Citation: 5185603 Manitoba Ltd et al v Government of Manitoba et al, 2023 MBCA 47
Date: 20230517
Docket: AI22-30-09754

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella

B E T W E E N :

5185603 MANITOBA LTD., PETER GINAKES and KEN CRANWILL	)	***D. G. Hill*** *and* ***R. Nerbas*** *for the Appellants*
(Plaintiffs) Appellants	)	
- and -	)	***J. R. Koch*** *for the Respondents*
GOVERNMENT OF MANITOBA, BRIAN PALLISTER, PREMIER OF MANITOBA, SCOTT FIELDING, MINISTER OF FINANCE and SCOTT SINCLAIR, DEPUTY MINISTER OF CROWN SERVICES	)	*Appeal heard:* ***October 24, 2022***
(Defendants) Respondents	)	*Judgment delivered:* ***May 17, 2023***

On appeal from 2022 MBQB 36

STEEL and MONNIN JJA

[1] The plaintiffs appeal from a decision of a Court of King's Bench judge dismissing their action against the defendants by reason of the provisions of targeted legislation which purported to terminate a contract and dismiss their action. At issue is the proper interpretation to be given to the provisions of that legislation.

[2] The plaintiff, 5185603 Manitoba Ltd. (518 Man.), is a landlord and owns the land and building at 800 Adele Avenue in Winnipeg (the premises).

The plaintiff, Peter Ginakes (Ginakes), is a director and shareholder of 518 Man. The plaintiff, Ken Cranwill (Cranwill), is also a shareholder of that company.

[3] 518 Man. entered into a commercial lease agreement (the lease) for the premises with the First Nations of Southern Manitoba Child and Family Services Authority (the tenant) in October of 2008. The defendant, the Government of Manitoba (the Government), was involved in the negotiation of the lease. 518 Man. made a number of leasehold improvements to the premises in the amount of $1.5 million to facilitate the use of the property for the specific purpose of a child care facility for at-risk children. The tenant sublet the premises to an agency (the subtenant) that provided services directly to the children for whom the tenant was responsible.

[4] The lease continued in place for over 10 years.

[5] In February 2019, after a change of government, which was then led by one of the defendants, Premier Brian Pallister (Premier Pallister), with the defendant, Scott Fielding, as minister of finance (Minister Fielding), the Government sought to bring the lease to an end. The then deputy minister of Crown Services, Scott Sinclair (Deputy Minister Sinclair), met with the plaintiffs on February 26, 2019 and presented them with a written agreement to terminate the lease which was offered to them to sign, failing which the Government would enact legislation to that effect without compensation. The plaintiffs declined.

[6] The plaintiffs alleged that, at approximately the same time, the Government directed the subtenant to vacate the premises without notice to

them. They also alleged that the sudden departure by the subtenant caused damage to the premises in the amount of $230,000.

[7] Shortly after, in July of 2019, the plaintiffs filed a statement of claim advancing three causes of action, namely: (1) misfeasance in public office; (2) interference with economic relations; and (3) a claim for defamation arising from statements made by Premier Pallister, Minister Fielding and the Government.

[8] In August of 2019, the defendants moved to strike the statement of claim as failing to disclose a reasonable cause of action and being an abuse of process as no legislation had been passed and the lease was still in force and being adhered to—at least as to payment. The defendants also took the position that the statements referred to by the plaintiffs had no defamatory meaning.

[9] In his decision, the master, with one exception, struck the plaintiffs' statement of claim for misfeasance in public office and intentional interference with economic relations. His decision was based primarily on the grounds that no legislation had been enacted and, therefore, damages had not occurred. He declined to strike the claim for defamation save for one statement which was subject to absolute privilege. He allowed the claim for the damage to the premises as a result of the precipitated departure to proceed.

[10] The master's decision was appealed to the then Court of Queen's Bench and the matter proceeded as a fresh hearing. Before the appeal was heard, the Government enacted legislation known as Bill 2, *The Budget Implementation and Tax Statutes Amendment Act, 2020*, 3rd Sess, 42nd Leg, Manitoba, 2020 (assented to 6 November 2020), SM 2020, c 21 (the *BITSA*

Act) effective November 6, 2020 (see the appendix to these reasons for a full text of section 230).

[11] Relying upon the *BITSA Act* and, in particular, section 230(9), which provided for the dismissal of the plaintiffs' action, the Government moved for an order confirming the dismissal of the plaintiffs' action effective November 6, 2020.

[12] Pursuant to section 230(3), the lease referred to in paragraph 3 herein was terminated. Section 230(6) purported to bar actions arising from that termination. Finally, section 230(9) stipulated that the action already commenced, namely, Court of Queen's Bench File No. CI19-01-21887, was dismissed.

[13] The motion judge allowed the plaintiffs' appeal with respect to the allegations of misfeasance in public office and interference with economic relations on the basis that the master had erred in finding that there were no damages which supported the claims. In his view, the plaintiffs had already suffered damages as a result of the precipitous departure by the subtenant at the Government's direction, and the "requisite element of damage [was] therefore properly [pled] in the plaintiffs' statement of claim" (at para 28). He also agreed with the master's decision not to strike the plaintiffs' claim in defamation, finding that the pleadings satisfied the requirements and setting out the statements that could be viewed as defamatory. However, on the application of the *BITSA Act*, the motion judge was of the view that the Government had unfettered authority to pass legislation affecting existing rights and that section 230(9) did so on a proper reading of that section.

[14] The motion judge rejected the plaintiffs' argument that, since the events giving rise to their causes of action had occurred prior to the enactment of the legislation, their action could not be directly or indirectly based on or related to the application of section 230. According to the plaintiffs' argument, it was not an action contemplated by section 230(6) and, therefore, could not be the subject of dismissal under section 230(9) (see para 47). In the motion judge's view, a plain reading of the words used in section 230(6) led him to conclude that the plaintiffs' action did fall within the category of actions referred to in section 230(6) and was directly or indirectly based on or related to the application of section 230 (see para 49).

[15] On appeal to this Court, the plaintiffs do not raise the validity of the legislation but, rather, take the position, as they had before the motion judge, that the damages arising from the actions of the subtenant at the behest and direction of the Government and for which the Government is responsible, predate the passing of the legislation and, therefore, cannot be considered as included in the proceedings targeted by section 230(6). Secondly, they argue that the defamation action does not arise as a result of the cancellation of the lease and cannot be included in the dismissal of the action pursuant to section 230(9).

[16] The panel raised two issues which were not dealt with at trial but were not "new issues" as they dealt with matters of statutory interpretation and jurisdiction (*R v Mian*, 2014 SCC 54 at paras 29-35):

(a) Whether a proper interpretation of section 230(6), including its French version, would lead to the same conclusion that the motion judge reached?

(b) Whether the effect of seeking to dismiss pre-emptorily a matter which was in the hands of the courts could be considered an infringement of the judicial function?

[17] After a closer review and upon consideration of the relevant jurisprudence, we have reached the conclusion that the motion judge's decision must be set aside and sent back for a new hearing for the reasons set out below.

Statutory Interpretation of Section 230(6) of the *BITSA Act*

[18] The motion judge recognized that, while there was the ability for the Government "to enact legislation which [divested] a person of vested rights, including contractual rights and rights of action" (at para 34), it required "clear and explicit statutory language" (*Wells v Newfoundland*, [1999] 3 SCR 199 at para 41).

[19] The defendants' motion to dismiss the plaintiffs' claim was predicated on the wording of sections 230(6) and 230(9) of the *BITSA Act* which reads as follows:

Proceedings barred **230(6)** No action or other proceeding, including but not limited to any action or proceeding in contract, restitution, tort, misfeasance, bad faith or trust or for a breach of fiduciary duty, that is directly or indirectly based on or related to the application of this section may be brought or maintained against any person.	**Irrecevabilité de certaines instances** **230(6)** Sont irrecevables les instances — liées notamment à la rupture d'obligations en matière contractuelle, délictuelle, fiduciaire ou de restitution ou à une mauvaise exécution ou à un acte de mauvaise foi — qui ont pour objet ou fondement, direct ou indirect, l'application du présent article.

Proceedings dismissed **230(9)** Any action or other proceeding referred to in subsection (6) commenced before the day this section comes into force is deemed to have been dismissed, without costs, on the day this section comes into force, including, without limitation, Court of Queen's Bench File No. CI19-01-21887.	**Rejet d'instances** **230(9)** Les instances visées au paragraphe (6) qui sont introduites avant le jour de l'entrée en vigueur du présent article, y compris le dossier de la Cour du Banc de la Reine du Manitoba numéro CI19-01-21887, sont réputées avoir été rejetées, sans dépens, ce jour-là.

[20] The motion judge's interpretation of the meaning and extent of section 230(9) required him to interpret section 230(6) to establish whether the plaintiffs' action was an action referred to in that section given the plaintiffs' position that it was not. The motion judge gave a plain meaning to the words of the English version of section 230(6) but did not consider whether there was a different meaning which could be ascribed to the French version.

[21] Our statutes are, by virtue of section 23 of the *Manitoba Act, 1870*, SC 1870, c 3, constitutionally mandated to be bilingual in French and English (see also section 7 of *The Interpretation Act*, CCSM c I80). The law relating to bilingual interpretation of legislation was discussed in some detail by this Court in the case of *Friesen (Brian Neil) Dental Corp et al v Director of Companies Office (Man) et al*, 2011 MBCA 20 (at para 24):

> The two fundamental rules of interpretation applying to bilingual legislation are described in The Honourable Mr. Justice Michel Bastarache *et al.*, *The Law of Bilingual Interpretation* (Markham: LexisNexis Canada Inc., 2008) as follows (at p. 15):
>
> > The bilingual model is based upon two fundamental principles, which we will discuss in this section. The first principle is the

> Equal Authenticity Rule. According to this rule, both the English and French versions of a statute are equally authentic statements of legislative intent, and neither one is supreme or paramount over the other. The second principle is the Shared Meaning Rule. This rule provides, in short, that both versions of the statute are expressions of the same legislative intent and that courts interpreting statutes should, as far as possible, attempt to ascertain that intent through a determination of the shared or common meaning of the two versions.
>
> . . .

[22] In *R v SAC*, 2008 SCC 47, Deschamps J explained the "rules" (at paras 14-16):

> The interpretation of bilingual statutes begins with a search for the shared meaning of the English and French versions. This Court has on a number of occasions discussed the appropriate approach for determining the shared meaning of English and French legislative provisions: see, e.g., *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6; *Schreiber v. Canada (Attorney General)*, [2002] 3 S.C.R. 269, 2002 SCC 62. In those cases, the Court adopted a two-step approach.
>
> The first step is to determine whether there is discordance between the English and French versions of the provision and, if so, whether a shared meaning can be found. Where a provision may have different meanings, the court has to determine what kind of discrepancy is involved. There are three possibilities. First, the English and French versions may be irreconcilable. In such cases, it will be impossible to find a shared meaning and the ordinary rules of interpretation will accordingly apply: *Daoust*, at para. 27; P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327. Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous: *Daoust*, at para. 28; Côté, at p. 327. Third, one version may have a broader meaning than the other. According to LeBel J. in *Schreiber*, at para. 56, "where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning".

> At the second step, it must be determined whether the shared meaning is consistent with Parliament's intent: *Daoust*, at para. 30. In the penal context, courts must also ensure that any ambiguity is resolved in favour of the accused whose liberty is at stake (*Marcotte v. Deputy Attorney General for Canada*, [1976] 1 S.C.R. 108).

[23] What did not occur in the Court below was a comparison of the French and English versions of section 230(6) of the *BITSA Act* to ascertain whether or not the same meaning could be derived from both versions.

[24] The two versions refer to "the application of this section" or "l'application du présent article." In essence, the subject of this section, as denoted by the title (**800 ADELE AVENUE LEASE TERMINATION** and set out explicitly in section 230(3)), is the legislated termination of the lease. Therefore, when the English version of section 230(6) refers to actions "based on or related to", it refers to the legislated termination of the lease. The French version uses the words "qui ont pour objet ou fondement" and, again, refers to the termination of the lease.

[25] Whereas proceedings directly or indirectly based on or founded on the legislated termination of the lease are barred in both languages, only the English version bars proceedings directly or indirectly "related to" the legislated termination of the lease.

[26] In *Slattery (Trustee of) v Slattery*, [1993] 3 SCR 430, the words "in respect of", "in relation to", "relating to", "with reference to" and "in connection with" were held to be functionally equivalent and suggestive of a wide rather than narrow scope of connection between two related subject

matters (at p 445) (emphasis omitted). The same can be said regarding the words "related to" in section 230(6).

[27] Thus, it appears that the English version of section 230(6) of the *BITSA Act* captures a broader group of proceedings than the French version—proceedings directly or indirectly *related to* the legislated termination of the lease, as opposed to proceedings directly or indirectly *based on or founded on* the legislated termination of the lease.

[28] Given that there is a discrepancy between the French and English versions, it is incumbent upon a court performing a proper interpretation to apply the narrower version of the two meanings so long as this narrower version appears to be consistent with the legislative intent. The French version, at its very broadest, only bars proceedings that are directly or indirectly *based on or founded on the legislated termination of the lease*. It is difficult to conclude that the defamatory action could be directly or indirectly based on the legislated termination of the lease since the defamation action was filed over a year before the legislation terminating the lease was enacted.

[29] What needs to be asked is whether the plaintiffs' defamation action is directly or indirectly based on the legislated termination of the lease. When that question is asked, it is clear that the legislated lease termination was neither directly nor indirectly the basis, nor a foundation, for the plaintiffs' defamation action.

[30] As well, an interpretation which limits the taking away of property rights (including a chose in action) should be preferred.

[31] While section 230(8) provides that section 230(6) applies regardless of whether the cause of action arose before the coming into force of that section, that does not affect the interpretation to be placed on the words based on or founded on. If the cause of action is not based on or founded on the legislated termination, then timing is irrelevant.

[32] To reconcile the two versions of the legislation, the narrower shared meaning interpretation needs to be adopted in accordance with *SAC*. Section 230(6) should only be read to bar proceedings directly or indirectly *based on* the legislated lease termination.

[33] This would also be consistent with what appears to have been the intention behind the statute. During the second reading of section 230 of the *BITSA Act*, Minister Fielding, when introducing the legislation, indicated that it was meant to "terminate the lease agreement between [518 Man.] and [the tenant]" ("Bill 2, The Budget Implementation and Tax Statutes Amendment Act, 2020", 2nd reading, Manitoba, Legislative Assembly, *Debates and Proceedings*, 42-3, vol 75, No 6 (15 October 2020) at 201-2 (Hon Myrna Driedger)). There was nothing ever said in the Legislature to suggest that the intent of the legislation was to cover other actions that were not directly or indirectly related to the lease cancellation, such as the defamation action.

[34] This interpretation also coincides with another applicable statutory interpretation principle, namely, that the presumption that legislation designed to curtail the rights of citizens is to be strictly construed (see Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at ch 15, section 15.04 at 490). As with all presumptions, this one is rebuttable by

words clearly indicating the Legislature's intention to interfere (see p 497) but, where rights of action are purported to be circumscribed by legislation, the terms of the legislation doing so attract "a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated" (*Berardinelli v Ontario Housing Corpn*, [1979] 1 SCR 275 at 280).

[35] Consistent with these principles of statutory interpretation, section 230(6) can properly be narrowly interpreted to mean that no action or other proceeding may be brought or maintained that is directly or indirectly based on the legislated lease termination. As discussed above, since the defamation action was filed well before the legislation terminating the lease was enacted and was based upon comments made prior to the legislation even being introduced into the Legislature, it becomes clear that the defamation action was not, directly or indirectly, *based on* the legislated lease termination.

[36] In our view, the plaintiffs' cause of action in defamation was not covered by the terms of section 230(6) of the *BITSA Act*. The question remains whether it was open to the motion judge to dismiss it on the basis of section 230(9).

[37] While a discussion of how section 230(6) should be interpreted in a bilingual context was first raised by the panel, it is not to be treated as a new issue on appeal. Bilingual interpretation in Manitoba is a constitutional requirement. Appellate courts are mandated to intervene to ensure a proper interpretation according to the *Manitoba Act*. It is appropriate for us to do so at this juncture.

Is Section 230(9) of the *BITSA Act* an Infringement on Judicial Independence and Section 96 of the *Constitution Act, 1867*?

[38] As we have indicated, the motion judge erred in his interpretation of section 230(6) of the *BITSA Act*. However, that is of little moment if his interpretation of section 230(9) of that *Act* is correct. The motion judge was of the view that the Government had unfettered authority to pass legislation affecting existing rights. Section 230(9) deemed the action "to have been dismissed, without costs, . . . including, without limitation, Court of Queen's Bench File No. CI19-01-21887." This file number corresponds to the plaintiffs' action. So, even if the plaintiffs' cause of action in defamation is not covered by the terms of section 230(6) of the *BITSA Act*, the specific action itself would be dismissed by reason of the application of section 230(9).

[39] It is well understood that the principle of parliamentary supremacy, as applied in Canada, means that, "[w]ithin the boundaries of the Constitution, legislatures can set the law as they see fit" (*British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 52). The Supreme Court of Canada has affirmed the principle of parliamentary supremacy on many occasions, including situations where the Legislature alters the rights or obligations of litigants in both pending or concluded court disputes. The Supreme Court has indicated that a legislature may validly pass a law which extinguishes its obligations with an individual if it is clear in its language (see *Wells* at paras 41-42; and *Manitoba Metis Federation Inc v Brian Pallister et al*, 2021 MBCA 47 at para 102).

[40] Thus, there are cases in which a court decision was actually made and, while subsequent appellate or related proceedings were pending,

retroactive legislation was enacted which affected the rights of litigants and was then applied in the subsequent proceedings, resulting in a reversal or disregard of the original court decision. For example, in *Proctor & Gamble Inc v Ontario (Minister of Finance)*, 2010 ONCA 149, leave to appeal to SCC refused, 33686 (12 August 2010), after a judge provided an interpretation of the term "returnable containers", which was favourable to the appellant, retroactive legislation amended the definition of that term in contradiction to the declared interpretation, thereby leading the Court to apply the new definition in the appellant's pending tax assessment appeals which effectively extinguished the basis of its appeal (see also *Barbour v The University of British Columbia*, 2010 BCCA 63, leave to appeal to SCC refused, 33642 (24 June 2010)). As was stated by the British Columbia Court of Appeal in *AAAM v Director of Adoption*, 2017 BCCA 409, "[i]n our democratic society the courts are obligated to follow and apply the law unless it is successfully challenged as being unconstitutional" (at para 8).

[41] There is also appellate jurisprudence which has upheld legislation which effectively nullified or extinguished *pending* actions—those in which no court decision had yet been made. An example of legislation which effectively nullified a pending action is *Authorson v Canada (Attorney General)*, 2003 SCC 39, a case in which a group of disabled veterans filed an action against the federal government for the pre-1990 interest undisputedly owed on their pension funds which the government had been holding in trust. The federal government thereafter enacted section 5.1(4) of the *Department of Veterans Affairs Act*, RSC 1985, c V-1, which provided that "[n]o claim shall be made" with respect to this pre-1990 interest (see also *Air Canada v British Columbia*, [1989] 1 SCR 1161).

[42] There are also cases where the Court upheld retroactive legislation which declared any cause of action relating to the new enactment to be extinguished (see, for example, *Bacon v Saskatchewan Crop Insurance Corp*, 1999 CarswellSask 308 (CA), leave to appeal to SCC refused, 27469 (1 June 2000); and *Alberta v Kingsway General Insurance Company*, 2005 ABQB 662).

[43] There have been some cases in which a legislated stay of a specific action was upheld as valid by the courts. In *Abitibi P & P Co v Montreal Trust Co*, [1943] 4 DLR 1 (PC (Eng)), provincial moratorium legislation specifically stayed Montreal Trust's mortgage action and pending notice of sale motion against Abitibi's assets so that a provincial Royal Commission plan regarding the Abitibi company could be considered. Atkin LJ rejected the Court of Appeal's determination that "[t]he Legislature is not competent to deny access to His Majesty's Courts in an individual case" (at p 8).

[44] Of course, stays are not the same as dismissals and the fact that the legislation in question in the *Abitibi* case simply imposed a stay, as opposed to a deemed dismissal, is a distinguishing feature. In this regard, Atkin LJ did note that the legislation involved "the <u>temporary</u> interference with [the action] by the Legislature" (at p 9) (emphasis added), and pointed out that the preamble to the legislation specifically imposed the stay in order to provide all parties with an opportunity to consider the Royal Commission plan, and that the legislation was expressed to be temporary and only remaining in force until December 31, 1942 (later extended to June 1943) (see pp 9-10).

[45] Thus, although the case law clearly establishes that Canadian lawmakers may enact legislation that retroactively alters the civil rights or

obligations of litigants in ongoing court disputes, we have been unable to find any court decisions commenting upon the constitutional validity of Canadian legislation which has deemed a court proceeding dismissed other than the recent Manitoba decision, *Flette et al v The Government of Manitoba et al*, 2022 MBQB 104.

[46] To be clear, other Canadian legislation exists which, like the *BITSA Act*, purports to deem court proceedings dismissed (see, for example, *Greenpeace Canada v Ontario (Minister of the Environment, Conservation and Parks)*, 2019 ONSC 5629; and *Francis v Ontario*, 2021 ONCA 197) but, other than *Flette*, there is no Canadian case law which has considered whether the legislated *dismissal* of court proceedings interferes with section 96 of the *Constitution Act, 1867* or violates judicial independence. Furthermore, there appears to be no other Canadian legislation, other than the *BITSA Act*, which dismisses a specific court file number.

[47] With respect to *Flette*, this decision related to another clause in the *BITSA Act*—section 231—which validated the provincial government's handling of the federally provided special child care allowances and similarly barred court proceedings, causes of action and remedies that implicated Manitoba's handling of those allowances and which also applied retrospectively to proceedings commenced or decided prior to section 231 being proclaimed. Section 231(13) stipulated further that any pending action or proceeding commenced before section 231 was proclaimed "[was] deemed to have been dismissed, . . . including . . . Court of Queen's Bench File No. CI18-01-14043 and File No. CI18-01-18438."

[48] In *Flette*, Edmond J agreed with Manitoba's contention that this legislation did not "interfere with the role of the superior courts established under s. 96 of the ***Constitution***, their core jurisdiction for resolving disputes, or access to s. 96 courts" (at para 138; see also para 144). In this regard, he dealt primarily with the access to the courts and the division of powers issues, explaining that "the moving parties [had] access to [that] court to challenge the constitutional validity of s. 231 of [the] ***BITSA*** [*Act*]" (at para 153), and concluding that "[t]he legislative branch [had] the jurisdiction to bar civil causes of action pursuant to its power under s. 92(13)" (*ibid*) (emphasis added). Edmond J ultimately found section 231 of the *BITSA Act* to be operationally incompatible with the federal legislation establishing the special child care allowances and to be contrary to section 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and, thus, determined that the entire provision was of no force or effect (see para 261).

[49] Although the Courts in the above examples have clearly confirmed that parliaments or legislatures may enact legislation which interferes with pending actions, proceedings or appeals, by extinguishing or nullifying rights, defences or causes of action, the Court had the opportunity in each of those cases to substantively adjudicate the rights of the litigants by determining how those rights were affected by the new enactment and, ultimately, it was the Court which made the decision to dismiss the case. Even in *Flette*, although Edmond J addressed the issue of access to the Court and correctly concluded that case law (such as discussed above) established that a provincial legislature was constitutionally competent to pass legislation *barring* civil causes of action (within its constitutional competence), he did not address the more specific question raised here, which is whether a provincial legislature

is constitutionally competent to pass legislation which *dismisses* pending court proceedings.

[50] The distinction lies in the difference between the Legislature's role in the passage of legislation and the Court's adjudicative role; the difference between dealing with substantive rights which are at issue in the proceedings; and interfering with the judicial process itself. As stated by the Court in *Barbour* (at para 32):

> . . . While a Legislature may not interfere with the Court's adjudicative role, it may amend the law which the court is required to apply in its adjudication. The difference between amending the law and interfering with the adjudicative function is fundamental to the proper roles of the legislature and courts in our parliamentary democracy.

[51] At what point does legislation, such as is present in this case, cross the line of legislative competency and intrude on the judicial function? In the present case, it may be asked whether section 230(9) of the *BITSA Act* infringes on the "core of the jurisdiction of the superior courts" (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 at para 32). Section 230(9) deems as dismissed "Court of Queen's Bench File No. CI19-01-21887." By this provision, the Court is, thus, effectively blocked from resolving the plaintiffs' dispute, a task that is central to the adjudicative function of courts.

[52] The Supreme Court has made it clear that neither Parliament nor legislatures may enact legislation which intrudes upon judicial independence and/or the judicial role. In this regard, the Court has indicated that "[j]udicial independence is a 'foundational principle' of the Constitution reflected in s. 11(*d*) of the [*Charter*], and in both ss. 96-100 and the preamble to the

Constitution Act, 1867", and has stated that judicial independence "serves 'to safeguard our constitutional order and to maintain public confidence in the administration of justice'" (*Imperial Tobacco* at para 44).

[53] In *MacKeigan v Hickman*, [1989] 2 SCR 796, McLachlin J (as she then was), for the majority, confirmed that "[a]ctions by other branches of government which undermine the independence of the judiciary therefore attack the integrity of our Constitution. As protectors of our Constitution, the Courts will not consider such intrusions lightly" (at p 828). In *Ell v Alberta*, 2003 SCC 35, Major J stated that "[t]he preamble to the *Constitution Act, 1867* . . . acknowledges judicial independence to be one of the pillars upon which our constitutional democracy rests" (at para 19; see also *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at para 38; and *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at paras 17-18).

[54] The Supreme Court has considered judicial independence within the context of the limits to parliamentary or legislative supremacy regarding section 96 courts. In *Manitoba Provincial Judges Assn v Manitoba (Minister of Justice)*, [1997] 3 SCR 3 (*Provincial Court Judges*), the Legislature passed legislation which required provincial court staff to take off unpaid days of leave ("Filmon Fridays"). Lamer CJC ultimately concluded that the Government's imposition of "Filmon Fridays" violated the administrative independence of the Provincial Court as it effectively forced the Chief Judge to close the Manitoba Provincial Court since the Court was unable to function without court staff.

[55] Although the legislation in *Provincial Court Judges* involved a violation of the *administrative* independence of the Provincial Court, it is clear that the Provincial Court still retained jurisdiction over the adjourned cases and had not simply been directed by the Legislature to dismiss any case that would have been held on those Fridays. In the present case, section 230(9) of the *BITSA Act* does not purport to direct the Court to dismiss the action; it is the Legislature itself that has stepped in and deemed the action dismissed.

[56] In *Imperial Tobacco*, the Supreme Court considered whether provincial legislation, which enacted rules of civil procedure that made it easier for the Government to successfully sue tobacco companies for health-care related damages, violated judicial independence because the rules "fundamentally [interfered] with the adjudicative role of the court hearing an action" (at para 48). Major J comprehensively reviewed the principle of judicial independence, stating, in part (at paras 47, 49, 54):

> . . . The critical question is whether the court is free, and reasonably seen to be free, to perform its adjudicative role without interference, including interference from the executive and legislative branches of government. See, for example, *Application under s. 83.28 of the Criminal Code (Re)* [2004 SCC 42], at paras. 82-92.
>
> . . . The question is not whether the Act's rules are unfair or illogical, nor whether they differ from those governing common law tort actions, but whether they interfere with the courts' adjudicative role, and thus judicial independence.
>
> None of this is to say that legislation, being law, can never unconstitutionally interfere with courts' adjudicative role. But more is required than an allegation that the content of the legislation required to be applied by that adjudicative role is irrational or unfair, or prescribes rules different from those developed at common law. The legislation must interfere, or be reasonably seen to interfere, with the courts' adjudicative role, or

> with the essential conditions of judicial independence. As McLachlin C.J. stated in *Babcock* [*Babcock v Canada (Attorney General)*, 2002 SCC 57], at para. 57:
>
> > It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government.
>
> [emphasis added]

[57] Section 230(9) of the *BITSA Act* does not appear to allow the Court the freedom to "perform its adjudicative role without interference" (*Imperial Tobacco* at para 47) or to "apply the law" (at para 50) to a case brought before it. Rather, the Legislature has deemed the entire action dismissed, thereby, it would seem, by-passing "the essential 'authority and function' . . . of the court" (at para 45). The Court, by this legislation, is prevented from performing its adjudicative role in relation to this pending action—it cannot assess the evidence in the claim, nor determine its weight, nor determine if the other provisions of the *BITSA Act* apply to the plaintiffs' claim. All the Court need do is verify the file number and act no further since the Legislature has stated that "Court of Queen's Bench File No. CI19-01-21887" is "deemed to have been dismissed, without costs" (the *BITSA Act* at section 230(9)).

[58] There have been cases which have addressed this and similar issues in other Commonwealth jurisdictions and have concluded that a legislature cannot legislate the dismissal of a case or direct a court to give a specific judgment.

[59] In the case of *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs*, [1992] HCA 64 (AustLII), Brennan, Deane and Dawson JJ explained that "[i]t [was] one thing for the Parliament, within the

limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It [was] a quite different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction" (at para 38).

[60] Similarly, in *Kable v Director of Public Prosecutions (NSW)*, [1996] HCA 24 (AustLII), the Australian High Court concluded that legislation which *directed* the Court to make a preventative detention order against one person, the appellant, violated the *Commonwealth of Australia Constitution Act* because, as stated by Toohey J, "the Act [required] the Supreme Court to exercise the judicial power of the Commonwealth in a manner which [was] inconsistent with traditional judicial process" (at para 28).

[61] The case law reviewed above clearly establishes that, "[w]ithin the boundaries of the Constitution, legislatures can set the law as they see fit" (*Imperial Tobacco* at para 52). Although this gives legislatures the power to pass almost any law they wish under their constitutional heads of power, including those in relation to "Property and Civil Rights in the Province" (at section 92(13) of the *Constitution Act, 1867*), the jurisprudence also makes clear that both Parliament and the legislatures are constitutionally restricted from exercising their powers in a way that infringes upon the principle of the independence of the judiciary or the judicial role, which is recognized and affirmed in the preamble and sections 96 to 101 of the *Constitution Act, 1867*, as well as in section 11(d) of the *Charter*.

[62] The question that has not been resolved or addressed in this case is whether legislation that directs a dismissal of a specific action that is already

in the hands of the courts is an infringement of the adjudicative function of the judiciary. Does this provision allow the Court to "perform its adjudicative role without interference" (*Imperial Tobacco* at para 47)? Does it impermissibly infringe upon the "core jurisdiction of superior courts" (*Trial Lawyers* at para 88)? Does the legislation block the courts from completing a task that is "central to what the superior courts do" (*ibid* at para 32)—judicially resolving a dispute filed before them by a plaintiff?

Conclusion

[63] In the Court below, the question of whether the legislated dismissal of court proceedings in section 230(9) interferes with the role of section 96 courts or violates judicial independence was not addressed. The demarcation line between the Legislature and the courts is a fundamentally important question. It would not be appropriate to allow this decision to go forward as a precedent without that issue being addressed.

[64] On the other hand, it would be equally inappropriate for this Court to deal with this issue without allowing the parties an opportunity to argue and allow the motion judge to adjudicate on the issue. Therefore, this matter should be returned to the motion judge for deliberation of that issue and any others that may arise from this conclusion.

[65] The appeal is allowed.

Steel JA

Monnin JA

I agree: Mainella JA

APPENDIX
The BITSA Act

DIVISION 3

800 ADELE AVENUE LEASE TERMINATION

Definition

230(1) In this section, "**800 Adele Avenue lease agreement**" means the lease agreement respecting the premises located at 800 Adele Avenue, Winnipeg, Manitoba, dated October 8, 2008, between

(a) 5185603 Manitoba Ltd., as Landlord; and

(b) the First Nations of Southern Manitoba Child and Family Services Authority, as Tenant.

References to Southern Authority

230(2) The name of the First Nations of Southern Manitoba Child and Family Services Authority, as established under *The Child and Family Services Authorities Act*, S.M. 2002, c. 35, was changed to the Southern First Nations Network of Care under section 4 of *The Statutes Correction and Minor Amendments Act, 2015*, S.M. 2015, c. 43. As a result, any reference to the First Nations of Southern Manitoba Child and Family Services Authority in the

SECTION 3

RÉSILIATION DE LA CONVENTION DE LOCATION CONCERNANT LE 800, AVENUE ADELE

Définition

230(1) Pour l'application du présent article, « **convention de location concernant le 800, avenue Adele** » s'entend de la convention de location visant les locaux sis au 800, avenue Adele, à Winnipeg, au Manitoba, laquelle est datée du 8 octobre 2008 et a été conclue par les parties suivantes:

a) 5185603 Manitoba Ltd., à titre de locateur;

b) la Régie des services à l'enfant et à la famille des Premières nations du sud du Manitoba, à titre de locataire.

Mention de la Régie du Sud

230(2) Le nom de la Régie des services à l'enfant et à la famille des Premières nations du sud du Manitoba constituée sous le régime de la *Loi sur les régies de services à l'enfant et à la famille*, c. 35 des *L.M. 2002*, a été remplacé par « Southern First Nations Network of Care » conformément à l'article 4 de la *Loi corrective de 2015*, c. 43 des *L.M. 2015*. Par conséquent, toute mention de la Régie des services à l'enfant et à la famille des Premières nations du sud du Manitoba dans la convention de location

800 Adele Avenue lease agreement is deemed to be a reference to the Southern First Nations Network of Care.

concernant le 800, avenue Adele vaut mention du Southern First Nations Network of Care.

Lease agreement terminated
230(3) Despite its terms, the 800 Adele Avenue lease agreement is hereby terminated effective November 30, 2020.

Résiliation de la convention de location
230(3) Malgré les modalités de la convention de location concernant le 800, avenue Adele, celle-ci est résiliée le 30 novembre 2020.

No cause of action
230(4) No cause of action arises as a direct or indirect result of the enactment of this section.

Absence de cause d'action
230(4) L'édiction du présent article ne donne lieu à aucune cause d'action, que ce soit directement ou indirectement.

No remedy
230(5) No costs, compensation or damages are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort, misfeasance, bad faith or trust or for a breach of fiduciary duty, is available to any person in connection with the application of this section.

Absence de droit d'indemnisation
230(5) Nul n'a droit à une indemnité ou à des mesures de redressement — liées notamment à la rupture d'obligations en matière contractuelle, délictuelle, fiduciaire ou de restitution ou à une mauvaise exécution ou à un acte de mauvaise foi — qui auraient pour fondement l'application du présent article.

Proceedings barred
230(6) No action or other proceeding, including but not limited to any action or proceeding in contract, restitution, tort, misfeasance, bad faith or trust or for a breach of fiduciary duty, that is directly or indirectly based on or related to the application of this section may be brought or maintained against any person.

Irrecevabilité de certaines instances
230(6) Sont irrecevables les instances — liées notamment à la rupture d'obligations en matière contractuelle, délictuelle, fiduciaire ou de restitution ou à une mauvaise exécution ou à un acte de mauvaise foi — qui ont pour objet ou fondement, direct ou indirect, l'application du présent article.

Definition of "person"
230(7) In subsection (6), **"person"** includes, but is not limited to,

Portée de l'irrecevabilité
230(7) La règle d'irrecevabilité énoncée au paragraphe (6) s'applique

(a) the Southern First Nations Network of Care, and its current and former directors, officers, employees and agents; and

(b) the Crown in right of Manitoba, and its current and former officers, employees and agents and any current or former member of the Executive Council.

aux instances introduites contre toute personne, y compris:

a) le Southern First Nations Network of Care et ses administrateurs, dirigeants, employés et mandataires, actuels ou anciens;

b) la Couronne du chef du Manitoba et ses dirigeants, employés et mandataires, actuels ou anciens, ainsi que les membres et anciens membres du Conseil exécutif.

Application — before and after coming into force

230(8) Subsection (6) applies regardless of whether the cause of action on which the proceeding is allegedly based arose before or after the coming into force of this section, and any decision in an action or other proceeding referred to in that subsection is of no effect.

Application antérieure et postérieure

230(8) Le paragraphe (6) s'applique que la cause d'action sur laquelle l'instance se présente comme étant fondée ait pris naissance avant ou après l'entrée en vigueur du présent article. Toute décision relative à une instance visée à ce paragraphe est inopérante.

Proceedings dismissed

230(9) Any action or other proceeding referred to in subsection (6) commenced before the day this section comes into force is deemed to have been dismissed, without costs, on the day this section comes into force, including, without limitation, Court of Queen's Bench File No. CI19-01-21887.

Rejet d'instances

230(9) Les instances visées au paragraphe (6) qui sont introduites avant le jour de l'entrée en vigueur du présent article, y compris le dossier de la Cour du Banc de la Reine du Manitoba numéro CI19-01-21887, sont réputées avoir été rejetées, sans dépens, ce jour-là.

No entitlement to compensation

230(10) Despite any other Act or law, no person is entitled to be compensated for any loss or damages, including loss

Inadmissibilité à l'indemnité

230(10) Malgré toute autre loi ou règle de droit, est inadmissible à une

of revenues, loss of goodwill, loss of profit or loss of expected earnings or denial or reduction of compensation that would have been payable to any person, arising from the application of this section or anything done in accordance with this section.

No expropriation or injurious affection

230(11) For greater certainty, no taking, expropriation or injurious affection occurs as a result of the application of this section.

No admission, etc.

230(12) Nothing in this section acknowledges, admits, validates or recognizes a cause of action or proceeding referred to in this section.

indemnité la personne qui, à la suite de l'application du présent article ou des actes accomplis en conformité avec ce dernier, a subi des pertes ou des dommages, notamment une perte de recettes, de la survaleur, de profits ou de gains prévus ou encore le refus ou la réduction d'une indemnité qui aurait été versée à une personne.

Absence d'expropriation et d'atteinte préjudiciable

230(11) Il demeure entendu que l'application du présent article ne constitue nullement une expropriation, même partielle, ou une atteinte préjudiciable.

Absence d'acquiescement ou d'admission de responsabilité

230(12) Le contenu du présent article ne peut être assimilé à une admission de responsabilité ou à un acquiescement à l'égard des causes d'action ou des instances visées au présent article et n'a pas pour effet de les valider ou de les reconnaître.