

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

DOREEN APPLES, TINA APPLES, TINA ROSE
BLACK, ALICE MANTLA, JENNIFER MANTLA,
SHEILA WASHIE, JENNIFER ANTOINETTE
WETRADE, PHOEBE ANN WETRADE, TINA
AGNES WETRADE, and DENISE ZOE also known as
ALICE ZOE

Plaintiffs

- and -

THE COMMISSIONER OF THE NORTHWEST
TERRITORIES and MAURICE CLOUGHLEY

Defendants

MEMORANDUM OF JUDGMENT

[1] The Plaintiffs commenced action in this Court against the Commissioner of the Northwest Territories and Maurice Cloughley on February 15, 2008. They allege they were sexually assaulted by the Defendant, Cloughley, between 1986 and 1988 when he was their teacher and supervisor and in the employ of the Defendant, Commissioner. They now apply Ex Parte to substitutionally serve the Defendant, Cloughley, who the Plaintiffs say is living in Nelson, New Zealand, pursuant to Rule 38 of the *Rules of Court* by publishing a Notice of the action on one occasion in the Nelson Mail, a local newspaper.

[2] In support of the application is filed the affidavit of Lori Kennedy, a Student-at-Law in the firm of the solicitors for the Plaintiffs.

[3] In her affidavit, Ms. Kennedy states that she conducted an internet search to ascertain the whereabouts of Mr. Cloughley. Several exhibits are attached to the affidavit including excerpts from the Nelson Mail, the Nelson Tramping Club, the New Zealand News and other websites which disclose that as of November, 2008, Mr. Cloughley and his wife, Katie, were living in Nelson, New Zealand and have been resident there since 2003.

[4] In paragraph 11 of her affidavit, Ms. Kennedy states:

11. Based on the foregoing I believe the Defendant Maurice Cloughley resides in Nelson, New Zealand and that personal service of the Statement of Claim on him is impractical.

[5] While online searches have established Mr. Cloughley's whereabouts, there is no evidence that any attempts have been made to serve this Defendant. Specifically, there is no evidence of any attempt to retain agents in Nelson, or elsewhere in New Zealand, to ascertain the exact address of Mr. Cloughley which ought not be difficult to do given his obvious association with the Nelson Tramping Club and other community activities he is engaged in. As is apparent from several of the news reports attached as exhibits, Mr. Cloughley appears to be well known in Nelson and a somewhat romantic figure given the fact he has sailed the world, written two books and spent many years working in "remote Eskimo and Indian settlements in Canada." Further, the affiant here did not attest as to whether she searched an address finder site on the internet- a rather simple device that is frequently used to locate people in today's world.

[6] Rule 38 of the NWT *Rules of Court* states:

38 (1) Where personal service of a document is required by these rules and it appears to the Court that it is impractical for any reason to effect prompt personal service of the document, the Court may make an order

- (a) for substitutional service of it; or
- (b) dispensing with service.

(2) An application for an order for substitutional service must be supported by an affidavit setting out why prompt personal service is impractical and proposing an alternative mode of service which, in the opinion of the deponent, will or is likely to be effective.

[subsections 3, 4 and 5 are not applicable]

The corresponding Alberta rule (r.23) is identical.

[7] In the annotation to Rule 23 in the *Alberta Civil Procedure Handbook*, 2008, Stevenson and Côté, it states:

The Rule uses the word “impractical” with respect to effecting prompt personal service, but decided cases suggest that courts apply a stricter standard, i.e., practical impossibility of serving the defendant personally. The affidavit supporting an application for substitutional service must state why prompt personal service is impractical, and show that reasonable efforts were made to locate and to personally serve the defendant. What is reasonable will depend upon the circumstances of the case, including the type of relief claimed, the amount involved, the efforts made to locate the defendant, and the steps taken to effect personal service...

This affidavit is very important, because the order is got *ex parte*, and if it is got on an inadequate affidavit, then later it is to be set aside, and the supposed service set aside along with it. If the time to serve has expired, the result will be fatal.

[8] The stricter standard referred to as applying in Alberta has equal application in the Northwest Territories. There being no evidence of why prompt personal service could not be effected or is impractical or of any attempts whatsoever to serve the defendant, Cloughley, I must deny this *ex parte* application.

[9] The Statement of Claim, filed February 15, 2008, will expire in a little over a month. No explanation was contained in the material for why service has not been attempted to this point in time. There may well be a good reason for the delay but I cannot speculate on that. The Plaintiffs will be required to attempt to effect personal service or apply again for substituted service supported by proper affidavit material on notice to the Defendant, Commissioner.

[10] In the circumstances of this case, where the Plaintiffs are seeking to have the Commissioner held liable for breach of duty of care and vicariously liable for the acts and omissions of the Defendant, Cloughley, I will direct that a copy of this Memorandum of Judgment be served on the Commissioner by the Plaintiffs within 14 days of the filing of this Memorandum.

[11] There shall be no order as to costs in any event of the cause.

D.M. Cooper
J.S.C.

Dated this 13th day of January, 2009.

Counsel for the Plaintiffs: Teri Lynn Bougie

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE D.M. COOPER
