOD
GUNDY/CIBC WORLD MARKETS)

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INC AND GRANT THORNTON GROUP OF
COMPANIES, GRANT THORNTON LTD., GRANT
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SOLICITORS OF RECORD:

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FOR THE DEFENDANTS

(HIS MAJESTY THE KING IN RIGHT OF CANADA,
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FOR THE DEFENDANTS
(PIIKANI NATION AND ACTING AGENT FOR
EMILY GRIER WHO IS SOLICITOR FOR PIIKANI
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THORNTON GROUP OF COMPANIES, GRANT
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CIBC TRUST CORPORATION, AND CIBC WORLD
MARKETS INC.)