ST. REGIS MOHAWK TRIBAL COURT

Dawn Lafrance,	)	
Plaintiff	)	
***by:* Bradford C. Riendeau, Esq.**	)	**Case No.: 10-CIV-00010**
v.	)	
	)	
Raymond Oaks,	)	
Defendant	)	
***by:* Lorraine M. White, Esq.**	)	

DECISION AND ORDER

I. PROCEDURAL HISTORY

Plaintiff, Dawn Lafrance, brought action in the St. Regis Mohawk Tribal Court, on January 26th, 2010, against Defendant Raymond Oaks, for transfer of a use and occupancy deed to two acres of land and the newly constructed structure, located at 128 McGee Road. (*See,* Amended Brief of Lafrance). Alternately, Plaintiff seeks a monetary judgment in the amount of $89,500.00. (*Id.* at para. 3). Plaintiff alleges that she and the Defendant had a verbal contract agreeing that the physical structure of the home was hers prior to and upon building the constructed home at 128 McGee Road in exchange for monetary contributions made by the Plaintiff to the Defendant.

The first hearing scheduled for April 29, 2010 was adjourned till May 7th after the Court received a notice from Defendant's Attorney. The Court then received notice from Plaintiff's Attorney asking for an adjournment of the May 7th hearing date, which was granted and set for May 18, 2010. On May 18, 2010, a pre-trial conference/hearing was held with attorneys Bradford C. Riendeau, Esq., present for the Plaintiff, and Lorraine M. White. Esq., present for the Defendant.

During the pre-trial conference held on May 18th, the parties stipulated that:

1.) Plaintiff and Defendant entered into an domestic relationship in 2005
2.) The relationship lasted from 2005 till September 2009
3.) During the aforementioned time the parties lived together on Cornwall Island, Akwesasne Ontario, Canada.
4.) During this relationship, an occupancy deed was issued to Raymond Oaks for land on the 'American' portion of the reservation, the 128 McGee Road property.
5.) During the relationship a home was built on the aforementioned property at 128 McGee Road.
6.) Plaintiff moved into the home in late 2009.

Plaintiff's complaint was filed on January 26th, 2010, and alleges she entered into an oral agreement with the Defendant for land and a newly constructed house located at 128 McGee

Road and that she is entitled to either two acres of land where the house sits and the house, or the amount she gave to the Defendant in the sum of $89,500.00 in United States currency. (*See,* Lafrance Comp. and Lafrance Amend. Comp.). Defendant filed an answer to Plaintiff's complaint, on February 22, 2010.

Pursuant to St. Regis Mohawk Tribe (SRMT) Tribal Council Resolution (TCR) 20-2008 Rules of Civil Procedure § XVI Rule 13(C) (hereinafter SRMT Civ. Pro), the Defendant filed to dismiss the cause of action for failure to state a claim upon which relief may be granted.[1] This decision and order is based upon whether the Plaintiff has a cause of action upon which relief may be granted by this Court.

II. DISCUSSION

Pursuant to SRMT Civ. Pro the Plaintiff carries the burden of proof. § XX [Rule 17](A); "he who pleads must prove."[2] The burden moving forward is one of proving a cause of action upon which relief may be granted by this Court. In doing so, Plaintiff must prove an agreement was entered into between Plaintiff and Defendant and that such agreement contemplated the transfer of the property from the Defendant Oaks to Plaintiff Lafrance.

The Plaintiff, in order to file a contract claim, must first meet the statute of limitations requirement found in SRMT Civ. Pro. §VIII [Rule 5] (A) (1), which states "In the case of torts and oral contracts, and actions not otherwise provided for herein, within three (3) years." The Plaintiff, Dawn Lafrance, met this requirement by timely filing her compliant, on January 26th, 2010.

The SRMT TCR 2008-19 Tribal Civil Code (herein after SRMT Civ. Code) specifically lays out, in a hierarchal fashion, the choice of law to be applied by the SRMT Court, which gives precedence to those first appearing in the list. The Court must first determine by examining § V (A) (1)-(6), in sequence, which law is controlling in the case at bar.

1. Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country (with great weight given at all times to principles of the United States Constitution and federal Indian law which recognize Indian sovereignty, self-determination, and self-government, which render many federal and state laws inapplicable to federal Indian Country, which provide for a federal trust responsibility to Indian tribes, and which provide rules of legal interpretation favorable to Indian tribes);

Plaintiff's Complaint is not based on a Constitutional claim, nor is it made under a federal statute: Therefore, the Court must look to the second prong of Tribal law to see which law is controlling.

2. Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe;

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[1] Most common, is that the criterion in considering a motion to dismiss for failure to state claim is whether the proponent of the pleading has a cause of action, not whether he has stated one. *See generally,* NY CPLR 3211(a)(7).

[2] *Actori incumbit onus probandi.* The burden of proof is upon on the Plaintiff.

In 2008, the SRMT Court requested from Tribal Council that a certified copy of the laws the Court is to utilize be sent to the Court. The Court received a bundle of certified laws, which included the following: SRMT TCR 2008-16 Rules of Civil Appellate Procedure, SRMT TCR 2008-17 Rules of Evidence, SRMT TCR 2008-18 Attorney Practice Requirements, SRMT TCR 2008-19 Civil Code, SRMT TCR 2008-20 Rules of Civil Procedure, SRMT TCR 2008-21 Court Filing Fees, and SRMT TCR 2008-22 Tribal Court and Judiciary Code.[3]

Here, Plaintiff filed a complaint that is based upon contract law. The Court has determined that there is no SRMT law on point, as there is no substantive SRMT 'Law of Contract, which would be akin to New York General Obligation Law (hereinafter, NY Gen. Oblig. Law).

Defendant asks the Court to use NY Gen. Oblig. Law as it will provide the Court with guiding principles and applications of comparative law in neighboring jurisdictions. (*See,* Oaks' Memorandum of Law). However, before the Court can contemplate Defendant's request to use the aforementioned law, the Court must look to other parts of Tribal law to determine if there are other controlling laws that must be given precedence.

3. Unwritten Mohawk laws, and written and unwritten Mohawk customs, traditions and practices, whenever such Mohawk laws, customs, traditions or practices are found by the Mohawk Court to be (i) well-established within the Tribe and recognized by Tribal members, (ii) applicable or relevant to the dispute in issue, and (iii) not inconsistent with due process and other rights established under Tribal law;

Here, there is nothing in the Plaintiff's pleadings to indicate an argument citing Mohawk custom or tradition as being applicable to this case. After review, the Court determines that there are no unwritten Mohawk laws that should be applied in this instance. Thus, the Court continues to the fourth part of Tribal law to determine the controlling choice of law.

4. Generally recognized principles of the law of contracts (including quasi-contracts or imperfectly formed invalid contracts), as reflected by the most recent Restatement of Contracts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine;

The Court is satisfied that this provision of SRMT law is applicable to the case at bar. Under the Restatement (Second) of Contracts § 110 (1981) (hereinafter, RSC), and as put forth by the Defendant, some contracts are required to be written. For example contracts required to be written include those: Contracts made upon consideration of marriage; contracts for the sale of an interest in land, and contracts that are not to be performed within one year from their making (e.g. house construction). (*See. Id.* (b)-(e)). Plaintiff's amended complaint asserts causes of action that rely on principles of contract law.

The Court finds that the RSC does offer the Court general guiding principles to determine whether the Plaintiff has a cause of action upon which relief can be granted. Thus, since there are no other controlling laws, the Court determines, where applicable, that the use of RSC is appropriate. The Court continues its examination of determine the precedence of choice of law.

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[3] These SRMT certified laws can be found at the Court's webpage. *See,* www.srmt-nsn.gov/tribalcourts.htm.

5. Generally recognized principles of the law of torts, as reflected by the most recent Restatement of Torts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine;

Plaintiff has not asserted a cause of action under the law of torts. Thus, the Court determines that Torts does not apply in this case. The Court continues its examination to the final prong of the test in determining the precedence of law.

6. If (but only if) consistent with principles of Tribal sovereignty, self-government, and self-determination, and if (but only if) consistent with principles of law identified earlier in this section, New York State laws on contracts and torts. (*See,* §V(A)).

The Court may apply New York State law upon finding that it does not infringe upon the three part test set out in §V(B): "(i) there is no other controlling principle of Mohawk law; (ii) application of the New York State law is consistent with principles of Tribal sovereignty, self-government, and self-determination; and (iii) application of the New York State law is in the overall interest of justice and fairness to the parties. (*See,* §V(B)).

Here, the Defendant's response asks the Court to consider NY Gen. Oblig. Law § 5-703(1) and (3) in the case at bar as guiding principles of comparative law. However, SRMT Civ. Code §V (A)(4), which requires the Court to use the RSC clearly precedes §V(A)(6), which allows the use of New York State law.

Thus, the Court must give preference first to the RSC in determining the case at bar, where applicable. In addition, since NY Gen. Oblig. Law passes the test found in §V(B), in that its use does not hinder Tribal sovereignty, self-government, and self-determination, it may be used to further support the controlling precedence found in the RSC.

Therefore, it is here that the SRMT Court begins its analysis.

In the case at bar, Plaintiff has alleged in her complaint the following causes of action: Dissolution of a Business Partnership, Specific Performance of a Contract, and Breach of Contract/Breach of Fiduciary Duty of an Agent. Each of these claims touch upon contractual claims.

A contract is a legally enforceable promise, either made by one side (a unilateral contract) or, much more commonly, reciprocal promises made by two sides in exchange for one another (a bilateral contract). All parties to all contracts have a duty of good faith and fair dealing in the performance and enforcement of contracts.

An oral contract is a contract where the terms have been agreed by spoken communication. In general, oral contracts may be just as valid as written ones. However, some jurisdictions either

require a contract to be in writing in certain circumstances, for example, where real property is being conveyed, or that a contract be evidenced in a separate writing.[4]

Since there is no substantive SRMT law of contracts, the Court is bound to follow the precedence of controlling law as found in Civ. Code §V(A)(1)(6); and, as such will use the RSC in determining the case at bar. In addition, the use of NY Gen. Oblig. Law§5-701 and §5-703[5] (1) and (3), as requested by the Defendant, is persuasive and since its use is not contrary to Tribal sovereignty, self-government, and self-determination, the Court, as set out by Civ. Code §V(B), will be used as further examples of the principles of law found in the RSC.

Under §110 of the RSC, "the following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is written memorandum or an applicable exception: (d) A contract for the sale of an interest in land. See also, (New York State General Obligation Law (herein NY Gen. Oblig. Law) §5-703(1) which provides:

> An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing.

In addition, Gen. Oblig. Law §5-703(3) states:

> A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent.

Here, Plaintiff alleges she entered into a verbal contract with the Defendant for both land and the structure built upon the land, which is real property.

Generally, 'real property' is defined as "land, and generally whatever is erected or growing upon or fixed to the land." (Black's Law Dictionary 1218 (6th ed. 1993)). Here, the majority of, Plaintiff's claims are dependent on whether or not a verbal agreement concerning real property, the land and newly built structure at 128 McGee Road, was entered into with the Defendant. The SRMT Court finds that RSC §§ 110, 126-127and NYS Gen. Oblig. Law § §5-703(1)(3) is persuasive in that agreements involving real property, other than a lease for less than 1 year in duration, need to be written; and, absent any evidence, from Plaintiff as indicated in RSC §§ 110§(1) and §5-703(3), the Court finds that Plaintiff's alleged verbal agreement does not constitute a valid contract, nor may a breach thereof be recognized upon which relief may be granted.

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[4] *See* Restatement (Second) Contracts §110 (1)(d). *See also*, NY State Oblig. Law §5-701, Agreements required to be in writing, including those involving real estate or interest therein. (*id.* (10))

[5] All contracts for the transfer of real property (other than a lease for less than 1 year in duration) in the State of New York must be in writing. NY Gen. Oblig. Law § 5-703.

The Court has reviewed the Plaintiff's and Defendant's positions. The Court is not convinced there is a contractual claim to grant relief. The claims are based on an interest in real property which is required to be in writing or a written memorandum. (*See,* RSC § 110). Here, the parties did not enter into a written contract. Thus, the Court finds that Plaintiff's cause of action for: Dissolution of a Business Partnership, Specific Performance of a Contract, and Breach of Contract/Breach of Fiduciary Duty of an Agent are dependent on the existence of a valid contract, which must be written. Thus, the court finds that the Plaintiff's aforementioned cause of actions fail, for there is no claim which the Court may grant relief.

A. Promissory Estoppel

Plaintiff also argues recovery under theory of "promissory estoppel," which is not dependent on existence of a contract or the particulars of consideration in the classic sense; "promissory estoppel" action, in contexts in which it is recognized, arises from a breached promise in circumstances under which it is fair to hold the promisor to terms of the promise. (*See*, RSC § 90(1)).[6]

Promissory estoppel is composed of a three prong test. For there to be promissory estoppel there must be: "1) A clear and unambiguous promise; 2) a reasonable and foreseeable reliance by the party to whom the promise is made; 3) and an injury sustained by the party asserting the estoppel by reason of his reliance."[7] (*Id.*).

Here, Plaintiff states, in part, that based on promises from the Defendant to transfer use and occupancy to two acres of land and a house, she provided funds for the purchase of the use and occupancy rights to land on McGee Road and to the construction of a house located at 128 McGee Road. (Lafrance Amend. Comp. at para. 36-40). Defendant denies that any such promises with Plaintiff took place. (Oaks Aff. at para 3-5). The Plaintiff did not plead in her Complaint where and when the promise was made. If there was an "injury" it may have occurred on Cornwall Island, but Plaintiff's complaint is devoid of any specificity on this issue.

The Court is not convinced that a clear and unambiguous promise took place which is necessary as a precursor to the other prongs of the promissory estoppel test. In addition, the Court finds that asserting promissory estoppel does not spare the Plaintiff from the other requirements contained in the RSC, namely that a written contract is needed for real property and for when the amount in controversy concerning real property is beyond $5000 and where the completion of the agreement is more than a year away.[8] Further, per the parties stipulation of having resided together on Cornwall Island, Ontario, Canada, any such equitable claim may best be heard in the jurisdiction where the promises may have been made.

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[6] "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Id.

[7] see, *Hoffman v.* Boone, 708 F. Supp. 78 (S.D.N.Y 1980); Chemical *Bank v. City of Jamestown,* 122 A.D.2d 530, 531, 504 N.Y.S.2d 908 (4th Dept.1986) (quoting *Ripple's of Clear view, Inc. v. Le Havre Assoc.,* 88 A.D.2d 120, 122, 452 N.Y.S.2d 447 (2d Dept.1982).

[8] See. §110(2)(c) states in relevant part: a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond $5000 in amount or value of remedy.

Thus, the SRMT Court finds that Plaintiff's cause of action for promissory estoppel fails because she has not met the burden of establishing the necessary elements of a promissory estoppel, nor does she overcome the need for interests in real property to have a written contract.

B. Misrepresentation & Fraud

Plaintiff argues for recovery under the theory of misrepresentation and fraud. She alleges Defendant was given money to purchase land and that Defendant would provide her with two acres of land and the house that was built on the land. (*See*, Lafrance Amend. Comp. at para. 43). Plaintiff also asserts that she gave Defendant $89,500 in U.S. funds to purchase land and to build the now existing house at 128 McGee Rd. (*Id.* at para 46-46). Defendant denies the allegations. (*See,* Oaks Comp.). Plaintiff filed this claim and asks for the recovery of the money, $89,500, given to the Defendant.

In general, misrepresentation is a false or misleading statement made by one party to another party about a present or past agreement, which the listener relies on and has the effect of inducing that party into the agreement. Fraud is generally defined as being a deliberate misstatement of a fact in which results in reliance by a party to his detriment. (Black's Law Dictionary 1001 (6th ed. 1993)).

Under RSC § 159, "a misrepresentation is an assertion that is not in accord with the facts." Such an assertion must relate to something that is a fact at the time the assertion is made for it to be a misrepresentation. (*See, Id.* at (c)).

For a misrepresentation to be fraudulent:

> A misrepresentation is fraud if the maker intends his assertion to induce a party to manifest his assent and the maker: a.) knows or believes that the assertion is not in accord with the facts, or b.) does not have the confidence that he states or implies in the truth of the assertion, or c.) knows that he does not have the basis that he states or implies for the assertion. (RSC §162 (1)).
>
> A misrepresentation is material if it would be likely to induce a reasonable person to manifest assent, or the maker knows that it would be likely to induce the recipient to do so. (RSC §162 (2)).

Here, whether one of the parties made a misleading statement/promise or not that led to reliance of the other party to act at his or her detriment is moot. Any misleading statement, promise, or fraud is unenforceable as evidenced by RSC § 178 (1) (A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by public policy against the enforcement of such terms) and within the R.S.C Statute of Fraud provision, a written contract or evidence of one is required for real property. (*See* §110). In addition, Plaintiff is asking for the

remedy of $89,000. Under RSC §110(2) (c) a contract is needed when the amount of value or remedy is beyond $5000. [9]

Thus, the Court finds that asserting misrepresentation and fraud does not spare the Plaintiff from the other requirements contained in the RSC §110(1) and (2) and 178(1), which require that an enforceable contract be written especially when the amount in controversy concerns real property, or the amount is over $5000. As such, Plaintiff's cause of action for misrepresentation and fraud fails.

C. Domestic Relationship/Common Law Marriage

The Plaintiff asserts that she had a domestic relationship and verbal agreement with the Defendant; and, that during this relationship she contributed money towards the purchase of land and a structure to be built; and that she is entitled to this property because of the domestic relationship and verbal agreement to both the building constructed and two acres of land at 128 McGee Road, or the $89,000 she contributed to the Defendant for such purposes. The Court now examines whether Plaintiff's cause of action dependent on a domestic relationship/common law marriage is a claim upon which this Court may grant relief.

The Court looks to the test found in SRMT Civ. Code §V (A) (1)-(6) to determine the precedence of controlling law. First, the Court determines that there is no controlling SRMT law concerning Marriage; and, as such, the Court is free to look at our sister nations' laws and New York State law as guiding principles of law in determining whether Plaintiff's cause of action, concerning and dependent upon a domestic relationship/ common law marriage, provides a cause of action for which this Court may grant relief.

Common-law marriage is generally a non-ceremonial relationship that requires "a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations." (Black's Law Dictionary 277 (6th ed. 1993)).

Since SRMT law is absent a certified SRMT Marriage Act, the Court has looked to our sister nations for further guidance. For instance, the Oneida Indian Nation does not recognize common law marriages stating, "Common law marriages are prohibited and the marriage of a man and woman may occur within the territorial jurisdiction of the Nation only if the marriage is in compliance with this Code." (*See*, Oneida Indian Nation Marriage Act §112 (2004)). In addition, the marriage must be solemnized during a ceremony by a recognized officiate and a license issued. (*Id.*).

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[9] *See,* §110(2)(c) states in relevant part: a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond $5000 in amount or value of remedy.

Next, New York also does not allow the creation of a "common law" marriage, a relationship in which a couple lives together but have not participated in a lawful ceremony or acquired a written contract of marriage.[10] However, New York does recognize as valid, common law marriages created in other states if the legal requirements of those states have been met. Upholding common law marriages, recognized as valid in states where the legal requirements have been met, and making the Courts available for determining the rights of parties now living in New York is based on the Full Faith and Credit clause of the U.S. Constitution.

Here, Plaintiff asks the Court to provide equitable relief based on the parties domestic partnership/common law marriage. (*See*, Lafrance Amend. Comp.). Although the parties resided together from 2005 to September 2009 in a domestic relationship, the parties did not apparently participate in a marriage ceremony that was officiated and recoded. The Court finds, since there is a lack of an SRMT law, the law of our sister nation, (the Oneida Indian Nation), and New York State's non-recognition of common-law marriages persuasive; thus, the Court is not willing, nor able to grant relief, in this instance, where the claim is dependent upon recognition of a common law marriage.

However, the Court does note that Ontario Canada recognizes common law marriage for specific provisions under the law and since the parties acknowledged having resided together from 2005 till September 2009 on Cornwall Island, Akwesasne Ontario, Canada; the Plaintiff may have a claim in Canada where the parties resided. For instance, pursuant to Ontario's Family Law Act §29(b) recognizes common law relationships by defining spouse for the purposes of establishing <u>support</u> as:

> "spouse" ... includes either of two persons who are not married to each other and have cohabited: (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child. (*Id.*).

Under the Family Law Act (Can.) in Ontario, the Matrimonial Property Act does not apply to common law relationships. Therefore, a person in a common law relationship, such as the Plaintiff in the case at bar, may be forced to choose to only seek support and not, common law acquired marital property under the Act.

In addition, the Modernization of Benefits and Obligations Act, S.C. 2000, c. 12, s. 148-152 (Can.) has introduced some changes the to the Indian Act, R.S.C. 1985, c. I-5 (Can.). After one year of co-habitation, a couple may be recognized for some purposes under the *Indian Act* as equivalent to a legally married couple. Under the Indian Act, common-law partner is defined as:

> In relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year. (*Id.* at s.2. (1)).

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[10] See generally, NY DRL Article 2 §10; NY DRL Article 3§11, which states a valid marriage is one with a : "written contract of marriage signed by both parties and at least two witnesses, all of whom shall subscribe the same within this state, stating the place of residence of each of the parties and witnesses and the date and place of marriage, and acknowledged before a judge of a court of record of this state by the parties and witnesses in the manner required for the acknowledgment of a conveyance of real estate to entitle the same to be recorded.

The Indian Act appears to be silent on the subject of common law matrimonial real property division. However, Plaintiff may be afforded a claim dependent on her domestic relationship/common law marriage under Ontario law.

Since the Plaintiff has not sought to have their common law relationship recognized under Canadian law, the SRMT Court need not, at this time, concern itself with recognition of that fact; but, the Plaintiff may wish to file for such recognition within the jurisdiction she resided with the Defendant; Ontario, Canada.

Thus, the SRMT Court has no statutory or customary grounds to recognize such a 'domestic relationship,' nor to offer remedies that may be afforded to those with common law marriages.

However, the SRMT Court's determination does not foreclose all opportunities offered the Plaintiff that she may still be able to acquire under Canadian law, and/or the Indian Act.

III. Conclusion

Based upon the aforementioned reasons, the Plaintiff has not overcome the burden of stating a legally recognized basis upon which relief may be granted; therefore, the SRMT Court finds in favor of the Defendant's motion to dismiss the complaint. The Court dismisses without prejudice.

Entered by my hand on this the 13th day of August 2010

Peter J. Herne, Chief Judge
Saint Regis Mohawk Tribal Court

SEAL

A copy of this decision will be provided to Mr. Bradford C. Riendeau and Ms. Lorraine M. White.