

Federal Court



Cour fédérale

Date: 20240405

Docket: T-1929-19

Citation: 2024 FC 532

Vancouver, British Columbia, April 5, 2024

PRESENT: Case Management Judge Kathleen Ring

BETWEEN:

**MARGUERITE MARY (MARGARET) BUCK, DOROTHY ANNE SAVARD,
SYLVIA M. MCGILLIS, FRANCES JUNE MCGILLIS, FLORENCE JOYCE
L'HIRONDELLE, AND MARILYN MCGILLIS**

Plaintiffs

and

**ATTORNEY GENERAL OF CANADA
AND ENOCH CREE NATION**

Defendants

ORDER AND REASONS

I. Overview

[1] This motion is brought on behalf of the Defendant, the Attorney General of Canada (the “Defendant Canada” or “Canada”), for an Order requiring each of the Plaintiffs, other than Sylvia M. McGillis (the “Plaintiff McGillis”), to serve an affidavit of documents deposited by themselves, or a person appointed by the Court under Rule 115 of the *Federal Courts Rules* (“Rules”), within 45 days from the date of the Order.

[2] This is one of three motions heard by the Court at a special sitting held by videoconference on March 4, 2024. The remaining two motions remain under reserve and will be addressed in a separate ruling.

[3] On this motion, the Defendant Canada submits that the Plaintiffs, other than the Plaintiff McGillis, have failed to serve an affidavit of documents in compliance with the *Rules* and the clear requirements of an Order dated October 5, 2023. Canada says that the initial Affidavit of Documents served on behalf of all of the Plaintiffs was deficient as the deponent, Deborah Hardy, is neither a Plaintiff nor a person appointed by the Court to represent any Plaintiff. Canada contends that the subsequent Affidavit of Documents sworn by the Plaintiff McGillis only satisfies that Plaintiff's obligation to provide an affidavit of documents. It is deficient insofar as it purports to be made on behalf of the other five Plaintiffs.

[4] Canada seeks an Order that each Plaintiff serve a new affidavit that is "deposed by themselves, or a person appointed by the Court under Rule 115". Canada says that the question of the proper deponent arises from the fact that the Plaintiffs have unilaterally named certain litigation guardians on behalf of several Plaintiffs on the style of cause on several Court documents without leave of the Court.

[5] The Plaintiffs oppose the motion. They say that they are pursuing a joint claim, and that producing five additional affidavits of documents for the remaining Plaintiffs, identical to the one provided by the Plaintiff McGillis, would not advance the litigation in any meaningful way and constitutes an unnecessary procedural step contrary to the purpose of the *Rules*. If further affidavits of documents are required, they submit that several Plaintiffs will require their designated

representatives to make their affidavits of documents on their behalf, as two of the Plaintiffs have failing mental health and one Plaintiff has died.

[6] At the hearing of the motion, the Court was advised that the Defendant, Enoch Cree Nation concurs with Canada's position on the motion.

[7] There are two main issues on this motion:

- a) Is each Plaintiff required to serve an affidavits of documents on the Defendant pursuant to the *Rules* and a prior Court Order?
- b) If so, what is the appropriate remedy where one Plaintiff is now deceased and two Plaintiffs are alleged to be under a legal disability?

[8] For the reasons that follow, the Defendant Canada's motion to compel service of individual affidavits of documents from each of the Plaintiffs, other than the Plaintiff McGillis, is granted. The Plaintiffs shall, as a preliminary matter, take any necessary steps to regularize the representation of three of the Plaintiffs under Rules 115 to Rule 118, in accordance with the terms of this Order.

II. The Plaintiffs' Affidavits of Documents are Deficient

[9] On May 17, 2023, counsel for the Plaintiffs served the Defendant Canada with an Affidavit of Documents of Deborah Hardy sworn on May 16, 2023 (the "Hardy Affidavit #1"). Ms. Hardy states that she is the daughter of the Plaintiff, Florence Joyce L'Hirondelle, and the niece of all the other remaining Plaintiffs. Hardy Affidavit #1 purports to be an affidavit of documents on behalf

of all six Plaintiffs, and Ms. Hardy attests that she has been authorized by the Plaintiffs to make the Affidavit.

[10] Additionally, the style of cause on Hardy Affidavit #1 was unilaterally amended by the Plaintiffs to add litigation guardians for three of the Plaintiffs (amendments underlined):

MARGUERITE MARY (MARGARET) BUCK BY HER LITIGATION GUARDIAN, ROGER JOHN BUCK, DOROTHY ANNE SAVARD BY HER LITIGATION GUARDIAN CHERYL FRANCES HANKINSON, SYLVIA M. MCGILLIS, FRANCES JUNE MCGILLIS, FLORENCE JOYCE L'HIRONDELLE BY HER LITIGATION GUARDIANS DEBORAH J. HARDY AND ALDON B. L'HIRONDELLE, AND MARILYN MCGILLIS

[11] For the reasons discussed below, the Plaintiffs cannot unilaterally appoint litigation guardians in this proceeding. Nor can they unilaterally amend the style of cause. Only the Court, by Order, can appoint a litigation guardian and amend the style of cause.

[12] On September 25, 2023, the Plaintiffs and the Defendants submitted separate letters to the Court setting out their proposed timetables for completion of next steps in this case managed proceeding. The Defendants' proposed timetable contemplated that the "plaintiffs each provide affidavits of documents in compliance with the Rules, including rules 224(1) and 115" by October 31, 2023. The Plaintiffs' proposed timetable was silent on the issue of any further affidavits of documents from themselves.

[13] On October 5, 2023, Justice Lafrenière made an Order (the "Scheduling Order") that states:

1. The Plaintiffs shall each provide affidavits of documents in compliance with the *Federal Courts Rules*, including Rules 224(1) and 115(1), no later than October 31, 2023.

[Emphasis added]

[14] The Plaintiffs did not appeal the Scheduling Order. Nor did they bring a motion to appoint any litigation guardians under Rule 115. Instead, they served the Defendants with the Affidavit of Documents sworn by the Plaintiff McGillis (the “McGillis Affidavit”) on October 30, 2023. The McGillis Affidavit purports to be made on behalf of all six Plaintiffs, and the Plaintiff McGillis attests that she has been authorized by the other Plaintiffs to make the Affidavit on their behalf.

[15] On November 30, 2023, the Defendant Canada brought this motion to compel each of the Plaintiffs, except the Plaintiff McGillis, to serve an affidavit of documents.

[16] Rule 223(1) governs who is required to serve an affidavit of documents, and Rule 224 specifies who must be the deponent of an affidavit of documents. These *Rules* read as follows:

223 (1) Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.

223 (1) Chaque partie signifie un affidavit de documents aux autres parties dans les 30 jours suivant la clôture des actes de procédure.

224 (1) The deponent of an affidavit of documents shall be

224 (1) L’auteur de l’affidavit de documents est

(a) where the party is an individual who is not under a legal disability, the party;

(a) la partie, s’il s’agit d’un particulier qui a la capacité d’ester en justice;

(b) where the party is an individual under a legal disability, a person appointed under rule 115;

(b) la personne nommée en vertu de la règle 115, si la partie est un particulier qui n’a pas la capacité d’ester en justice;

[Emphasis added]

[Notre soulignement.]

[17] The Plaintiffs advance a novel argument that in the context of their claim, which they describe as a “single joint claim” involving identical factual and legal issues for all of them, the term “party” in Rules 223(1) and 224(1) should be interpreted to mean the six Plaintiffs acting jointly as one “party”. As such, the Plaintiffs were entitled to serve one affidavit of documents on behalf of all six Plaintiffs.

[18] I disagree. Rule 223(1) means what it says. It requires "every party" to serve an affidavit of documents on every other party to the action. The term “party” is expressly defined in Rule 2 to mean, in respect of an action, “a plaintiff, defendant or third party” [Emphasis added].

[19] In a case involving multiple plaintiffs, as in this case, Rule 223(1) requires every plaintiff to serve a separate affidavit of documents on every other party to the action. This requirement stands unless the Court has made an order under Rule 55, Rule 385 or otherwise dispensing with compliance with Rule 223(1), or all parties have mutually agreed upon an alternate form of affidavit of documents (as they are served but not filed). In this case, there is no Court Order or agreement between the parties dispensing with compliance with any of the requirements of Rule 223.

[20] As regards the proper deponent of an affidavit of documents, where “the party” is an individual, subrules 224(1)(a) and (b) require that the deponent must be “the party”, or a person appointed by the Court under Rule 115 if the party is under a legal disability. Thus far, no Order has been made by this Court appointing a person to represent any Plaintiff under Rule 115.

[21] Neither of the two Affidavits of Documents that have been served on behalf of all of the Plaintiffs are compliant with Rule 223 or Rule 224. The Hardy Affidavit is deficient for two

reasons. First, it is a single affidavit of documents tendered on behalf of six separate Plaintiffs. Second, the deponent is not a Plaintiff, nor has she been appointed by the Court to represent any of the Plaintiffs pursuant to Rule 115.

[22] The McGillis Affidavit is sufficient to the extent that it is being tendered as the Affidavit of Documents on behalf of the Plaintiff McGillis. However, it violates Rules 223 and 224 insofar as it purports to be the Affidavit of Documents on behalf of all of the Plaintiffs. Ms. McGillis has not been appointed by this Court under Rule 115 to represent any of the other Plaintiffs. As a result, she was not a proper deponent of an affidavit of documents on behalf of any of the other Plaintiffs.

[23] Even if the Plaintiffs were correct in their interpretation of Rules 223 and 224, and those provisions do not compel each of them to execute and serve a separate affidavit of documents, it would not change the outcome of this motion. Upon issuance of the Scheduling Order by Justice Lafrenière on October 5, 2023, they became legally bound to adhere to the terms of the Court's Order requiring that "[t]he Plaintiffs shall each provide affidavits of documents in compliance with the Federal Courts Rules, including Rules 224(1) and 115(1)".

[24] If the Plaintiffs disagreed with the Defendants' September 25th proposal to the Court that each Plaintiff provide an affidavit of documents in compliance with the *Rules*, the Plaintiffs had the opportunity to voice their objections to the Court prior to the issuance of the Scheduling Order on October 5, 2023. No objection was taken. The Plaintiffs could have also appealed the Scheduling Order. No appeal was brought. At this stage, the Plaintiffs are legally obliged to comply with the Scheduling Order. Compliance with case management orders and directions is not optional: *Odyssey Television Network Inc. v. Ellas TV Broadcasting Inc.*, 2018 FC 337 at para 74.

[25] Moreover, even if the Court were to entertain the Plaintiffs' objections despite a legally binding Order, I am not persuaded that the Plaintiffs have "identical factual claims", and therefore the content of their respective affidavits of documents would necessarily be the same. The facts alleged in the Second Amended Statement of Claim filed November 18, 2022 indicate that each Plaintiff holds one or more distinct Certificates of Possession, and they did not all receive their interest in the subject property on the same date. It follows that each Plaintiff has (or initially had) at least a few unique documents in their possession, power or control.

[26] For the above reasons, I conclude that the Hardy Affidavit and the McGillis Affidavit are both deficient. The Plaintiffs, other than Sylvia M. McGillis, have not complied with their legal obligations under the *Rules* and pursuant to the Scheduling Order to each serve an affidavit of documents on the Defendants.

III. What is the Appropriate Remedy?

[27] The Defendant Canada seeks an Order, pursuant to Rule 227 of the *Rules*, requiring each of the Plaintiffs, other than the Plaintiff McGillis, to serve an affidavit of documents deposed by themselves, or a person appointed by the Court under Rule 115 of the *Rules*, within 45 days from the date of the Order.

[28] I agree with Canada that each of the Plaintiffs are required to serve an affidavit of documents. However, the proper deponent and the timing of service of such affidavits of documents by three of the five Plaintiffs may be complicated in this case by several factors set out in the second Affidavit of Deborah Hardy sworn January 11, 2024 (Hardy Affidavit #2) in response to Canada's motion. Hardy Affidavit #2 reads in part:

6. My auntie, the Plaintiff Mary Marguerite Buck passed away on December 29, 2021 and her estate is in the process of being settled. Her interest in the Certificate of Possession will be transferred to her children.
7. My mother, the Plaintiff, Florence Joyce L'Hirondelle suffers from failing mental health and is represented by her litigation guardians, myself and my brother Aldon B. L'Hirondelle.
8. The Plaintiff Dorothy Anne Savard suffers from failing mental health and is represented by her litigation guardian, her daughter, Cheryl Frances Hankinson.

[29] As regards these three Plaintiffs, and for the reasons discussed below, the Court will craft this Order in a manner that enables them to take the necessary steps to regularize their representation before this Court prior to service of their individual affidavits of documents.

[30] As for the remaining two Plaintiffs, Frances June McGillis and Marilyn McGillis, they shall each be required to serve an affidavit of documents deposed by themselves within 45 days of the date of this Order.

A. Devolution of Interest of Marguerite Mary (Margaret) Buck

[31] The evidence on this motion is that Plaintiff, Marguerite Mary (Margaret) Buck (the “Plaintiff Buck”), passed away on December 29, 2021, and her “estate is in the process of being settled”. It is not clear why the Court is only being apprised of these facts now.

[32] Rule 116 sets out the general rule that the death of the Plaintiff Buck does not, in itself, terminate the proceeding insofar as it relates to her: *Daniels v. Canada*, 2005 FC 699 at para 13.

[33] The continuation of a proceeding following the death of a party is governed by Rules 117 and 118 of the *Rules*. These provisions stipulate the procedure that was to be followed upon the

devolution of the deceased's interest in this proceeding to her Estate. Specifically, the executor or administrator of the Estate of the Plaintiff Buck (the "Estate Representative") was required, within 30 days, to serve and file a notice and affidavit setting out the basis for the devolution of the interest, failing which another party to the proceeding could move for default judgment or dismissal. Where the notice and affidavit is duly served and filed, a party to the proceeding may object to the Estate or the Estate Representative continuing as a party, and require that entity to move for an order substituting itself for the original party.

[34] Rule 117 does not provide authority for an assignment or devolution of interest in a proceeding. It only addresses the necessary procedural requirements. If the devolution of interest is challenged, the Court must look to the common law or relevant statutory provisions in order to determine if it is permissible: *Tacan v. Canada* (2003), 237 F.T.R. 304.

[35] The purpose of Rules 117 and 118 is to ensure that parties before the Court know who their opponents are and that they are informed of any purported changes in that regard so that they can raise appropriate objections: *Bauer Hockey Ltd. v. Sport Masko Inc. (CCM Hockey)*, 2018 FC 832 at para 14.

[36] In this case, although the Plaintiff Buck died over two years ago, there is no evidence before the Court as to whether and when letters probate or letters of administration were granted, thereby bringing the Estate Representative within the devolution of proceedings rules and triggering the 30-day time limit imposed by Rule 118: *Daniels v. Canada*, 2005 FC 699 at paras 3, 14-15.

[37] Moreover, the identity of the Estate Representative is not apparent from the evidence before the Court. While the Plaintiffs unilaterally amended the style of cause on Hardy Affidavit

#1 to state that “Roger John Buck” is the litigation guardian of the Plaintiff Buck, there is no evidence before the Court to substantiate that he is the duly appointed representative of the Estate of the Plaintiff Buck.

[38] What is clear is that the purported representative of the Estate of the Plaintiff Buck has not served and filed the prescribed notice and affidavit under Rule 117. It may well be that the time for filing a notice and affidavit under Rules 117 and 118 has expired, given Ms. Hardy’s evidence that the “estate is in the process of being settled”. If so, the case law states that non-compliance with these provisions is not automatically fatal to the proceeding as it relates to the Plaintiff Buck. Instead, it constitutes an irregularity that may be addressed by the Court, in the exercise of its discretion under Rule 118 or Rules 56 to 60 of the *Rules: Sport Maska Inc. v. Bauer Hockey Ltd.*, 2019 FCA 204 at paras 22 to 38.

[39] In my view, the most expeditious way to address this matter is to set a schedule for completion of the requisite steps under Rules 117 and 118 so the proper deponent of the affidavit of documents on behalf of the Estate of the Plaintiff Buck can be identified. The timetable will include, among other matters, a 30-day deadline for the representative of the Estate of the Plaintiff Buck to serve and file the required notice and affidavit, without prejudice to any objections which may be raised by the Defendants regarding the timeliness of service of these documents.

B. Appointment of Representatives for Dorothy Anne Savard and Florence Joyce L’Hirondelle

[40] Hardy Affidavit #2 alleges that two of the Plaintiffs, Florence Joyce L’Hirondelle (the “Plaintiff L’Hirondelle”) and Dorothy Anne Savard (the “Plaintiff Savard”) suffer “from failing mental health”. According to Ms. Hardy, the Plaintiff L’Hirondelle is represented by her litigation

guardian, Cheryl Frances Hankinson (daughter). The Plaintiff Savard is represented by her litigation guardians, Deborah Hardy (daughter) and Aldon B. L'Hirondelle (son).

[41] Rule 115(1)(b) specifies that the Court may appoint one or more persons to represent a person under a legal disability by whom a proceeding is brought.

[42] If the purported litigation guardians of the Plaintiff L'Hirondelle and/or the Plaintiff Savard take the position that these Plaintiffs are "under a legal disability", it is incumbent upon them to bring a motion pursuant to Rule 115 of the *Rules* for an Order appointing them as the respective representatives of these two Plaintiffs. The Plaintiffs cannot unilaterally appoint litigation guardians to represent the Plaintiff L'Hirondelle and the Plaintiff Savard in this proceeding.

[43] If the Plaintiff L'Hirondelle and/or the Plaintiff Savard choose not to bring a motion under Rule 115(1), they must each serve a separate affidavit of documents within 45 days from the date of this Order.

IV. Conclusion

[44] For the above reasons, the Court concludes that each of the Plaintiffs, other than Sylvie M. McGillis, shall serve a separate affidavit of documents in accordance with the terms of this Order.

[45] The Defendant Canada seeks costs of the motion payable forthwith in any event of the case, in the amount of \$2,500.00. As Canada was successful on this motion, I find that it is entitled to its costs of the motion. Further, I agree with Canada that elevated costs are warranted and should be payable forthwith. Canada was required to bring this motion because of the Plaintiffs' failure to comply with the *Rules* and the Scheduling Order. In my view, the Plaintiffs should not have opposed the motion, given the Scheduling Order which explicitly required each Plaintiff to serve

an affidavit of documents. As for the issues raised in Hardy Affidavit #2, there are provisions laid out in Rules 115 to 118 governing the death of a party or if a party is under a legal disability. It was the responsibility of the Plaintiffs and their counsel to familiarize themselves with these *Rules* and to abide by them, instead of unilaterally opting to proceed in a different manner without notice or permission of the Court.

[46] Costs are hereby fixed in the amount of \$1,800.00, inclusive of disbursements and taxes, and are payable forthwith from the Plaintiffs to the Defendant Canada.

ORDER in T-1929-19

THIS COURT'S ORDERS that:

1. Each of the Plaintiffs, other than Sylvie M. McGillis, shall serve a separate affidavit of documents in accordance with the terms of this Order.
2. The Plaintiffs, Frances June McGillis and Marilyn McGillis, shall each serve an affidavit of documents deposited by themselves within 45 days of the date of this Order.
3. The executor or administrator (the "Estate Representative") of the Estate of the Plaintiff, Marguerite Mary (Margaret) Buck shall serve and file a notice and affidavit pursuant to Rule 117(1) of the *Rules* within 30 days of the date of this Order.
4. Paragraph 3 of this Order is made without prejudice to any objections which may be raised by the Defendants regarding the timeliness of service of the notice and affidavit served pursuant to Rule 117.
5. If a party to the proceeding objects to the continuance of the proceeding by the Estate of the Plaintiff Buck, as represented by the Estate Representative, the party shall serve and file a notice of objection, pursuant to Rule 117(2) of the *Rules*, within 15 days after service of the notice and affidavit described in paragraph 3 of this Order.
6. If a notice of objection is served and filed under paragraph 5 of this Order, the Estate Representative shall, within 15 days after service of the notice of objection, bring a motion on behalf of the Estate of the Plaintiff Buck for an Order that the Estate be substituted for the Plaintiff Buck, pursuant to Rule 117(2) of the *Rules*.

7. If no party serves and files a notice of objection under paragraph 5 of this Order, the Plaintiffs shall, within 20 days after service of the notice and affidavit described in paragraph 3 of this Order, submit an informal request for an Order to amend the style of cause to substitute the Estate of the Plaintiff Buck or the Estate Representative (Rule 112) for the deceased Plaintiff Buck, pursuant to paragraph 41 of the Court's *Amended General Practice Guidelines* dated December 20, 2023.
8. The Estate Representative shall serve an affidavit of documents on the Estate of the Plaintiff Buck, deposed by him or herself, within 20 days of the date of any Order of the Court made under paragraph 6 or 7 of this Order, as the case may be.
9. If the Estate Representative of the Estate of the Plaintiff Buck has not served the notice and affidavit within the time period prescribed by paragraph 3 of this Order, or obtained an Order under paragraphs 6 or 7 of this Order, any other party to the proceeding is at liberty to bring a motion to have the proceeding dismissed as against the Plaintiff Buck, pursuant to Rule 118 of the *Rules*.
10. If the purported litigation guardians of the Plaintiff L'Hirondelle and/or the Plaintiff Savard seek an Order of this Court appointing them as representatives of these Plaintiffs, they shall bring a motion under Rule 115 of the *Rules* within 30 days from the date of this Order.
11. If a motion is brought under Rule 115 and the Court grants the motion, the Court-appointed representative of the Plaintiff L'Hirondelle and the Court-appointed representative of the Plaintiff Savard shall each depose an affidavit of documents on

behalf of the Plaintiff they represent and serve it within 20 days of the date of the Order made under Rule 115.

12. If a motion is brought under Rule 115 but it is dismissed by the Court, the Plaintiff L'Hirondelle and the Plaintiff Savard shall each serve an affidavit of documents deposited by themselves within 20 days of the date of the Order made under Rule 115.
13. If the Plaintiff L'Hirondelle and the Plaintiff Savard choose not to bring a motion under Rule 115(1), they shall each serve an affidavit of documents deposited by themselves within 45 days of the date of this Order.
14. Costs of the motion, hereby fixed in the amount of \$1,800.00, inclusive of disbursements and taxes, shall be paid forthwith by the Plaintiffs to the Defendant Canada.

"Kathleen Ring"

Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1929-19

STYLE OF CAUSE: MARGUERITE MARY (MARGARET) BUCK,
DOROTHY ANNE SAVARD, SYLVIA M. MCGILLIS,
FRANCES JUNE MCGILLIS, FLORENCE JOYCE
L'HIRONDELLE, AND MARILYN MCGILLIS v
ATTORNEY GENERAL OF CANADA AND ENOCH
CREE NATION

HELD BY VIDEOCONFERENCE

DATE OF HEARING: MARCH 4, 2024

JUDGMENT AND REASONS: RING CMJ

DATED: APRIL 5, 2024

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