

Band Councils, Band Moneys and Fiduciary Duties

Paper to be presented at “Aboriginal People and the Law”, Hosted by the Native Court Worker and Counselling Association of B.C. April 12, 2011

This paper was prepared by John R. Rich and Nathan E. Hume, Articled Student, of Ratcliff & Company LLP, April 4, 2011

TABLE OF CONTENTS

Introduction.....	1
Summary	1
What is a Fiduciary	2
Fiduciary Duty of Band Council.....	3
Bands and Band Members	4
Corporate Comparison	6
Band Councils and Band Moneys.....	7
Capital Moneys	7
Revenue Moneys under Ministerial Control.....	7
Revenue Moneys under Band Control	8
Settlement Moneys.....	8
Band Income	8
Damages.....	8
General.....	9
Distribution of Money.....	9
Duty to Band - Whether to Distribute.....	9
Duty to Members - How to Distribute	11
Blueberry River Trust Case	13
Enforcing Fiduciary Duty - Legal Consideration	14
Action or Judicial Review.....	14
Forum.....	14
Proper Plaintiff.....	14
Proper Defendant	15
Remedies.....	16

Band Councils, Band Moneys and Fiduciary Duties

Introduction

Many cases have confirmed that band councillors owe a fiduciary duty to bands and band members.¹ The existence and basic content of that duty are uncontroversial. However, the disputes that reach the court generally involve such egregious behaviour that the caselaw provides little practical guidance to councillors. To use band moneys or resources to benefit a councillor's relative or deny distributions to certain members or families clearly breaches the duty of loyalty and trust to which the band and its members are entitled. But what about a decision to distribute band money without regard to investment in cultural programs and services, or conversely a refusal to distribute funds to existing members, in favour of planning for the future? This paper explores these issues.

The fiduciary obligations of band councils are more complicated than they may seem because band councillors owe duties to the band itself as well as the individual members. Some cases have mentioned that duty but none has analyzed it.

Although all activities of a band council in respect of its dealings with band assets and band membership are imbued with this fiduciary duty, this paper is restricted to consideration of the duties of band councillors in dealing with band money. It is intended to provide assistance to band councils, while also exploring legal issues of interest to lawyers.

Summary

Band councils owe fiduciary duties to their bands and to band members. These are distinct duties and while they are generally compatible they can, in some circumstances, conflict. Although the relationship between these duties has not received much attention from courts or academics, it is of great practical importance for band councils. Perhaps the most critical context for these duties is the use of band moneys. When council decides whether to spend, save or invest band moneys, it must consider and satisfy its fiduciary duty to the band. It must settle on

¹ See, e.g., *Leonard v. Gottfriedson*, [1981] 21 BCLR 326; *Louie v. Derrickson*, [1993] BCJ No. 1338; *Ermineskin Cree Nation v. Minde*, 2010 ABQB 93.

the use that will best serve the long-term interests of the band as a distinct cultural, economic and political unit. When council decides how to spend band moneys, it must fulfill its fiduciary duties to band members. It must act in their best interests, which must be understood in light of the best interests of their community. This task is further complicated by the existence of at least six different kinds of band moneys, each of which can present different procedures and considerations. Councillors should be aware of their obligations, as well as the legal mechanisms by which those obligations can be enforced. This paper aims to help both councillors and lawyers navigate this relatively uncharted area of Canadian law.

What is a Fiduciary

The Oxford Dictionary definition of a fiduciary is “a trustee.”² A fiduciary duty is one that arises in the context of trust. Where one party has placed its “trust and confidence” in another and the latter has accepted, expressly or by operation of law, to act in a manner consistent with the reposing of such “trust and confidence,” a fiduciary relationship has been established.³

A fiduciary must act with the utmost good faith toward his beneficiaries. A fiduciary owes a duty of loyalty to his beneficiaries, which means to treat them equally, avoid any potential conflicts of interest and reap no personal profit from the relationship. He must always act in the best interests of his beneficiaries and, when doing so, must exercise the care, skill and prudence of an ordinary person. The fiduciary’s conduct will be strictly scrutinized for compliance with his obligations. These formulas indicate the high standards to which fiduciaries are held and they are fairly easy to apply in most cases.

As fiduciaries, band councillors are in good company. Lawyers, real estate agents and the Crown are also fiduciaries. More sympathetic examples include parents and doctors, who owe fiduciary duties to their children and patients, respectively. The content of the duty depends on the context and thus varies in each case. However, the basic elements of trust and confidence are always present.

² Concise Oxford Dictionary.

³ Ellis *Fiduciary Duties in Canada*, Carswell Looseleaf at p. 1-2.1.

Madam Justice Wilson of the Supreme Court of Canada set out a three part test for the establishment of a fiduciary duty in *Frame v. Smith*⁴:

1. Whether a person may exercise some discretion or power;
2. Whether that person can unilaterally exercise that power or discretion so as to affect the legal or practical interests of another person; and
3. Whether the latter person is peculiarly vulnerable to or at the mercy of the person holding the discretion or power.

Fiduciary Duty of Band Councillors

The relationship between band council and band members clearly satisfies the three-part test in *Frame v. Smith*. First, band council has the discretion to exercise the powers granted to it by the *Indian Act* and by the customs of its band. Second, band council may exercise those powers unilaterally to affect the interests of band members. Third, band members are vulnerable to this exercise of power by band council because the latter controls the communal resources on which much of their future prosperity relies. Generally, then, a fiduciary duty will exist when the band council makes a discretionary decision that will affect the band or band members.

A few examples will assist. In *Leonard v. Gottfriedson*, the defendant was a former band councillor. While on council, he executed and arranged for other members of council to execute improper band council resolutions that purported to transfer interests in reserve land to him. The judge noted that “the chiefs and councillors of a band are in a position of trust relative to the interests of the band generally, the band’s assets and the members of the band” and declared the defendant was not in lawful possession of the land in question.⁵

In *Gilbert v. Abbey*, a former chief had caused the band to repay her student loan, fund her sons’ private school education and purchase a trailer for her to live in on reserve. She participated in each decision by council to use band funds for her benefit, although her conflict

⁴ *Frame v. Smith*, [1987] 2 S.C.R. 99 at ¶¶60-63 (Wilson J., dissenting); see also *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 ¶¶30-32 (La Forest J.) and ¶131 (Sopinka and McLachlin JJ., dissenting).

⁵ *Leonard*, *supra* note 1, at ¶¶17 and 74.

of interest with the band and its members was clear. The judge found that she had breached her fiduciary duty to act in the best interests of the members of her band.⁶

In *Louie v. Derrickson*, the defendant was a former chief. During his term, he negotiated with the Ministry of Transportation and Highways to ensure that a new road through the reserve infringed land allocated to him and arranged for band council to pay him a disproportionate amount of compensation for that severance in violation of council's own policies. The judge noted again that chiefs and councillors are trustees of band assets and owe fiduciary duties to both the band and its membership, and concluded the defendant had violated these duties.⁷

As these cases demonstrate, band councillors owe fiduciary duties not only to band members but also to their bands. The distinction can be difficult to draw and it is not always clear in the judgments. The next section discusses this situation.

Bands and Band Members

A band exists apart from its members. It is not just the sum of the individuals who currently belong and who previously belonged to it. As a matter of law, a band has a certain status and limited powers. As a matter of experience, a band has a history, an integral relationship with the land, a tangible role in the lives of its members and, ideally, a future.

As a result, a band also has interests that may differ from those of the individuals who comprise it at any given time. In particular, a band aspires to endure: not merely to subsist but to thrive in its own way and to maintain its distinct existence. Some of its concerns are cultural, as a band requires a sense of community to span so many generations, but others are economic and environmental. A band cannot survive if its members are destitute or its lands irreparably spoiled. Some band members may share these concerns, but they need not. As in all communities, some members may favour their immediate material interests over cultural vitality,

⁶ *Gilbert v. Abbey*, [1992] 4 CNLR 21 (BCSC).

⁷ *Louie*, *supra* note 1 at ¶¶44-47 and 89-93.

environmental sustainability and political autonomy. In contrast, such long-term concerns define a band.⁸

Thus, the relationship between band council and the band itself also satisfies the three-part test for a fiduciary duty. Band council is the only body authorized to act on behalf of the band: it has powers, whether prescribed or traditional, and discretion over their use. As band council is the primary temporal authority in the community, it may exercise those powers unilaterally to affect the interests of the band. And, as band council is the sole legitimate representative of the band, the latter is extremely vulnerable to the actions of the former.

Band councillors must mediate between the interests of their two beneficiaries: bands and their members. This balance can be difficult to strike, especially when members express interests that contradict those of the band. Councils must grapple with this dilemma when they decide what to do with band moneys. Other assets, such as land, also engage the fiduciary duties of band councils, but this analysis focuses on money.

As a result, the duties of band councillors differ from those of many other fiduciaries. In light of the interests of the band, its members may have an interest in allocating band moneys to cultural programs or even to community-based commercial enterprises. In turn, these investments may deliver greater incidental benefits to some members than to others and thus fail to treat each beneficiary equally. Language programs, for example, may favour students and the persons paid to teach them. Similarly, skills training may help those individuals able to embark on a new career but not those unprepared to take such risks. However, in each case, the benefits redound to the community as a whole and thus to the band itself. Language programs perpetuate band culture, and skills support jobs that bring a measure of prosperity and financial security to the community. Thus, band councils face difficult choices as to whether and how to spend moneys.

⁸ Long range interests are recognized by most, if not all First Nations. As an example of express recognition of long term interests, the Huu-ay-aht First Nation, in its post-treaty legislation, requires that all government officials take an oath, honouring the principle of “Uu-a-thluck” (taking care of future generations).

Corporate Comparison

While acknowledging the fundamental differences between bands and corporations, the latter may offer some guidance for councillors who wish to understand their obligations. It may also help courts distinguish council's duties to band members from its duties to the band itself.

The directors of a company owe a fiduciary duty to that company. They do not owe such a duty to its shareholders, its bondholders or its employees: only to the company itself.⁹ Where the company is a going concern, this duty obligates directors to assess and address the long-term interests of the corporation.¹⁰ This orientation, however, may require them to consider the interests of other stakeholders, whether customers or creditors, but always with a view to the preservation of the corporation.¹¹

Bands are not corporations. Band membership informs identity; equity investments generally do not. Bands are communities of fate: individuals belong to them such that their destinies are inextricable.¹² Corporations are not communities at all: they are voluntary associations that seek to maximize profit for their investors. Whereas bands cannot be liquidated and divided up amongst their members, corporations are dissoluble.

Nonetheless, the case law concerning directors and their companies confirms that persons can owe fiduciary duties to associations apart from their members. The case law also confirms that the duty owed to such associations can diverge from any duties owed to their constituents. Finally, it confirms that a fiduciary must attend to the long-term interests of the association as a recognizable concern: a fiduciary may not sacrifice the identity of the association to the passing interests of its members.

⁹ *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at ¶37.

¹⁰ *Re BCE* at ¶38.

¹¹ *Id.* at ¶40; see also, *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at ¶42.

¹² *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67 at ¶15-16.

Band Councils and Band Moneys

Band council decisions are further complicated by the existence of at least six different types of band moneys. The *Indian Act* divides “Indian moneys” between “capital moneys” and “revenue moneys.” The former are derived from the sale of capital assets that belong to the band or lands surrendered to the Crown. The latter are all other moneys collected, received or held by the Crown for the use and benefit of a band.¹³ In addition, a band can receive settlement moneys when it resolves a land claim or litigation with the Crown. It also can generate its own income from commercial activities on and off reserve. Finally, when litigation succeeds, a band can obtain damages from the Crown. Each category of money may involve different decisions, different decision-makers and different obligations.

Capital Moneys

First, the Minister must authorize any expenditure of capital moneys and may do so for any purpose that, in his opinion, benefits the band.¹⁴ These purposes include a *per capita* distribution to members, so long as the total amount distributed does not exceed 50% of the moneys derived from the sale of surrendered band lands.¹⁵ The Act provides that a band council must consent to each expenditure of capital moneys but, since the Minister ultimately authorizes the transfer, councillors’ fiduciary duties likely are not engaged by the decision to consent.

Revenue Moneys under Ministerial Control

Unlike capital moneys, a band may assume control of its revenue moneys under the *Indian Bands Revenue Moneys Regulations*.¹⁶ Where a band does not control its revenue moneys, the Minister must authorize each expenditure, again with the consent of council. The Minister may use these moneys for any purpose that, in his opinion, “will promote the general progress and welfare of the band or any member of the band.”¹⁷ In this case, as with capital moneys, the Minister decides whether to dispose of revenue moneys so the Minister retains the fiduciary duty to act in the best interests of the band.

¹³ *Indian Act*, R.S.C. 1985, c. I-5, ss. 2(1) and 62.

¹⁴ *Indian Act*, s. 64(1)(k).

¹⁵ *Indian Act*, s. 64(1)(a).

¹⁶ *Indian Act*, s. 69; *Indian Bands Revenue Moneys Regulations*, C.R.C., c. 953.

¹⁷ *Indian Act*, s. 66(1).

Revenue Moneys under Band Control

Where a band does control its revenue moneys, the Minister no longer authorizes every expenditure, the duty to act in the best interests of the band and band members no longer resides with the Crown. Thus band council must decide what to do with revenue moneys and councillors must consider and satisfy their fiduciary duties.

Settlement Moneys

If moneys paid to settle a land claim or litigation are paid into a band's revenue account, then the preceding analysis applies. But where such moneys are paid into a trust and councillors are made trustees, then their fiduciary duty requires adherence to the terms of the trust when clear and the exercise of good judgment when the trust agreement is silent or ambiguous. If councillors are not named trustees of settlement moneys, then they cannot affect the distribution of those moneys and thus cannot owe a fiduciary duty with respect to them.

Band Income

Where a band earns income from commercial activities, councillors enjoy full discretion to determine how that money should be used. Neither the *Indian Act* nor the terms of a trust agreement constrain that decision. Thus, the full range of fiduciary duties applies.

Damages

Where a band wins damages from a suit against the Crown, that money will be paid directly to the band. As with band income, the *Indian Act* does not apply to that money and no trust agreement governs. Unlike band income, these awards are generally intended to compensate the band for past injustices: they are supposed to right historic wrongs. As the band sought and obtained this money for that purpose, councillors likely should consider it when they contemplate and try to fulfill their fiduciary duties.

General

When dealing with any type of band money, councillors should explore not only its possible uses but also the option of saving and investing it. In some circumstances, for example where money is scarce and renewable funds are not forthcoming, councillors may have a duty to conserve band capital rather than distribute it to members or even invest it in community projects. If they fail to do so, they may imperil the band by gutting its finances. However, where a band enjoys a more stable financial situation, their duty may be merely procedural: they may be obligated only to consider saving and investing band moneys as one of several options.

Distribution of Money

Duty to Band - Whether to Distribute

The decision whether to distribute band money implicates band council's fiduciary duty to the band itself. Regardless of the manner in which the money is spent or distributed to members, the very decision to dispose of it may prejudice the interests of the band by consuming the resources necessary to preserve solidarity and autonomy, and may compromise the band's future. Such a decision cannot be remedied by even the most conscientious manner of distribution because the harm to the band will have already been done. If that money arose from a settlement or the extraction of non-renewable resources, then it will not be replenished over time and the band will suffer a permanent disadvantage.

In addition to language and cultural programs, a band requires money, skills, infrastructure and natural resources to prepare for its future. Such needs generally favour tactical investments over distributions. However, in some instances, a distribution to members may actually serve the best interests of a band. For example, where members are so poor that the bonds of the community begin to fray, it may be reasonable for band council to deploy band moneys to ensure the band does not unravel altogether.

Whether to dispose of band money is frequently a decision for band council to make.¹⁸ Vocal band members, even if they comprise the majority of a band, may inform decisions by band council but cannot relieve councillors of their fiduciary duty to act in the best interests of the band.¹⁹ For example, if members vote in favour of increasing or accelerating a distribution of band moneys, councillors must decide independently how to respond. If the amount requested is so large or inopportune as to undermine the interests of the band, perhaps by diverting funds from educational programs or communal ventures, councillors should disregard such a vote or risk breaching their fiduciary duty to the band.

However, a tradition or custom of consulting membership before deciding how to use band assets may generate a duty to engage in timely and meaningful consultations. Although *Noble v. Ecoforestry Soc. et. al.*²⁰ dealt with changes to a forest management plan, its rationale may extend to the use of other band assets, such as money. If consultation with respect to a resource is integral to the relationship between band members and that resource, then band council may have an obligation to consult them before it decides to distribute or otherwise dispose of it. However, council may not use its obligation to listen to band members as an excuse to abdicate its responsibilities to the band itself.

In contrast, where settlement moneys are held in an express trust for the band or its members, the discretion of band council may be severely curtailed. An example of this would be a settlement agreement which establishes a trust to deal with the disposition of the settlement moneys. Where the terms of the trust are clear, a band council charged with administering the trust must simply follow those terms to discharge its fiduciary duty: it must distribute moneys at the times, in the amounts and for the purposes specified by the trust agreement. However, where the document is silent or ambiguous, councillors must once again exercise discretion. Guided by their fiduciary duty to the band, they must consider whether the interests of the band are best served by disposing of the settlement moneys.

¹⁸ The exception to this is where money comes to the Band Council with the specified purpose that it be distributed, for example in the case of a claim settlement which may provide for a certain amount of the negotiated settlement to be distributed among band members.

¹⁹ *Assu v. Chickite*, [1999] 1 C.N.L.R. 14.

²⁰ *Noble v. Ecoforestry Soc. et. al.*, 2003 BCSC 430.

Duty to Members – How to Distribute

Once band council has decided to distribute moneys to band members, it must decide how to distribute them. While the first decision is informed by council's fiduciary duty to the band, the second must be guided its duty to band members. To determine the proper manner of distribution, band council must abide by the standard incidents of a fiduciary duty.²¹

The content of council's fiduciary duty to band members generally does not depend on the type of moneys it decides to distribute. Whether dispensing capital moneys, revenue moneys, settlement moneys or income from band activities, council must treat all of the beneficiaries equally: it cannot arbitrarily favour one member or one group of members over others. If it requests a transfer of capital or revenue moneys from Indian Affairs for the express purpose of distributing it to members, then it must fulfill the duties of a trustee and ensure each member receives an equal share.²² In contrast, where council has simply established a practice of disbursing equal shares of band income to members, it enjoys a little more discretion. For example, instead of holding an amount assigned to a minor in trust until adulthood, council may give it to a family member responsible for his or her care.²³

Nonetheless, in each case, councillors must act in the best interests of each band member and they must demonstrate an ordinary degree of prudence while doing so.²⁴ They must also discharge a duty of loyalty to band members by avoiding any conflict of interest and any profit from their position of authority. The conduct of councillors will be subject to strict scrutiny.²⁵ However, mere incompetence or poor results likely will not constitute a breach of a councillor's fiduciary duty unless accompanied by "the stench of dishonesty or disloyalty."²⁶

Some duties must be relaxed to accommodate the unique circumstances of band councils. For example, the strict prohibition on conflicts of interest does not apply to small bands with

²¹ *Buffalo v. Canada (Minister of Indian Affairs and Northern Development)*, [2003] 1 C.N.L.R. 1 at pp. 4-5.

²² See, eg. *Moon v. Campbell River Indian Band*, [1996] 3 FC 907 at ¶¶47-49.

²³ *Williams v. Squamish First Nation*, 2003 FCT 50 at ¶¶27 and 29.

²⁴ *Gilbert v. Abbey*. *supra* note 6 at ¶22; *Hodgson v. Ermineskin Indian Band No. 942*, 1999 CanLII 8558 (FC) at ¶16.

²⁵ *Annapolis Valley First Nations Band v. Toney*, 2004 FC 1728.

²⁶ *Solomon v. Alexis Creek Indian Band*, 2007 BCSC 459 at ¶60.

dense family networks. Ordinarily, a councillor who faced a potential conflict of interest, such as a proposal that might benefit a relative, would be obligated to disclose the conflict, withdraw from discussion and abstain from voting on the matter. However, in small bands, these stringent precautions may disqualify so many councillors as to paralyze council. In such circumstances, the test for a conflict of interest may be relaxed: rather than any appearance of a potential and disproportionate advantage, a councillor will be disqualified only if he will receive a direct personal benefit from the proposal.²⁷ Again, in such circumstances, a councillor who faces a conflict may be able to participate in discussions so long as he withdraws and abstains from any vote on the matter.²⁸

The unique circumstances of band councils also may entail unique obligations. The question of membership, in particular, presents serious challenges. For example, a band council must make reasonable efforts to identify all members of a band before it distributes money that all members are entitled to share *pro rata*. In *Barry v. Garden River Indian Band of Ojibways*, the council undertook to distribute settlement moneys to band members.²⁹ It was aware that the Department of Indian Affairs was struggling to process applications for reinstatement of Indian status after the enactment of Bill C-31. It was aware that its new membership code denied membership to children born before April 17, 1985 to women reinstated by Bill C-31. It was aware also that the parents of these children contested this aspect of the membership code, but council insisted on making the distribution before the issue was resolved and refused to distribute money to them. By adopting an arbitrary cut-off date for determining membership, the Garden River council breached its duty as fiduciary and trustee to identify those persons entitled to benefit from the distribution.³⁰ Similarly, where band council contemplates such a distribution of money and is aware that certain individuals claim to be members of the band, it must set aside amounts to prepare for their eventual addition to the band list.³¹

²⁷ *Assu v. Chickite*, supra note 19 at ¶57.

²⁸ *Id.* at ¶56.

²⁹ *Barry v. Garden River Indian Band of Ojibways*, [1997] 4 C.N.L.R. 28.

³⁰ *Id.* at ¶¶26-28.

³¹ *Hodgson v. Ermineskin Indian Band No. 942*, 1999 CanLII 8558 (F.C.) at ¶16, aff'd 180 F.T.R. 285.

Blueberry River Trust Case

A recent case illustrates the challenges band moneys may present to band councils.³² A trust was established in 1998 to administer the funds involved in the historic settlement between the Blueberry River and Doig River First Nations and the Crown for the latter's breach of fiduciary duty with respect to the improper sale of mineral rights associated with reserve lands. The trust was devised by Blueberry River's chief and council and was approved by a vote of band members. The trust agreement provides that, in the event of a *per capita* distribution, any amount allocated to a member under 19 years of age is held in trust for that member until his 19th birthday. On that date, each such member receives only the nominal amount previously distributed to members over 19: he does not receive any interest. Instead, the interest that had accrued in the interim is pooled with the interest on other amounts similarly held on behalf of minor members and used to fund community programs and other initiatives.

The B.C. Public Guardian and Trustee, which represented Blueberry River children in public care, alleged that holding back those amounts constituted a breach of fiduciary duty by the chief and council of Blueberry River. The trustees, only some of whom were Blueberry River members, then petitioned the court for instructions on whether they could distribute the withheld interest. In that petition, the Public Guardian and Trustee, claimed, among other things, that the funds were not distributed evenly and that, even if a fiduciary duty could be satisfied by "in kind" distributions, no process existed to ensure that those benefits were properly distributed.

Blueberry River council made a number of arguments in response. It asserted that the decision to include this term in the trust agreement was not subject to a fiduciary duty. Instead, the decision was a matter of band governance. It also argued that, if the decision was subject to a fiduciary duty, that duty had been satisfied by the dedication of the withheld interest to community interests. Those children who did not receive interest would benefit disproportionately during their minority from the programs funded by the arrangement.

These arguments suggest one way in which councillors may try to balance the interests of their beneficiaries. The children of a band are, in a very concrete sense, its future. In abstract, to

³² *Re: The Blueberry Interim Trust and the Blueberry Not-for-Profit Trust*, No. S083911 (Vancouver).

reserve funds to improve their education and preserve their sense of community would appear to serve their interests as well as those of the band. However, whether it is permissible to withhold the necessary amounts solely from their distributions or if all members must share equally in the cost of such measures remains unclear as, at the date of this paper, the court has yet to release its decision.

Enforcing Fiduciary Duty – Legal Considerations

Action or Judicial Review

Where a breach of fiduciary duty is alleged in respect of a band council decision, two approaches are available: judicial review or an action for breach of fiduciary duty. An application for judicial review would challenge a decision of the band council made in breach of councillor's duty to the band or band members. An action for breach of fiduciary duty would allege the conduct of one or more band councillors fell short of that high standard.

Forum

The proper forum depends on whether the proceeding takes the form of a judicial review or an action. Band councils have been held to be federal boards. Consequently, any application for judicial review must be brought in Federal Court pursuant to Section 18 of the *Federal Court Act*. In contrast, an action for breach of fiduciary duty likely will be brought in B.C. Supreme Court, although in some circumstances, such as where the claim involves money held by the Crown or where council acts as an agent of the Crown, the Federal Court will have concurrent jurisdiction to hear the claim.³³

Proper Plaintiff

The identity of the proper plaintiff depends on which fiduciary duty is alleged to have been breached. If a councillor is alleged to have breached his duty to band members by distributing band moneys improperly, a band member disadvantaged by that distribution may bring an action in his personal capacity. However, if the council is alleged to have violated its

³³ *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 17; *Hodgson*, *supra* note 31 at ¶¶23-45.

duty to the band by unreasonably deciding to distribute band moneys, the proper plaintiff is unclear.

Ordinarily, the only entity able to sue on behalf of a band is the band council. Where the council itself is said to have breached its fiduciary duty, this monopoly presents a serious problem. The band and its members would have to wait to elect another band council, which could then bring a representative action on behalf of the band against the previous councillors. However, such an action may prove futile because the harm to the band may be irreparable and the defendants may be judgment-proof. Further, such an action may prove impossible in bands with entrenched and unequal factions. Aggrieved members may have to wait forever: these “perpetual losers” may never be able to elect a sympathetic council willing to launch a claim against councillors who represent the dominant faction.

Clearly, this rule is inadequate for this context. Fortunately, the B.C. Supreme Court has found that, although individual members cannot sue allegedly delinquent councillors on behalf of the band, they can sue in their personal capacity.³⁴ Thus, bands faced with a deviant council need not wait until after the damage is done to seek relief: enterprising members can initiate proceedings to protect the interests of the band. Although this procedure is important and appealing, as it develops both councils and courts will need to beware the risk of abusive (and expensive) fishing expeditions.³⁵

Proper Defendant

In general, the defendants will be those councillors who are alleged to have breached their fiduciary duties, whether to specific members or to the band. However, in cases where the complaint is not a breach of loyalty by a particular councillor but a breach of good faith by the entire council, the council itself may be a proper defendant.³⁶ For example, where a council withholds distributions from certain members, it may be subject to suit for breach of fiduciary

³⁴ *Ryan v. Leighton*, 2006 BCSC 278 at ¶20.

³⁵ See, e.g., *Amahoose v. Kehewin Cree Nation*, 2010 FC 919.

³⁶ *Hodgson v. Ermineskin*. *supra* note 31.

duty.³⁷ In addition, where the plaintiff seeks relief that will affect band assets, it may be appropriate and even necessary to join the band (as represented by band council) as a defendant to a claim against particular councillors.³⁸

Who is Liable?

In the event a court concludes a councillor has breached his fiduciary duty, the identity of the persons liable will depend on the sort of breach found. If a councillor profited from his position of authority, he will be personally liable for the harm caused by that breach. If instead council is found to have distributed moneys unevenly or excluded persons entitled to receive money, the band itself will be liable to make the proper compensatory payments.

Remedies

In an application for judicial review, the remedies available will be limited to discretionary relief, such as injunctions, declarations, or writs of *certiorari*. In contrast, actions are more versatile. In addition to declarations and injunctions, an applicant can also obtain damages, which can be important where a councillor has used his position for personal enrichment.

³⁷ *Barry, supra* note 29.

³⁸ *Ryan, supra* note 34 at ¶¶12-15.