CITATION: Taylor et al. v. Ginoogaming First Nation, 2019 ONSC 0328
COURT FILE NO.: CV-18-230-00
DATE: 2019-01-11

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MARTHA TAYLOR, JASON RASEVYCH, CALVIN TAYLOR, GEORGETTE O'NABIGON, MARIANNE ECHUM, CINDY WESLEY and THEODORE SCOLLIE in their capacity as Trustees of the GINOOGAMING FIRST NATION TIMBER CLAIM SETTLEMENT TRUST	)	*E. Esquega and Molly MacDonald* for the Applicants
Applicants	)	
- and -	)	
GINOOGAMING FIRST NATION	)	*Not Appearing*
Respondents	)	
	)	**HEARD:** July 13, 2018, at Thunder Bay, Ontario

Madam Justice T. J. Nieckarz

Decision On Application

Overview:

[1] This is an Application brought by the Trustees of the Ginoogaming First Nation Timber Claim Settlement Trust (the "Trust") for the opinion, advice, and direction of the court concerning the interpretation of the Timber Claim Trust Agreement (the "Trust Agreement").

[2] Specifically, the opinion, advice, and direction sought pertain to the following two questions:

1. Does Article 12.5 of the Trust Agreement require the Trustees to make *per capita* payments to members who would have been entitled to be placed on the Band List of the Ginoogaming First Nation at the time of the ratification vote but for the discriminatory registration provisions in the *Indian Act*, R.S.C., 1985 c.I-5 that were in effect at the time?

2. If the answer to question #1 is "yes" then do the Trustees also have an obligation to hold funds in the Trust for the purpose of the *per capita* payments beyond the 20-year period specified in Article 12.5? If so, then for how long?

[3] The Trustees rely on Rules 14.05(3)(a), (b), (f), and (h) of the *Rules of Civil Procedure* along with s. 60 of the *Trustee Act*, R.S.O. 1990, c. T.23 in support of their Application.

[4] The Trustees have taken a neutral position regarding the outcome of this matter.

[5] No one appeared on behalf of the Respondent First Nation. I note that the Office of the Children's Lawyer was served with the Application Record but takes no position on the Application. Counsel for the Applicants advise, that notice of this proceeding was posted in various locations including at the Ginoogaming band office, at Confederation College, at Lakehead University, in the Thunder Bay newspaper, and in various locations in the Geraldton area. As a result of these notices, a number of requests for the Application materials were received by counsel for the Applicants and satisfied, but no one appeared at the hearing of the Application other than the Applicants.

The Facts:

The Trust:

[6] The Ginoogaming First Nation ("Ginoogaming") is a Band pursuant to the terms and provisions of the *Indian Act*. Ginoogaming is the settlor of the Trust.

[7] On or about March 27, 2002, Ginoogaming and the Government of Canada entered into the Ginoogaming Timber Claim Settlement Agreement (the "Settlement Agreement"). The Settlement Agreement provided the terms for a resolution of a historical claim made by Ginoogaming with respect to the mismanagement of Ginoogaming's timber assets on reserve. The total value of the settlement was approximately $14 million.

[8] Attached as a schedule to the Settlement Agreement was the Trust Agreement dated January 17, 2002, that created the Trust. The funds from the timber claim settlement were to form the property of the Trust.

[9] Prior to the Settlement Agreement being entered into, the terms and conditions of the Settlement Agreement and the Trust Agreement were put to the members of Ginoogaming and approved in a ratification vote that was held on December 15, 2001. The ratification vote authorized Ginoogaming to enter into the terms of the Settlement Agreement and also to settle the Trust on the terms set out in the Trust Agreement.

[10] At the time of the vote, Ginoogaming had 507 registered adult members and 230 minor members. Ginoogaming has never assumed control of its band membership list, which is

maintained by the director of Indigenous and Northern Affairs Canada. The right to become a member is regulated pursuant to the terms of the *Indian Act*. To be placed on a Band List, a person must be entitled to be registered as an "Indian" pursuant to the registration provisions in the *Indian Act*.

[11] In June of 2002, the Ginoogaming Chief and Council passed a Band Council Resolution ("BCR") directing that the remaining funds from another settlement, of approximately $2 million, also be transferred to the Trust and be administered accordingly. These funds represented the remaining settlement proceeds from a settlement in 1998 with Ontario Hydro (as it was then called) to settle a claim for historical flooding on Ginoogaming lands caused by Ontario Hydro activities.

[12] The Ontario Hydro settlement funds formerly formed the trust property of the Keemeshominishmanak Fund. Ginoogaming's decisions regarding this fund became the subject of a judicial review proceeding before the Federal Court of Canada in *Medeiros v. Echum*, 2001 FCT 1318, 213 F.T.R. 221 ("*Medeiros*"). In that case, the court considered the differential treatment between band members living on reserve and those living off reserve arising out of two Band Council Resolutions ("BCRs") that directed the use of the funds. The BCRs directed the Ontario Hydro settlement funds into the Keemeshominishmanak Fund to finance on-reserve projects, and they authorized payments to certain Elders living on-reserve. The Federal Court agreed with the applicants that the BCRs were discriminatory to off-reserve members and were therefore ultra vires. The assets of the fund were ordered to be remitted to the Chief and Council of Ginoogaming, who subsequently passed the June 2002 BCR directing that the funds be placed into the Trust.

[13] The recitals to the Trust Agreement provide that the Trust is to enure to the benefit of the present and future generations of the Members of Ginoogaming. Article 11 of the Trust provides that trust property may be used for various initiatives for the benefit of Ginoogaming, including promoting the health of members, construction of infrastructure on Reserve lands, and education. In addition, Article 12.5 of the Trust Agreement, which is the subject matter of this Application, provides for a one-time payment to be made to a specified category of persons as follows:

> 12.5 Within six months of the first deposit of the Compensation, as set out in Article 2.1 of the Settlement Agreement, the Trustees shall effect a payment from the Trust Property of ONE THOUSAND DOLLARS ($1,000.00) **to each and every Member, without discrimination, alive on the day of the vote.** Any Member who is EIGHTEEN (18) years or older on the day of the vote and who fails to identify herself or himself to the Trustees and provide a valid mailing address for the payment within TWENTY (20) years of the date of the vote shall forever be disqualified from receiving the payment; all such delayed payments shall be WITHOUT accrued interest. The Trustees shall hold all payments to Members who are not Voters until they attain the age of EIGHTEEN (18), at which time they shall be paid $1,000.00 PLUS accrued interest from the date of the vote to the date of their eighteenth birthday. [Emphasis added].

Article 2(c) of the Trust Agreement defines the term "Band Member" as follows:

> 2(c) "Band Member" has the same meaning as "Member", and means a person whose name appears on the Ginoogaming Band List, pursuant to the provisions of the *Indian Act.*

[14] The term "Member" is not defined in the Trust Agreement, but it is defined in the Settlement Agreement. Article 2 of the Trust Agreement provides that, if a term is not specifically defined in the Trust Agreement, but is defined in the Settlement Agreement, it shall have the same meaning as in the Settlement Agreement. Article 1.1(o) of the Settlement Agreement defines "Member" as follows:

> 1.1(o)"Member" means a person whose name appears on the First Nation's Band List on the Voting Day.

[15] "Voting Day" is defined in Article 1.1(x) of the Settlement Agreement to mean the day set for holding the Ratification Vote, which was December 15, 2001.

[16] As of February 16, 2018, at least 118 individuals who were alive on the Voting Day have since become members of the Ginoogaming Band List. Some of those members, although at the time of the hearing of the Application it was not known how many, were not entitled to register for Indian Status and membership with Ginoogaming on the Voting Day solely because of provisions in the *Indian Act* that have since been struck down as discriminatory and an unjustifiable infringement of *Charter* rights. But for the discriminatory registration provisions in the *Indian Act*, these individuals could have been "Members" as defined in the Settlement Agreement.

The Legislative Background:

[17] The *Indian Act* has been and remains the primary legislation governing Aboriginal peoples and their lands. The Act sets out criteria defining "Indian" status for purposes of determining entitlement to a range of legislated rights, federal programs and services. Status under the Act is also tied to an individual's eligibility to become a member of a First Nation, unless that First Nation maintains its own membership list.

[18] Prior to 1985, the *Indian Ac*t provisions regarding status explicitly favoured paternal lineage and discriminated against aboriginal women and their descendants. Specifically, from 1869 onwards the marriage of an Aboriginal woman to a non-Aboriginal man meant loss of status for the woman and her children. Aboriginal men who "married out" did not lose their

status, and neither did their children. Additionally, a non-Aboriginal woman who married an Aboriginal man gained status and the right to be registered as a member of a particular band.

[19] The *Indian Act* was amended in 1951 in several ways. Significantly, children of a married Aboriginal man who married a non-Aboriginal woman would be entitled to Indian status unless the child's paternal grandmother was also non-Aboriginal. In those cases, the child would lose his or her Indian status once they reached the age of twenty-one years. This was referred to as the "double-mother" rule.

[20] Leading up to the implementation of the *Charter of Rights and Freedoms*' equality rights provisions in April of 1985, there was significant advocacy by Aboriginal women's groups, human rights organizations, and other bodies, along with court challenges seeking to eliminate the gender discrimination in the *Indian Act*. Bill C-31, An Act to Amend the *Indian Act*, S.C. 1985, c.27, s.4 ("Bill C-31") came into effect on April 17, 1985, and attempted to remove the differential discriminatory treatment between men and women.

[21] The Bill C-31 amendments removed the "marrying out" provisions and the "double mother" rule, and entitlement to registration was restored to those who had lost their status under those provisions. Those entitled to register for Indian status would now either be entitled to register under ss. 6(1) or 6(2) of the *Indian Act*. Unfortunately the Bill C-31 amendments resulted in a complicated array of categories of individuals entitled to status and failed to fully rectify the discriminatory effects of prior registration provisions.

[22] The Bill C-31 amendments continued to draw a distinction between those individuals with two Aboriginal parents and those with only one Aboriginal parent, although it eliminated the distinction between paternal and maternal lineage for children born after 1985.

[23] The amendments also implemented the "second generation cut-off" rule. The second generation cut-off rule signified the loss of status after two successive generations of mixed Aboriginal and non-Aboriginal parentage. The amendments were criticized for creating a disadvantage for the descendants of aboriginal women who had married out and regained status under Bill C-31 because their children, who were born before 1985 and registered under the new Act, were unable to transmit status onward if they married a non-Aboriginal person. In contrast, the children of Aboriginal men who had married non-Aboriginal women prior to 1985 did not suffer the same fate.

[24] These were the provisions pertaining to eligibility for status and registration for membership with a First Nation that were in effect on the Voting Day when the Trust was settled and ratified by Ginoogaming members. Since then, there have been two further significant legislative changes to these provisions that have arisen from two significant court decisions.

[25] The first of those decisions was the 2009 British Columbia Court of Appeal decision *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 269 B.C.A.C. 129 leave to appeal to the S.C.C. refused, 33201 (November 5, 2009) ("*McIvor*"). In *McIvor*, the court found that, despite the corrective purpose of the Bill C-31 amendments, the registration provisions of the *Indian Act* (and specifically the second generation rule) continued to provide differential treatment to individuals born prior to April 1985 based on whether the child's sole

Aboriginal grandparent was a male or female. The court found that, while the amendments gave individuals affected by the double mother rule additional rights, it also created new inequalities. As such, the offending provisions were deemed to be unconstitutional and were declared to be of no force and effect. This declaration was suspended for a period of one year to give the federal government time to make the necessary amendments to the legislation.

[26] In response to *McIvor*, Bill C-3, the *Gender Equity in Indian Registration Act* (short title) ("Bill C-3"), was introduced and received royal Assent in 2010. Pursuant to the Bill C-3 amendments, the grandchildren of eligible Aboriginal women who had lost status as a result of marriage became entitled to register for status, but the legislation did not address all issues related to gender discrimination in the *Indian Act*. Bill C-3 focused exclusively on the specific circumstances outlined in *McIvor* and the remedies required to only address these issues. Inequities persisted, with some individuals and their descendants continuing to have fewer rights than others by virtue of having an Aboriginal grandmother as opposed to grandfather.

[27] A further challenge to the status and registration provisions of the *Indian Act* came with the 2015 the Superior Court of Quebec case, *Descheneaux c. Canada (Procureur Géneral),* 2015 QCCS 3555, 259 A.C.W.S. (3d) 601. In this case, the Plaintiffs argued that Bill C-3 had not gone far enough to remedy the inequities perpetuated by the *Indian Act*. Specifically, the Plaintiffs alleged that the Act continued to perpetuate differential treatment between:

a. First cousins, depending on the sex of their Indian grandparent, where the grandparent was married to a non-Indian before 1985; and

b. Siblings, where a male and female child were born out of wedlock between the 1951 and 1985 amendments to the Act.

[28] The Plaintiffs argued that the differential treatment resulted in an unequal ability to pass on Indian status, depending on whether a person was descended from a male or female Indian grandparent or parent. The Quebec Superior Court agreed and held that the registration provisions of the *Indian Act* that continued to unfairly discriminate against Aboriginal women and their descendants and limit their ability to pass on Indian status were declared of no force and effect. The court's decision was suspended for 18 months (with subsequent extensions of this timeframe) to give Canada time to enact new legislation.

[29] The federal government's response to *Descheneaux* was Bill S-3, an Act to amend the *Indian Act* (elimination of sex-based inequities in registration) (short title) ("Bill S-3"), which received royal assent on December 12, 2017. Part of the legislation came into force on December 22, 2017. This includes an extension of entitlement to Indian status to individuals affected by inequities relating to the different treatment of cousins, siblings, or minors who were omitted from historic lists. Further amendments will come into force at a later date that will further extend the categories of those eligible for registration under the Act.

The Issues:

[30] The primary issue to be determined on this Application is whether members of Ginoogaming, who would have been entitled to membership on the Voting Day but for the discriminatory provisions of the *Indian Act* and have since become members by virtue of the two amendments to that Act, are entitled to the payment contemplated by Article 12.5 of the Trust Agreement. If they are, does the 20 year time limit provided for in Article 12.5 still apply for

these individuals to identify themselves and claim their payment or should the time limit be extended?

The Law:

[31] Section 60 of the *Trustee Act*, and Rule 14.05(3)(a) of the *Rules of Civil Procedure* provide a trustee the ability to apply to this court for the opinion, advice, or direction on any question respecting the management or administration of the trust property. Specifically, s. 60 of the *Trustee Act* grants to the court the jurisdiction to provide advice and direction to a trustee as to what they can and cannot do within the confines of the trust agreement: *Roseau River Anishinabe First Nation et al. v. RRFNT AKI Property Holdings Ltd. et al.,* 2014 MBQB 215, 311 Man.R. (2d) 155, at para. 108.

[32] Both trust principles and contractual interpretation principles factor into how a court is to interpret a trust document: *The Canada Trust Company v. Browne*, 2012 ONCA 862, 115 O.R. (3d) 287, at para. 64. In doing so, a court must take into account the trust agreement as a whole and should consider the factual matrix surrounding the trust agreement: The *Canada Trust Company v. Browne*, at para. 64; *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (C.A.), at para. 32.

[33] In The *Canada Trust Company v. Browne*, at paras. 67 and 70 the Ontario Court of Appeal considered the importance of the factual matrix

> [67] It is well established that in interpreting a contract, the court may consider the "factual matrix" surrounding the contract, even where there is no ambiguity. "Indeed, because words always take their meaning from their context, evidence of the circumstances surrounding the making of a contract has been regarded as

admissible in every case": *Hi-Tech Group Inc. v. Sears Canada Inc.* (2001), 2001 CanLII 24049 (ON CA), 52 O.R. (3d) 97 (C.A.), at para. 23.

…

[70] In *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc*. (1997), 1997 CanLII 4085 (BC CA), 49 B.C.L.R. (3d) 317, at para. 18, the British Columbia Court of Appeal described the factual matrix as the "background" of the contract:

> The factual matrix is the background of relevant facts, that the parties must clearly have been taken to have known and to have had in mind when they composed the written text of their agreement. It can throw light on what the parties must have meant by the words they chose to express their intention….
>
> The factual matrix is the background which may deepen an understanding of what the parties meant by the language they used, but the Court cannot make a new agreement.

[34] While the factual matrix may be used to clarify the parties' intentions as expressed in a written agreement, it cannot be used to contradict that intention or have the effect of making a new agreement. Ultimately, the words of the agreement are paramount: *The Canada Trust Company v. Browne,* at para. 71.

Analysis:

[35] The Applicants do not seek to vary the terms of the Trust. This court has been asked solely the question of whether Article 12.5 of the Trust Agreement requires the Trustees to make *per capita* payments to members who would have been entitled to be placed on the Band List for Ginoogaming on the Voting Day but for the discriminatory registration of the *Indian Act.* Based on a plain reading of the Trust Agreement, the conclusion I am forced to reach is that it does not.

[36] Article 12.5 of the Trust Agreement is clear that the *per capita* payments are to be made "to each and every Member, without discrimination, alive on the day of the vote." Member is

not defined in the Trust Agreement, but is defined in s. 1.1(o) of the Settlement Agreement. Section 2 of the Trust Agreement incorporates the definitions contained in the Settlement Agreement. "Member" is clearly defined in the Settlement Agreement as "a person whose name appears on the First Nation's Band List **on the Voting Day**" (emphasis added). The Voting Day was December 15, 2001. The new Members of Ginoogaming, who have become members by virtue of the amendments to the *Indian Act*, were not members on the Voting Day.

[37] The amendments to the registration provisions of the *Indian Act* did not take place until 2010, and then 2017, and are ongoing. There is nothing in either Bill C-3 or Bill S-3 that indicates that those individuals who have either gained or re-gained "Indian" status and rights of membership in a First Nation as a result of the amendments will have those rights accrue to them retroactive to a date prior to the amendments coming into effect. In other words, the rights afforded to those individuals by "Indian" status, including membership, did not accrue prior to the 2010 and 2017 amendments. Even though it is fully recognized that but for the discriminatory provisions of the *Indian Act* those individuals *should have* been members on the Voting Day, the reality is that they were not and are therefore excluded from the benefit of the payment provided for in Article 12.5.

[38] The Applicant Trustees, while they took no position on this Application, did point out that the *per capita* payments made pursuant to Article 12.5 are to be made to members "without discrimination." The Trustees argue that part of the factual matrix is the *Medeiros* decision that was issued shortly before the Trust was ratified. They state that the settlors of the Trust, being clearly aware of the perils of having a discriminatory provision in a Trust Agreement, were mindful in the drafting of the Trust Agreement not to discriminate between members. The

Trustees argue that the settlors intended an inclusive interpretation of "Member" in the Trust Agreement.

[39] I agree with the position of the Trustees that the settlors were careful in the drafting of the Trust Agreement not to have discriminatory provisions in the Trust Agreement such as those found in the offending BCR's in *Medeiros.* But I do not find that this changes the result. This Trust Agreement does not discriminate between members on-reserve or off-reserve and it does not discriminate between any other class of members. Keeping in mind the context of the *Medeiros* case that caused the settlors to be mindful of discriminating as between existing members, this would appear to have been the intention of the settlors in incorporating the words "without discrimination." The Trustees have acknowledged in argument that there is no evidence that the Settlors turned their minds to the particular type of discrimination found in the registration provisions of the *Indian Act.* In fact, the Trustees argued that the settlors could not have anticipated that portions of the *Indian Act* would be found unconstitutional at a much later date. This supports the conclusion that the words "without discrimination" are in specific reference to ensuring there is no discrimination between those who fell within the definition of the term "Member" on the Voting Day.

[40] The general recitals to the Trust Agreement express a clear intention to benefit all present and future generations of Members. The Trustees in their argument suggested this too may support an inclusive interpretation of "Member" in the Trust Agreement. A reading of the Trust Agreement does not support this interpretation. The provisions of Article 11.4 allow for the use of Trust Property for the benefit of the First Nation as a whole in order to accomplish this goal of benefitting present and future generations. However, when it comes to Article 12.5, the settlors

of the Trust expressed an intention to limit the payment to those individuals who were members of Ginoogaming on the Voting Day. Based on a clear reading of the Trust Agreement, any individual who became or becomes a member after that date has no entitlement to enjoy the benefit of the Article 12.5 payment.

Other Cases:

[41] The Trustees point to *Barry v. Garden River Band of Ojibways* (1997) A.C.W.S. (3d) (ONCA) ("*Garden River*"), as an example of litigation in which discrimination in the distribution of settlement trusts has been at issue. In *Garden River*, female members of the Band brought an action for an accounting and payment of their *per capita* distributive share of a trust fund received by the Band in settlement of a claim with the Government of Canada. The appellants claimed a share for themselves and on behalf of all other women who were reinstated to membership in the Band as a result of Bill C-31 amendments to the *Indian Act.* The concern was that the share had been reduced for enfranchised women in the amount they had received when they left the band, while no deductions were made from the share of other members who owed debts to the Band for other reasons. Minor appellants also claimed a share on behalf of themselves and all other children of reinstated women who are or should be known to the trustees.

[42] In *Garden River,* the court quoted at para. 35 the following from Waters, *Law of Trusts in Canada*:

> It is a primary duty upon trustees that in all their dealings with trust affairs they act in such a way that, if there are two or more beneficiaries, each beneficiary receives exactly what the terms of the trust confer upon him and otherwise receives no advantage and suffers no burden which other beneficiaries do not

> share…*It is still the duty of the trustees to carry out the terms of the trust as they find them, and to ensure that in the administration of the trust they do not give advantage or impose burden when that advantage or burden is not to be found in the terms of the trust.* [Emphasis added].

[43] As noted by the court, at para. 43, a trustee's first duty is to follow the terms of the trust instrument. In the *Garden River* case, the terms of the trust were set by BCR on September 28, 1987, to make a *per capita* distribution of the settlement funds to *all* members of the Band. It was only after the trust was created, when, on December 3, 1987, the Band further resolved to determine membership and make the disbursement on December 17 and 18, 1987. The court noted that the distribution date for the settlement funds was arbitrary in that it was not chosen for any particular reason. The court also noted that payments had been made to other individuals after the cut-off date pursuant to the terms of a subsequent BCR. The court found that, in knowing there was an issue with respect to the qualification of the minor appellants for membership but making a decision to distribute the funds before it could definitely ascertain the identity of all beneficiaries, this was a breach of the Band's duty to act fairly and impartially and was a breach of its specific duty to determine and ascertain the class that was to benefit from the distribution and identify and locate the members of that class.

[44] The Trustees in the case at hand acknowledge that *Garden River* is distinguishable on its facts. In this case, the date for determining membership is provided for in the Trust Agreement and was not arbitrarily determined after the date of the settlement of the Trust. As stated by the Court of Appeal, a trustee's duty is to follow the terms of the trust instrument. In the case at hand, the trust instrument is clear that membership is determined on the Voting Day, namely December 15, 2001.

[45] The Trustees also point to *Blueberry Interim Trust, Re*, 2011 BCSC 769, 203 A.C.W.S. (3d) 683 ("*Blueberry*"), and suggest that arguably the same fiduciary duties apply to the Applicants in this case to treat all beneficiaries fairly and equally as was found in *Blueberry.* I agree with that general statement. However, this argument still does not overcome the clear and plain definition of "Members" as provided for in Article 1.1(o) of the Settlement Agreement and the obligation of the trustees to carry out the terms of the Trust Agreement.

[46] The facts before the court in *Blueberry* concerned the *per capita* payment to minor members and the duties which arose at the time the Band undertook to distribute settlement funds. Similar to the case at hand, the Band settled a claim, and then created a trust to hold and manage the proceeds. The trust provision in *Blueberry* provided that the minor beneficiaries were to receive their payments upon turning 19, but were not entitled to accrued interest. The Public Guardian and Trustee took the position that minor members were entitled to the accrued interest as the time value of the money needed to be considered. Otherwise, the minor members would be treated differently than the adult members who received their payments much earlier. The Public Guardian and Trustee sought a declaration that payment of interest to the minor beneficiaries was required. The court agreed with the Public Guardian and Trustee and held that even though there was no breach of fiduciary duty by failing to provide for the payment of interest in the terms of the Trust, the act of distributing the funds to minor members without paying interest would result in a breach of that duty and the duty to treat all beneficiaries fairly and equally.

[47] In *Blueberry,* the court noted that a Band Council is impressed with a fiduciary obligation to ensure a fair distribution of settlement proceeds upon receipt of those proceeds, and even

before the terms of a trust are settled. At para. 54, the court noted that several cases have held that, when a Band undertakes to make a *per capita* distribution, it must treat band members equally.

[48] In the case at hand, there is nothing to indicate or suggest that the Band breached its fiduciary duty by not treating band members fairly and equally. All band member as at the Voting Day were treated equally and the Trust Agreement was clearly drafted to avoid issues such as that in *Blueberry* where arbitrary deductions were made from some beneficiary's payments and interest was not paid to minors. There is no breach of the duty of loyalty and honesty to future members of the Band necessary to establish a breach of fiduciary duty. The Applicants did not present any case law or make any argument that suggests that this duty extends to future members and therefore the limitation on distribution to members that were registered on the Voting Day is a breach.

Public Policy:

[49] In confirming that this court has jurisdiction pursuant to s. 60 of the *Trustee Act* to hear this application, the applicants make reference to *Canada Trust Co. v. Ontario (Human Rights Commission),* and specifically para. 40, where the court states:

> To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not be conducive to public interests.

[50] *Canada Trust Co.* dealt with a public charitable trust that was discriminatory on its face. The Trust Document stated that the Trustees were only to provide scholarships to white Christians. The Applicants in that case sought a declaration that the trust, to the extent that it

was discriminatory, was void on the grounds of public policy. The Court of Appeal agreed. More recently, in *Spence v. BMO Trust Co.*, 2016 ONCA 196, 129 O.R. (3d) 561, the Court of Appeal has clarified that a settlor has the common law right to limit the scope of beneficiaries as long as the document is not discriminatory on its face. It cannot be said that the Trust Agreement is discriminatory on its face. In any event, the applicants neither sought to vary the terms of the Trust, nor did they seek to have certain provisions declared void.

Order:

[51] In light of the foregoing, I find that the payments provided for in Article 12.5 are not extended to any individuals who became a member of Ginoogaming after December 15, 2001, even if they should have otherwise been a member on that date but for the discriminatory provisions of the *Indian Act.* In light of my findings as to the interpretation of Article 12.5 there is no need to answer the second question posed by the applicants with respect to the 20-year time limit.

[52] As indicated at the outset of this decision, I was asked only to interpret the Trust Agreement and not to amend or vary it. It is not the role of an interpreting court to change the plain meaning of a trust document. I do, however, note that Article 16 of the Trust Agreement specifically provides for changes or amendments to the terms of the Trust Agreement if approved by a vote of the Members. It is also open to the Trustees to bring an application for a variation of the terms of the Trust if otherwise permitted by law.

[53] The Applicants are entitled to their costs from the Trust to be fixed. The Applicants are asked to provide a Bill of Costs within 30 days of the date of this decision.

"Original signed by"
The Honourable Madam Justice T.J. Nieckarz

Released: January 11, 2019

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SUPERIOR COURT OF JUSTICE

B E T W E E N:

MARTHA TAYLOR, JASON RASEVYCH, CALVIN TAYLOR, GEORGETTE O'NABIGON, MARIANNE ECHUM, CINDY WESLEY and THEODORE SCOLLIE in their capacity as Trustees of the GINOOGAMING FIRST NATION TIMBER CLAIM SETTLEMENT TRUST

Applicants

- and -

GINOOGAMING FIRST NATION

Respondents

DECISION ON APPLICATION

Nieckarz J.

Released: January 11, 2019

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