# NOVA SCOTIA COURT OF APPEAL

**Citation:** *Sipekne'katik v. Mi'kmaw Family and Children's Services of Nova Scotia*, 2023 NSCA 44

**Date:** 20230620
**Docket:** CA 520788
**Registry:** Halifax

**Between:**

Sipekne'katik

Appellant

v.

Mi'kmaw Family and Children's Services of Nova Scotia

Respondent

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| **Judge:** | The Honourable Justice Joel Fichaud |
| **Appeal Heard:** | May 29, 2023, in Halifax, Nova Scotia |
| **Subject:** | Disclosure – relevance – unjust enrichment |
| **Summary:** | Since 2010, Mi'kmaw Family and Children's Services ("MFCS") operated from a building MFCS had built on the reserve land of Sipekne'katik First Nation at Indian Brook. There was no lease and no rent was paid. In November 2021, Sipekne'katik told MFCS to vacate. MFCS did so and sued Sipekne'katik for unjust enrichment, *i.e.* the value of the building.<br><br>At the discoveries, Sipekne'katik requested particulars of MFCS' arrangements for office space with the Eskasoni First Nation and the Bear River First Nation on their reserve lands elsewhere in Nova Scotia. MFCS provided the leases but declined to provide further particulars, saying the information was irrelevant to this lawsuit. |

Sipekne'katik moved in the Supreme Court for an order that MFCS provide the further particulars. The motions judge dismissed the motion. He said the arrangements with the Eskasoni and Bear River First Nations were irrelevant to MFCS' claim for unjust enrichment against Sipekne'katik.

Sipekne'katik appealed.

**Issues:** Are the further particulars relevant to this lawsuit under *Civil Procedure Rule* 14.01?

**Result:** The Court of Appeal dismissed the appeal.

Under Rule 14.01, "relevance" for disclosure has the same meaning as at trial.

Under the tests for unjust enrichment, an impoverishment and enrichment is actionable unless there is a juristic reason for that outcome. When there is no established category of juristic reason, the defendant must show there is an atypical juristic reason based on reasonable expectations of the parties and public policy considerations.

MFCS discussed with Sipekne'katik, constructed and began use of the building on Sipekne'katik's reserve between 2007 to 2010. Until July 2022, when the matter arose at discoveries, Sipekne'katik was unaware of the arrangements for office space between MFCS, on the one hand, and the Eskasoni and Bear River First Nations. The arrangements between MFCS and the Eskasoni and Bear River First Nations played no role in the dealings or relationship between MFCS and Sipekne'katik at the relevant time. Those particulars are not relevant to the parties' reasonable expectations or to the public policy considerations that govern this lawsuit.

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| | |
|---|---|
| **Judges:** | Wood C.J.N.S., Fichaud and Derrick JJ.A. |
| **Appeal Heard:** | May 29, 2023, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal granted and appeal dismissed with costs, per reasons for judgment of Fichaud J.A., Wood C.J.N.S. and Derrick J.A. concurring |
| **Counsel:** | Mary B. Rolf for the Appellant<br>Dennis J. James, K.C. and Anna-Marie Manley for the Respondent |

**Reasons for judgment:**

[1] For over a decade, Mi'kmaw Family and Children's Services ("MFCS") operated from a building MFCS had erected on the reserve land of Sipekne'katik First Nation at Indian Brook. There was no written lease. In November 2021, Sipekne'katik told MFCS to vacate. MFCS did so and sued Sipekne'katik for unjust enrichment. The claimed enrichment is the value of the building.

[2] At the discoveries, Sipekne'katik requested details of MFCS's arrangements for office space with the Eskasoni First Nation and Bear River First Nation on their reserve lands elsewhere in Nova Scotia. At those locations, MFCS has written leases. MFCS provided the leases to Sipekne'katik but declined to produce further particulars, saying the information was irrelevant to this lawsuit.

[3] Sipekne'katik moved in the Supreme Court for an order that MFCS produce the further particulars. The motions judge dismissed the motion. He held the information was not relevant under *Civil Procedure Rule* 14.01(1).

[4] Sipekne'katik appeals. The issue is whether particulars of MFCS' office arrangements with the Eskasoni and Bear River First Nations are relevant to MFCS' claim for unjust enrichment against Sipekne'katik.

***Background***

[5] Sipekne'katik First Nation is a "band" as defined by s. 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5. The *Indian Act* reserves land, vested in the federal Crown, for the use and benefit of bands. Sipekne'katik's reserve is at Indian Brook.

[6] Mi'kmaw Family and Children's Services ("MFCS") was incorporated as a society further to a 1985 Agreement between Her Majesty in Right of Canada, Her Majesty in Right of Nova Scotia and the Indian Bands of Nova Scotia, represented by their Chiefs. MFCS is an agency under the *Children and Family Services Act*, S.N.S. 1990, c. 5 and provides child and family services to Mi'kmaq children on reserves in Nova Scotia. The services include child protection, adoption, foster care, temporary and permanent care.

[7] In November 2021, MFCS had three office buildings in Nova Scotia. One is at Eskasoni in eastern Cape Breton on the reserve of the Eskasoni First Nation. A

second is at Bear River near the southern end of the Annapolis Valley on the lands of the Bear River (L'sitkuk) First Nation.

[8] At issue in this case is the third building that served as MFCS's central office for Mainland Nova Scotia. It is at 520 Church Street, Indian Brook, on Sipekne'katik's reserve land. I will term it the "Office Building".

[9] MFCS constructed the Office Building in 2009 and 2010 and has used it for child support and family protection services.

[10] There was no written lease with Sipekne'katik. MFCS paid no rent.

[11] In November 2021, Sipekne'katik demanded that MFCS vacate the Office Building within six weeks. MFCS did so.

[12] On December 2, 2021, MFCS filed a Notice of Application in Court. The Notice pleads that, in 2007, Sipekne'katik "entered into an agreement for MFCS to build the Indian Brook Office on Sipekne'katik land, for MFCS' exclusive use in providing child protection and family support services for children and families located on Mi'kmaw reserves in mainland Nova Scotia, including Sipekne'katik". MFCS sued Sipekne'katik for breach of contract and unjust enrichment, the claimed enrichment being the value of the Office Building.

[13] Sipekne'katik's Notice of Contest, dated January 13, 2022, says: (1) its Band Council neither transferred an interest in the premises to MFCS nor approved MFCS' construction and use of the Office Building, (2) MFCS' use has not been designated under the *Indian Act*, (3) MFCS's possession has been a trespass, and (4) MFCS owes Sipekne'katik occupation rent that sets off any amount it may owe to MFCS for unjust enrichment.

[14] A Consent Order, dated January 19, 2022, severed liability and damages. The issue of liability is to be heard as an application under *Civil Procedure Rule* 5, based primarily on affidavits. In April, May and June of 2022, the parties filed their affidavits. On July 20 and 21, 2022, they conducted discoveries.

[15] During the discoveries, Sipekne'katik learned of MFCS' office buildings on the Eskasoni and Bear River reserve lands. Sipekne'katik's counsel requested copies of the leases. MFCS provided them. The documents are described as sub-leases and include the following:

- The sub-lease between Eskasoni Leasing Corporation as Sublandlord and MFCS as Subtenant is dated December 15, 2017 for a term of 20 years. MFCS has an option to renew for indefinite further terms of 20 years [art. 2.5]. Eskasoni is to pay for the improvements [arts. 1.2 (t) and 6.2]. MFCS is to pay rent of One Dollar plus applicable taxes plus amortized costs of the improvements [art. 4.1]. Building improvements are "property of the Sublandlord and shall become the absolute property of the Sublandlord upon the expiration or termination of this Sublease for any reason whatsoever" [art. 7.1].
- The sub-lease between Bear River First Nation as Sublandlord and MFCS as Subtenant is dated December 18, 2019 with no fixed term. It says the improvements "shall at all times be the property of the Sublandlord and shall become the absolute property of the Sublandlord upon the expiration or termination of this Sublease for any reason whatsoever provided that the Sublandlord pays to the Subtenant at that time an amount equal to the fair market value of the Improvements" [part. 6.1].

[16] At the discoveries, counsel for Sipekne'katik made five further requests respecting MFCS' leased premises at Eskasoni and Bear River:

- First - confirm whether MFCS paid the cost of construction in relation to the former Eskasoni office space (constructed in around 1991), or whether periodic payments were made to the Eskasoni Band to reimburse the cost of construction.
- Second - confirm whether MFCS either requested or received compensation from Eskasoni for the value of MFCS' former Eskasoni building in connection with MFCS vacating that space and moving into the new Eskasoni office building that was constructed around 2020.
- Third - confirm the cost of construction for the current MFCS Bear River office.
- Fourth - confirm the total amounts paid by MFCS to construct, or renovate and improve, (a) the former MFCS Indian Brook office space at the convent building, and (b) the former MFCS building in Eskasoni, and (c) the Eskasoni Band's "fisheries building" which MFCS temporarily occupied.

- Fifth - confirm whether MFCS has in the past ever received compensation for building value in connection with vacating that building and moving into new premises.

[17] According to counsel, MFCS has provided the information requested by para. (a) of the fourth request and the information, insofar as it related to Sipekne'katik's reserve, requested by the fifth request.

[18] MFCS declined to produce the other information in the five requests that related to the Eskasoni and Bear River reserves. The letter from MFCS' counsel to Sipekne'katik's counsel said those requests were declined because the lawsuit involves a building on Sipekne'katik land, does not involve the Eskasoni or Bear River land, and "Sipekne'katik has not claimed that it was aware of or informed in its conduct by any arrangements" between MFCS and the Eskasoni or Bear River First Nations.

[19] Sipekne'katik moved for an Order that MFCS respond to the declined requests.

[20] Justice James Chipman of Supreme Court heard the motion on October 18, 2022. By a Decision dated November 2, 2022, the judge dismissed Sipekne'katik's motion (2022 NSSC 313). Justice Chipman's reasons said:

> [97] With respect, I do not accept the rationale put forward by Sipekne'katik's counsel. In this regard, I am of the opinion that further production with respect to the Eskasoni and Bear River offices would not assist with what has been plead here. Once again, the evidence discloses that there is no lease agreement between Sipekne'katik and MFCS. To delve further into the agreements MFCS has or had with other Bands could potentially lead to an unnecessary tangent at the upcoming Application in Court. In this regard, I am concerned that the matter could devolve into an expanded, off point Application. …

[21] Justice Chipman (para. 100) quoted *Garland v. Consumers' Gas Co.*, 2004 SCC 25, paras. 44-46. The passage from *Garland* is quoted below (para. 36). Justice Iacobucci set out the three elements of unjust enrichment. The third is that there be no "juristic reason" for the enrichment. Sipekne'katik submitted that the information concerning the Eskasoni and Bear River premises relates to whether there was a juristic reason for any enrichment by Sipekne'katik.

[22] Justice Chipman rejected that submission. His reasons said:

> [102] In this matter, should the situation reach the point where the burden shifts to Sipekne'katik, I am not persuaded on the evidence before me that Sipekne'katik will require the documentation that they are asking for. In saying this I am mindful of the potential examination of all the circumstances of the transaction between the parties. I say this also bearing in mind the reasonable expectations of the parties and public policy considerations. In my view, straying into MFCS' arrangements with other Bands will no way inform the trier of fact on the critical issues between these parties.
>
> [Justice Chipman's underlining]

### *Issue on Appeal*

[23] On January 27, 2023, Sipekne'katik filed a Notice of Application for Leave to Appeal and Notice of Appeal to the Court of Appeal. Sipekne'katik's factum identifies the single issue as:

> 14. The issue for determination in this Appeal is whether the Learned Chambers Judge erred in determining that the subject matter of the Appealed Undertakings was irrelevant to, and therefore that the answers to the Appealed Undertakings were not producible by MFCS in the underlying proceeding.

### *Leave to Appeal*

[24] An appeal from an interlocutory order requires leave to appeal: *Judicature Act*, R.S.N.S. 1989, c. 240, s. 40; *Civil Procedure Rule* 90.09. The test for leave is whether the Appellant has raised an arguable issue: *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, para. 18. As MFCS has acknowledged, Sipekne'katik's issue is arguable. I would grant leave to appeal.

### *Standard of Review*

[25] The determination of relevance is a non-discretionary issue of law to which the appellate standard is correctness: *R. v. Mohan*, [1994] 2 S.C.R. 9, para. 18; *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, para. 23; *Intact Insurance Company v. Malloy*, 2020 NSCA 18, para. 18.

### *"Relevance" for Disclosure Under Nova Scotia's Rules*

[26] The *Civil Procedure Rules*, as re-issued in 2009, say:

> **Presumption for full disclosure**

14.08 (1) Making full disclosure of *relevant* documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

…

**Scope of discovery**

18.13 (1) A witness at a discovery must answer every question that asks for *relevant* evidence or information that is likely to lead to relevant evidence.

(2) A witness at a discovery must produce, or provide access to, a document, electronic information, or other thing in the witness' control that is *relevant* or provides information that is likely to lead to relevant evidence.

(3) A witness who cannot comply with Rule 18.13(2) may be required to make production, or provide access, after the discovery or at a time, date, and place to which the discovery is adjourned under Rule 18.18.

**…**

**Production or access after discovery or at adjournment**

…

18.18 (2) A judge may order a witness who fails to comply with a requirement for production or access to make production or provide access, and the judge may order the witness to indemnify the party who seeks the order for the expense of obtaining the production or access.

[italics added]

[27] Rule 14.01 defines "relevant" for the purpose of disclosure:

**Meaning of "relevant" in Part 5**

14.01 (1) In this Part, "relevant" and "relevancy" *have the same meaning as at the trial of an action or on the hearing* of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:

(a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing *whether a judge presiding at the trial or hearing of the proceeding* would find the document, electronic information, or other thing relevant or irrelevant;

(b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing *whether a judge presiding at the trial or hearing of the proceeding* would find the information relevant or irrelevant.

> (2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.
>
> [italics added]

[28] The 2009 *Rules* replaced the "semblance of relevance" test, applied under the former *Rules*, with trial relevance. As Justice Moir explained in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4:

> 24. Rule 14.01(1) is to be understood against the background of legislative history: gradual adoption of the nineteenth century "semblance of relevancy" test on the basis that it is too difficult for lawyers and judges to determine relevancy in the pre-trial stage; recognition that the test led to wasteful expense and, thus, impeded justice, and; for Nova Scotia, the recommendation of a solution through a definition of "relevant" for the purposes of disclosure and discovery.
>
> …
>
> 46. This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
>
> - The semblance of relevancy test for disclosure and discovery has been abolished.
>
> - The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
>
> - The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to **the meaning of relevance in evidence law generally**. The Rule does not permit a watered-down version.
>
> - Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
>
> In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and recognition that an overly broad requirement worked injustices in the past.
>
> [bolding added]

[29] This court has endorsed Justice Moir's view: *Brown v. Cape Breton*, *supra*, paras. 9-13, 22; *Intact Insurance*, paras. 24-45; *Homburg*, paras. 65-72.

[30] As Justice Moir said, relevance for disclosure means the same as in evidence law generally.

[31] As to the meaning of "relevance" in evidence law generally, I will apply Justice Rothstein's formulation from *R. v. White*, 2011 SCC 13:

> (a) *Relevance*
>
> 36. … In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence" [citations omitted].

[32] To identify those propositions, the starting point is the pleadings.

[33] However, sometimes the pleading of wishful generalities blurs the focus. Rule 14.01(1) directs the motions judge to replicate the trial judge's perspective. Therefore, as a practical matter, an effective submission on relevance should be supported by evidence. In *Intact Insurance, supra*, para. 39, Justice Farrar said "[e]vidence plays a central role in production motions under the *2009 Rules*, as it is instrumental in 'reproducing the vantage point of the trial judge' ". To similar effect: *Brown*, paras. 22-23, per Bryson J.A.

### *Unjust Enrichment under Garland v. Consumers' Gas*

[34] Sipekne'katik submits its requests relate to whether, under the tests for unjust enrichment, there is a juristic reason for any enrichment. The parties canvassed the authorities on "juristic reason".

[35] In *Garland*, Justice Iacobucci set out the elements of unjust enrichment:

> 30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) **an absence of juristic reason** for the enrichment. [citations omitted] [bolding added]

[36] Justice Iacobucci explained the third element:

> (b) Absence of Juristic Reason
>
> …
>
> 40 … While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment", while the English courts require "that the enrichment be unjust" [citation omitted]. It is not of great use to speculate on why Dickson J. in *Rathwell*,

*supra* [*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436] expressed the third condition as absence of juristic reason but I believe that **he may have wanted to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion"** (p. 473). **The importance of avoiding a purely subjective standard was also stressed** by McLachlin J. in her reasons in *Peel*, *supra* [*Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762], at p. 802, in which she wrote that the application of the test for unjust enrichment **should not be "case by case 'palm tree' justice".**

…

42 Professor Smith [L. Smith, "The Mystery of 'Juristic Reason' " (2000), 12 S.C.L.R. (2d) 211] argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely the absence of juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model where the plaintiff must show a positive reason that it would be unjust for the defendant to retain the enrichment. In my view, however, **there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism**.

43 … As McLachlin J. wrote in *Peel*, *supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet the changing perceptions of justice". But at the same time **there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are**. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 … Consequently, in my view, the proper approach to **the juristic reason analysis is in two parts**. **First, the plaintiff must show that no juristic reason from an established category exists to deny recovery**. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*) [*Pettkus v. Becker*, [1980] 2 S.C.R. 834], a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*) [*Peter v. Beblow*, [1993] 1 S.C.R. 980], and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, **then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis**.

45 **The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason** why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which **courts can look to all the circumstances of**

> **the transaction** in order to determine whether there is another reason to deny recovery.
>
> 46 **As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations.** It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.
>
> [bolding added]

[37] In short, if there is no established juristic reason for the enrichment, such as contract, statute, operation of law or gift, the defendant must show an atypical juristic reason based on two criteria: the reasonable expectations of the parties and public policy considerations. Justice Iacobucci's application of the tests is instructive on the ambit of these criteria.

[38] Since 1981, Consumers' Gas Co., a regulated utility, had levied late payment penalties. The penalties were at a rate that had been approved by orders of the Ontario Energy Board, further to provincial legislation. However, the penalties exceeded the interest limit under s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. Due to this operational conflict between provincial and federal laws, the Ontario Energy Board's approval orders were inoperative under the paramountcy doctrine (para. 53 of Iacobucci J.'s reasons). In 1994, Mr. Garland started a class action against the utility to challenge the approval orders on this basis and recover the penalties.

[39] Justice Iacobucci concluded: (1) the Ontario Energy Board's approval was a "juristic reason" for the utility's enrichment from 1981 to 1994, but (2) that reason ended in 1994 when the utility received notice of the class action. The claim for unjust enrichment was allowed for the excess payments after notice of the claim in 1994 and dismissed for the excess payments before that date.

[40] Justice Iacobucci explained:

> 48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders

> creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of the conflict with s. 347 of the *Criminal Code*. The plaintiff has thus made out a *prima facie* case for unjust enrichment.
>
> …
>
> 53 … It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.
>
> 54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.
>
> 55 **When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would not authorize an LPP scheme that violated the *Criminal Code*. …**
>
> …
>
> 57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. **As a matter of public policy, a criminal should not be permitted to keep the proceeds of his crime. …**
>
> **58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. …**
>
> 59 However, in 1994, when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. … **After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.**
>
> [bolding added]

[41] The Supreme Court has reiterated *Garland*'s tests for unjust enrichment: *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, at para. 23, per Binnie J. for the Court; *Gladstone v. Canada (Attorney General)*, 2005 SCC 21, at para. 18, per Major J. for the Court; *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, at para. 36, per Bastarache J. for the Court; *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55, at para. 32, per McLachlin C.J.C. for the Court; *Ermineskin Indian Band v. Canada*, 2009 SCC 9, at para. 183, per Rothstein J. for the Court; *Kerr v. Baranow*, 2011 SCC 10, at paras. 112-13, 121-

23, per Cromwell J. for the Court; *Moore v. Sweet*, 2018 SCC 52, paras. 56-59, per Côté for the majority.

***Application to "Relevance" in this Case***

[42] Sipekne'katik submits the requested information is relevant to the parties' reasonable expectations and public policy factors under Justice Iacobucci's second test. To frame that submission, I will set out the key allegations in the pleadings and evidence.

[43] MFCS' Notice of Application pleads that Sipekne'katik "entered into an agreement for MFCS to build the Indian Brook Office on Sipekne'katik land".

[44] Sipekne'katik's Notice of Contest denies that its Band Council consented to MFCS' use of 520 Church Street and construction of the Office Building. It says the formal requirements of the *Indian Act* were not followed. It claims MFCS' occupation has been a trespass for which MFCS owes occupation rent.

[45] As this is an application under Rule 5, the parties have filed their affidavits which will constitute the bulk of the evidence. This detailed context helps to situate the line of scrimmage for the contested issues.

[46] The affidavits include the following:

- MFCS filed an affidavit dated April 13, 2022, by Arlene Johnson, Executive Director of MFCS. She refers to minutes of meetings in 2007 to the effect that the Band agreed to donate and designate the land for the use of MFCS, and in 2009 respecting funding participation by Indigenous and Northern Affairs Canada (paras. 31-36, 39-40). She says MFCS built the Office Building "based on the Band Council's promise to designate the land" under the *Indian Act* (para. 35). Prior to the construction of the Office Building at Indian Brook, MFCS had rented all its space (para. 30). MFCS constructed the Eskasoni building in 2017-19 and the Bear River building in 2020 (paras. 37-38).
- MFCS filed an affidavit dated April 13, 2022, by Monica Clarke-Johnson, Assistant Executive Director of MFCS. That affidavit (para. 15) says there has never been a lease of the Office Building, MFCS has paid no rent to Sipekne'katik and "[m]y understanding is that

Sipekne'katik authorized MFCS to build the Indian Brook Office on Sipekne'katik land for MFCS to use, and that MFCS built and paid for the building".

- Sipekne'katik filed an affidavit, sworn May 20, 2022, of Doreen Knockwood, a Band Councillor. Ms. Knockwood's affidavit (paras. 12-30) says: (1) Sipekne'katik did not agree to lease, authorize the use of, or donate the land to MFCS, (2) the Band Council did not pass a resolution to allow construction of the Office Building, and (3) the Band neither issued a permit to MFCS nor sought to designate the land for MFCS' use under the *Indian Act*.

[47] From this material, the key questions are:

- As a question of fact, between 2007 and 2010, when construction was complete, did Sipekne'katik agree to donate 520 Church Street for MFCS' use and to arrange its designation under the *Indian Act*?
- As to the existence of a juristic reason, what were the parties' reasonable expectations?
- Secondly, as to the existence of a juristic reason, what are the public policy considerations? In this respect, did the process leading to the construction and use of the Office Building comply with the requirements of the *Indian Act* and, if not, what are the consequences?

[48] I will address relevance for those points.

[49] **Was there an agreement to donate and designate?** Whether Sipekne'katik agreed to donate 520 Church Street for MFCS' use, or to promote its designation under the *Indian Act*, turns on the dealings between MFCS and Sipekne'katik from 2007 until the Office Building was put to use in 2010. There is neither a pleaded allegation nor evidence that, at any time, MFCS' office arrangements at Eskasoni and Bear River played a role in those dealings.

[50] **Is there relevance to reasonable expectations?** In *Garland*, to a significant degree the reasonable expectations were based on some shared awareness by the parties. Before 1994, the payors reasonably expected some penalty for non-payment and Consumers' Gas reasonably expected it could rely on the Ontario Energy Board to quantify the penalty. From 1994, when the payors' lawsuit was served on Consumers' Gas, the parties shared the knowledge that the quantum of

the penalty was at risk for a possible conflict with the *Criminal Code*. (*Garland*, paras. 55 and 59)

[51] A juristic reason stems from the transaction or relationship between the parties. Their shared awareness may arise from discussion, notice as in *Garland*, the joint experience of their dealings or obvious common sense. Without some connection to their transaction or relationship, a "juristic reason" could emerge simply from one party's uncommunicated aspiration. In a commercial setting, privately held subjective expectancies are not juristically enforced against the other party. Hence, in *Garland*, para. 45, Justice Iacobucci said the court examines "all the circumstances of the transaction". In *Moore*, Justice Côté for the majority said:

> [62] … Each of these categories [of established juristic reasons] points to a *relationship* between the plaintiff and the defendant that justifies the fact that a benefit has passed from the former to the latter. …
>
> [Justice Côté's italics]

As for the residual juristic reasons under *Garland*'s second step, Justice Côté cited "considerations relating to the way in which the parties organized their relationship" (para. 83). To the same effect, see *Kerr*, para. 45, per Cromwell J.

[52] Based on the evidence and argument at this motion, the relevant time for the parties' reasonable expectations was the period when the Office Building was conceived and discussed, constructed and put into use by MFCS.

[53] The Office Building at Indian Brook was discussed in 2007, completed in 2010 and occupied shortly thereafter. It was the first building erected by MFCS. Before that, MFCS had rented its offices.

[54] After the Indian Brook Office Building was in use, MFCS constructed the buildings at Eskasoni and Bear River in 2017-19 and 2020 respectively. MFCS' subleases with Eskasoni and the Bear River First Nation are dated in 2017 and 2019.

[55] In its factum and confirmed by counsel at the hearing in this Court, Sipekne'katik acknowledged that, until the discoveries in July 2022, it was unaware of MFCS' office arrangements with the Eskasoni or Bear River First Nations. By then, Sipekne'katik already had evicted MFCS.

[56] At the relevant time, Sipekne'katik had no awareness of the office situation at Eskasoni or Bear River. MFCS' office arrangements at Eskasoni and Bear River did not affect how Sipekne'katik organized its relationship with MFCS. Those arrangements lay outside the circumstances of the transaction between Sipekne'katik and MFCS and did not impact their reasonable expectations.

[57] **Is there relevance to public policy factors?** In *Garland*, Justice Iacobucci noted:

> 40 … The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel*, *supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree justice' ".

[58] Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2022), 2nd ed., says:

> … the reference to "public policy" is not an invitation to intuitive justice. The defendant instead must adduce proof of some discrete policy that militates against liability. In *Garland* itself [see para. 57], for example, Iacobucci J. reduced recovery on the basis of the policy against allowing the defendant to retain the benefits of its crimes. (p. 77)

> Likewise in the present context. As previously discussed, "public policy" *simpliciter* is either a meaningless phrase or an invitation to palm tree justice. The concept becomes legitimate and workable only when it is expressed in terms of specific principles. In *Garland*, for instance, Iacobucci J. invoked the "overriding public policy" that "a criminal should not be permitted to keep the proceeds of their crime". (p. 327)

[59] In this case, Sipekne'katik relies on the principle that a Band's interest in reserve land should not be encumbered except by compliance with the process under the *Indian Act*.

[60] Sipekne'katik says the construction and use of the Office Building failed to comply with that process. Whether that is correct is for the merits hearing.

[61] The issue will involve: (1) a finding of what happened, respecting the process under the *Indian Act*, leading to the construction and use of the Office Building at 520 Church Street, (2) a determination whether what happened did or did not comply with the *Indian Act*, and (3) an assessment of the legal consequence

of that determination for an unjust enrichment claim. MFCS' office arrangements with the Eskasoni or Bear River First Nations do not pertain to those matters.

[62] **Summary:** I agree with the conclusion of the motions judge. The requested material is not relevant.

***Conclusion***

[63] I would grant leave to appeal but dismiss the appeal. I would award appeal costs of $2,500 all inclusive, payable by Sipekne'katik to MFCS.

Fichaud J.A.

Concurred:

Wood C.J.N.S.

Derrick J.A.