Court File No. T-2172-99

IN THE FEDERAL COURT OF CANADA
TRIAL DIVISION

B E T W E E N:

HARRY DANIELS, LEAH GARDNER and
THE CONGRESS OF ABORIGINAL PEOPLES
Plaintiffs (Respondents)

- and -

HER MAJESTY THE QUEEN, as represented by
THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
and THE ATTORNEY GENERAL OF CANADA
Defendants (Applicants)

WRITTEN REPRESENTATIONS OF THE PLAINTIFF, THE CONGRESS OF ABORIGINAL PEOPLES

PART I - NATURE OF PROCEEDINGS

1. This is a motion to strike the Plaintiffs' Amended Statement of Claim pursuant to the *Federal Court Rules*. The Defendants move to strike on the following grounds:

(a) That the Plaintiffs do not have standing to maintain this action;

(b) That the Statement of Claim does not contain the necessary material facts;

(c) That the Statement of Claim does not disclose a reasonable cause of action;

(d) That the allegations in the Statement of Claim are vexatious, prejudicial and an abuse of process of the Court; and

(e) That the claim seeks declarations of fact only.

2. The position of the Congress of Aboriginal Peoples ("CAP") is that the motion must be dismissed. This is a declaratory action to determine legal issues that have very real practical significance for Canada's Aboriginal peoples. The declaratory action is a time-honoured method to determine issues of public law. No "cause of action" in the traditional sense is required. The declaratory action does not compel any party to do anything, but

rather relies upon the honour of the Crown in assuming that once the legal issues are determined, the Crown will respond appropriately. The declaratory action's use in support of extra-judicial claims, to help remove obstacles to effective and meaningful negotiations, was approved by the Supreme Court of Canada in relation to this very plaintiff in *Dumont v. Canada*.

Dumont v. Canada (A.G.), [1990] 2 S.C.R. 279

Hogg & Monahan, *Liability of the Crown* (3d ed.) at 26-28

3. The central issue in this case arises from the federal government's denial that it has jurisdiction over Metis and Non-Status Indians under section 91(24) of the *Constitution Act, 1867*. This denial is used as justification for the federal government's refusal to deal with Metis and Non-Status Indian issues and organizations, including CAP, and for the exclusion of Metis and Non-Status Indians from many federal government programs and benefits. As noted by the *Report of the Royal Commission on Aboriginal Peoples*, ("RCAP Report"), this denial is "at the core of official federal government discrimination", and until this position is changed, "no other remedial measures can be as effective as they can be". CAP says that this denial is wrong in law.

RCAP Report, (Ottawa: Ministry of Supply and Services, 1996) Vol. IV at 219-20

4. The Plaintiffs seek a declaration to resolve this central issue. The declaration sought will resolve a long-standing question of great practical significance. It will remove the key obstacle to the negotiation of a range of matters pertaining to the rights and interests of Metis and Non-Status Indian peoples. The courts have repeatedly called for governments and Aboriginal peoples to negotiate such matters as the preferred means of resolving them, consistent with the honour of the Crown. Yet this negotiation process cannot take place until the legal issue in this action is resolved.

Delgamuukw v. The Queen, [1997] 3 S.C.R. 1010, at 1123-24

Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at 268-69

R. v. Powley, (2001) 53 O.R. (3d) 35 (C.A.) at para. 166; (2000) 47 O.R. (3d) 30 (S.C.J.) at paras. 79-88

5. The Plaintiff's declaratory action is a well-recognized public interest proceeding that the Supreme Court of Canada has approved, and for which it has development specific requirements. The Defendants' motion to strike does not address the action as it is. Most of their arguments address other kinds of actions, which have other requirements. To the extent that any of their points apply to public interest declaratory actions, CAP says that the requirements of such an action are met. The Defendants' motion is designed to hinder, rather than help, the negotiation process. Accordingly, the motion should be dismissed.

PART II - THE FACTS

6. On an application to strike a Statement of Claim, the facts as pleaded in the claim must be taken as true. These facts include the following:

(a) That CAP represents Metis and Non-Status Indian people throughout Canada;

(b) That CAP's objects include the advancement of the interest of Metis and Non-Status Indian people of Canada;

(c) That these objects further include the advancement on all occasions of the Aboriginal constitutional and treaty rights and interests of the Aboriginal people of Canada … through collective action;

(d) That these objects include discussion with the government of Canada and recommending to it legislation affecting the interests of the Aboriginal people of Canada, and entering into agreements with Canada for such purposes.

Amended Statement of Claim, para. 3

7. It is further pleaded and must be accepted as true that the Metis are Aboriginal people located throughout Manitoba and the Northwest Territories and elsewhere in Canada, and that the Metis today consist of persons descended from Aboriginal ancestors who were recognized as Metis, or who self-identify as Metis and are accepted as such by the Metis community or certain Metis organizations.

Amended Statement of Claim, para. 7, 9-13, 17

8. It is further pleaded and must be accepted as true that there are persons of Aboriginal ancestry and identity who are not treated by the federal government as having status under the *Indian Act*, referred to as Non-Status Indians.

Amended Statement of Claim, para. 18-21

9. It is further pleaded and must be accepted as true that CAP has attempted and continues to attempt to engage in negotiations with the Defendant Her Majesty the Queen in Right of Canada (the "Federal Government") concerning the rights, interests and needs of the Metis and Non-Status Indian people of Canada, but such negotiations have been frustrated and hampered by the Federal Government's denial that it has jurisdiction over or responsibility for Metis and Non-Status Indians. Further:

(a) The Federal Government has refused or failed to negotiate in good faith with representatives of Metis and Non-Status Indian peoples on a collective basis through representatives of their own choice; and

(b) As a result, Metis and Non-Status Indians have suffered deprivations and discrimination in respect of health care, education and other benefits, material and cultural benefits associated with connection with Indian reserves, vulnerability to criminal prosecution on exercise of Aboriginal rights, and the loss of opportunity to negotiate or enter treaties with respect to unextinguished Aboriginal rights or agreements with respect to other Aboriginal matters and interests.

Amended Statement of Claim, paras. 23-26

10. In particular, the Plaintiffs plead that the Federal Government justifies its conduct by an interpretation of s.91(24) of the *Constitution Act, 1867* that is erroneous in law. They seek declarations that Metis and Non-Status Indians are within federal jurisdiction under s.91(24) and that Metis and Non-Status Indians are owed fiduciary duties by the Federal Government, including an obligation to negotiate with them on a collective basis through their chosen representatives.

Amended Statement of Claim, paras. 25, 27

PART III - ISSUES AND LAW

(a) Threshold On Motions To Strike

11. The Courts have repeatedly held that a motion to strike should only be granted where it is plain and obvious that an action cannot succeed. Any doubt is to be resolved in favour of the Plaintiffs at this preliminary stage. Further, any questions that would be better resolved on the basis of an evidentiary record should be deferred. This is particularly the case in the rapidly evolving area of Aboriginal law.

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959

Canada (A.G.) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735

Dumont v. Canada (A.G.), [1990] 2 S.C.R. 279

Shubenacadie Indian Band v. Canada (A.G.), [2001] F.C.T. 181, at para. 5

(b) Standing

12. CAP has standing to bring this action. In *Finlay v. Canada*, the Supreme Court of Canada held that a party without a cause of action in a traditional, private law sense could bring proceedings to vindicate public rights in two situations:

(a) Where the Plaintiff suffered special damage peculiar to himself; or

(b) Where the public interest favours recognizing such standing.

Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607, at paras. 18, 31-32

13. CAP has specifically pleaded that it represents Metis and Non-Status Indians, that it has attempted to engage in negotiations with the Federal Government on their behalf, and that the Federal Government wrongfully refuses to negotiate with CAP in good faith. As such, CAP has suffered “special damage” of a unique kind from the Defendants’ wrongful acts. This is sufficient to give CAP standing in its own right.

Finlay, supra

Dumont, supra

Native Women's Association of Canada v. Canada, [1992] 3 F.C. 192 (C.A.)

Federation of Law Societies of Canada v. Canada (A.G.), unreported decision of B.C.S.C. dated November 20, 2001

14. Alternatively, CAP submits that it meets the criteria for "public interest" standing set out in *Finlay*. That is:

- There are serious and justiciable issues to be determined;
- CAP is directly affected by or has a genuine interest in the issues; and
- There is no other reasonable and effective manner in which the issues may be brought before the Court.

Finlay, supra, at para. 26

(i) Serious And Justiciable Issues

15. As to the first requirement, the Supreme Court has held that the issues to be determined must be justiciable and raise serious legal questions. It is not necessary that the Plaintiffs have a cause of action in the traditional sense.

16. Each of the legal issues raised in this action is capable of judicial determination, and raises a serious legal question. These issues are:

- Whether Metis and Non-Status Indians are within federal jurisdiction under s.91(24); and
- Whether the Federal Government owes fiduciary duties to Metis and Non-Status Indians, including the right to be negotiated with in good faith on a collective basis through their chosen representatives.

17. As to the reach of s.91(24) of the *Constitution Act, 1867*, a similar issue was litigated before the Supreme Court of Canada in *Re Eskimos*, so the issue is clearly justiciable.

There is also substantial authority for the proposition that s.91(24) includes Metis and Non-Status Indians.

> *Re Eskimos*, [1939] S.C.R. 104
>
> *RCAP Report*, Vol. IV, p. 295
>
> Manitoba, Public Inquiry Into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1
>
> Bradford W. Morse and John Giokas, "Do the Metis Fall Within Section 91(24) of the Constitution Act, 1867?" and Don S. McMahon, "The Metis and 91(24): Is Inclusion the Issue?" in *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: RCAP, 1995)
>
> Hogg, *Constitutional Law of Canada*, (looseleaf ed.) 27-3 - 27-4
>
> Clem Chartier, "'Indian': An Analysis of the Term as Used in s.91(24) of the *BNA Act*", (1978-79) 43 Sask. L. Rev. 37

18. CAP further asserts that the Federal Government owes fiduciary duties in its conduct towards CAP and towards Metis and Non-Status Indians generally. Contrary to the submissions of the Defendants, the Crown's fiduciary duties are not confined to situations where a discrete s.35 claim has been established. Rather, it is an overarching obligation towards Aboriginal peoples. As noted in *R. v. Sparrow*:

> The government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.
>
> *R. v. Sparrow*, [1990] 1 S.C.R. 1075
>
> *R. v. Powley*, (2001) 53 O.R. (3d) 35 (C.A.) at para. 166; (2000) 47 O.R. (3d) 30 (S.C.J.) at paras. 79-88
>
> *Delgamuukw, supra*, para. 186

19. At the very least, it is not "plain and obvious" at this preliminary stage that the Plaintiffs will fail to demonstrate at trial that the Federal Government has a duty to negotiate with CAP, and such duty has been breached. This issue too is both justiciable and serious.

20. This case is similar in many respects to *Dumont v. Canada*. In *Dumont*, the Plaintiffs (including CAP) sought declarations that certain spent Federal and Manitoba legislation was unconstitutional, on the basis that such declarations would be of assistance to the Plaintiffs in negotiating Metis land claims with the Federal Government. Although the declarations were sought in support of extra-judicial claims, a motion to strike was dismissed, and the dismissal of the motion ultimately upheld by the Supreme Court of Canada. The Supreme Court held that the issues were justiciable, that declarations may be granted in aid of extra-judicial claims, and that the validity of the legislation and its effect upon the Plaintiffs were better dealt with at trial on a proper factual record. The same is true at the case at bar, and this decision by a binding court ought to be regarded as a complete answer to the Defendants' motion.

Dumont v. Canada, *supra*

(ii) CAP Is Directly Affected Or Genuinely Interested

21. As to the direct effect of these issues upon CAP, or CAP's genuine interest in their resolution, this aspect of the test is rightly conceded by the Defendants, and is unquestionably met. CAP (previously called the Native Council of Canada) has represented Aboriginal peoples in a variety of contexts since 1972, and has frequently been recognized by the courts in that role as a party or public interest intervenor to litigation where the Aboriginal rights and interests of Metis and Non-Status Indian peoples are at issue. As noted in the RCAP Report, the Native Council of Canada was responsible for the inclusion of "Metis" in s.35 of the *Constitution Act, 1982*.

Dumont v. Canada, supra

Lovelace v. The Queen, [2000] 1 S.C.R. 950

Corbière v. The Queen, [1999] 2 S.C.R. 203

Re Canada Assistance Plan, [1991] 2 S.C.R. 525

R. v. Powley, supra

Native Women's Association of Canada v. Canada, supra

RCAP Report, Vol. IV, p. 230

(iii) No Other Reasonable And Effective Manner To Bring Issues To Court

22. On the issue of whether there is another reasonable and effective manner in which the issues raised may come to Court, CAP respectfully submits that this is not the case. A claim that an Aboriginal or treaty right has been infringed or denied contrary to s.35 is unlikely to raise squarely the issue of whether Metis or Non-Status Indians as peoples come within the scope of s.91(24). The matters complained of in this proceeding are the Federal Government's failure to act and denial of jurisdiction with respect to Metis and Non-Status Indians, not that the Federal Government has acted positively so as to infringe a particular individual's or community's s.35 rights.

23. The Supreme Court held in *Dumont* that the method of proceeding chosen by the plaintiffs, a declaratory action to determine legal issues of real practical significance for Metis and Non-Status Indian peoples, is both available and appropriate. The Defendants cannot choose for the Plaintiffs how to frame their case. In particular, a representative proceeding under Rule 114 is not required for a declaratory action that seeks no damages, mandatory orders, or any individual entitlement to any specific rights or benefits. The declaratory action has coexisted with representative proceedings for many years, yet it has never been suggested that the declaratory action is unavailable, or that public interest plaintiffs should be denied standing, because all persons with a common interest in determining an issue of public law might in theory be able to use the cumbersome vehicle of a representative proceeding. The declaratory action on issues of the kind raised in the case at bar is clearly distinguishable in this respect from a proceeding to establish site-specific s.35 rights by a particular individual or group.

Dumont v. Canada, supra

Dyson v. Attorney General, [1911] K.B. 410 (C.A.)

A.G. Canada v. Law Society of British Columbia, (1982) 137 D.L.R. (3d) 1 (S.C.C.) at 13-15

Thorson v. A.G. Canada, [1975] 1 S.C.R. 138

Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265

Canada (Minister of Justice) v. Borowski, [1981] 2 S.C.R. 575

24. The nature of the proceeding also distinguishes this case from *Maurice v. Canada*, relied upon by the Defendants, where a corporate plaintiff was removed as a party. In *Maurice*, the relief sought was compensation, and this relief related only to the individual plaintiffs. In this case, however, the relief sought is not any individual right to damages or any specific individual entitlement, but "Dyson" declarations on issues of public law. Further, the relief sought relates directly to CAP, in that CAP asserts that the Defendants are obliged to negotiate with CAP as a collective entity. CAP has a distinct interest as a national, representative body for the Metis and Non-Status Indians in resolving the central issue of the scope of s.91(24), so that it may carry out its mandate as set out in paragraph 3 of the Claim. The practical concerns giving rise to this proceeding - including the exclusion of Metis and Non-Status Indians from Federal Government negotiations, programs and benefits - are national in scope, and it is appropriate that CAP as a national, representative body be included as a party.

Maurice v. Canada, (1999) 183 F.T.R. 9

Amended Statement of Claim, para. 3, 23-17

25. As noted by the RCAP Report in 1996, the question of federal jurisdiction over Metis and Non-Status Indians is one that has not been decided by the courts, though many cases have dealt with specific Metis rights, and this remains true today. In these circumstances, the effect of acceding to the Defendants' submissions may be to allow the Federal Government to deny Metis and Non-Status Indians the ability to negotiate effectively, and access to a range of programs and benefits, on an indefinite basis. The impact upon individuals in the Metis and Non-Status Indian communities may be substantial. Allowing the claim to proceed will avoid this risk.

RCAP Report, Vol. 4, p. 209

Federation of Law Societies of Canada v. Canada (A.G.), unreported decision of B.C.S.C. dated November 20, 2001 at para. 36

(iv) Not The Appropriate Time To Determine Standing

26. CAP further submits that this is not the appropriate time to attack the Plaintiffs' standing. Where the Court does not have sufficient material before it for a proper understanding of the nature of the case, the issues raised, and the interests of the Plaintiffs, questions of standing should be deferred to trial.

Finlay, supra, at para. 16

(c) The Statement Of Claim Is Not An Improper Pleading

27. CAP respectfully submits that there is nothing improper about the Statement of Claim. Rather, the Defendants have sought to characterize the action as something which it is clearly not, i.e., a s.35 claim by a particular community for a specific Aboriginal right, and then criticize the claim for not conforming to their characterization. It is the Plaintiffs' right to frame their case as an action for a declaration in aid of extra-judicial claims in the image of *Dumont*; it is not for the Defendants to convert it into a claim for a site-specific s.35 right by a particular individual or group in the image of *R. v. Van der Peet*, or to attack the pleadings on that basis. That is not a proper use of the Court's extraordinary power to strike a claim at the pleadings stage, which must only be done in the clearest of cases.

Dumont v. Canada, supra

R. v. Van Der Peet, [1996] 2 S.C.R. 507

(i) The Claim Pleads The Necessary Material Facts To Support The Declaration Sought

28. As set out above, the claim pleads as material facts that the Defendants have refused to deal with the Plaintiffs, and have denied opportunities and benefits to Metis and Non-Status Indians, on the basis of the Defendants' view that Metis and Non-Status Indians do not fall within s.91(24). The Plaintiffs have further pleaded in some detail the historical development of the Federal Government's current position on Metis and Non-Status Indians. These are the material facts, and the only material facts, necessary to support claims for a declaration that federal jurisdiction under s.91(24) extends to Metis and Non-

Status Indians, and that the Federal Government may not refuse to negotiate with them through their chosen representatives.

29. If these facts are accepted as true, it is clear that there is a significant controversy between the Plaintiffs and Defendants on legal questions with real and significant practical effects on Metis and Non-Status Indians. Indeed, these very real practical problems are explicitly recognized by the RCAP Report:

> At the core of official federal government discrimination has been the government's consistent refusal to acknowledge that Metis matters fall within its jurisdiction under section 91(24) of the constitution. While that section does not refer explicitly to Metis people, there is strong legal reason to believe that section 91(24) applies to *all* Aboriginal persons. The government of Canada's refusal to accept the argument has had serious discriminatory consequences, both personal and collective, for Canadian Metis.
>
> Except in the northern territories, Metis people often have been deprived of post-secondary educational assistance and benefits ranging from health care to economic development and cultural support programs available to other Aboriginal peoples. On one occasion, the federal government's refusal to deal with Metis concerns tied the hands of a provincial government trying to help: as discussed later in this chapter, when the Alberta government requested federal co-operation to enact a constitutional amendment to entrench the Alberta Metis Settlements, the government of Canada refused to help.
>
> Of the many measures needed to ensure that Metis people receive fair treatment in the future, one of the most fundamental is the elimination of discrimination in all forms. The refusal by the government of Canada to treat Metis as full-fledged Aboriginal people covered by section 91(24) of the constitution is the most basic current form of governmental discrimination. Until that discriminatory practice has been changed, no other remedial measures can be as effective as they should be.
>
> *RCAP Report*, Vol. 4, p. 219-220

30. The Defendants' reliance upon *Cheslatta Carrier Nation v. British Columbia* is misplaced. *Cheslatta Carrier Nation* involved the assertion of a particular claim to a specific section 35 right to hunt and fish at a specific site. Such cases have their own requirements and features, set out in *Van der Peet*. The case at bar is not a site-specific Aboriginal

rights case like *Van der Peet*. It is an action for a declaration in aid of extra-judicial claims, like *Dumont*. Accordingly, at this preliminary stage the Plaintiffs must show only that there is some basis for their claim that there would be practical utility to a decision on the matters in issue, even if the declarations are sought in aid of extra-judicial claims. That standard is easily met by referring to the Statement of Claim and the RCAP Report.

> *Cheslatta Carrier Nation v. British Columbia*, (2000) 193 D.L.R. (4th) 344 (B.C.C.A.)

31. *Cheslatta Carrier Nation* is readily distinguishable, because in that case the Court expressly found that the declaration sought would serve no useful purpose and that there was no live controversy. As found by the Court, granting the relief sought would not resolve a "real difficulty", and further would potentially prejudice the rights of third parties. The contrary applies in the case at bar - the declaratory relief sought would resolve a real difficulty, and would not prejudice any third party rights.

> *Cheslatta Carrier Nation*, *supra*, para. 16-17
>
> *Dumont v. Canada*, *supra*
>
> *RCAP Report*, *supra*

(ii) "Reasonable Cause Of Action"

32. The Defendants' assertion that the claim discloses no reasonable cause of action misconstrues the nature and purpose of the claim. *Finlay* and *Dumont* establish that it is not necessary in a declaratory action that there be a "cause of action" in the traditional private law sense. Paragraphs 28 to 31 above establish that the material facts pleaded are sufficient for the nature of the relief sought. Much as the Defendants may wish to treat this as a different kind of case - a particular claim to a specific Aboriginal right protected by s.35 – the simple fact is that it is not.

33. This is not the appropriate juncture to assess in detail the "factual underpinnings of the claim". That is much more appropriately done on the basis of an evidentiary record.

> *Dumont v. Canada*, *supra*

Prete v. Ontario, (1993) 16 O.R. (3d) 161 (C.A.), leave to appeal to S.C.C. denied (1994) 17 O.R. (3d) xvii (note)

(iii) The Allegations Are Not Vexatious, Prejudicial Or An Abuse of Process

34. CAP respectfully submits that the claim cannot reasonable be described as "vexatious", "prejudicial" or "an abuse of process" within the meaning of Rule 221. Such labels are reserved for the clearest possible cases, often involving unrepresented litigants, where the necessity to defend creates real hardship to the defending parties.

35. In the case at bar, the Defendants do not allege any difficulty or hardship in defending the claim. They are fully aware of the issues giving rise to the litigation, and have been criticized by the most extensive federal Royal Commission in Canadian history for their failure to address the central issue in the case. The Defendants themselves agreed to resolve this issue in part by a constitutional declaration in the *Charlottetown Accord*, which provided at s.54 that "[f]or greater certainty, a new provision should be added to the *Constitution Act, 1867*, to ensure that Section 91(24) applies to all Aboriginal peoples". The issues to be determined are defined, and the historical development of the Defendants' present position is set out in detail. They are fully aware of the issues that they must defend, if indeed they have any defence.

RCAP Report, supra, at 209-10

(iv) The Plaintiffs Do Not Seek Declarations Of Fact

36. Contrary the Defendants' assertion, the Plaintiffs do not seek "declarations of fact", but a determination of the legal issues of whether s.91(24) includes Metis and Non-Status Indians, and whether the Crown owes a duty to negotiate with Metis and Non-Status Indians through their chosen representatives. These are quintessentially questions of a legal nature, that ought to be determined by the Court and which were determined (in relation to the Inuit) by the Supreme Court of Canada in *Re Eskimos*. At the very least, whether the declarations sought should be granted is a matter that should be determined in the trial setting.

Re Eskimos, *supra*

Dumont v. Canada, *supra*

R. v. Powley, supra

PART IV - ORDER REQUESTED

37. CAP respectfully requests that the motion be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: January 14, 2002

Joseph Eliot Magnet
Faculty of Law – University of Ottawa
57 Louis Pasteur
Ottawa, Ontario K1N 6N5

Ph: (613) 562-5800 ext. 3315
Fax: (613) 562-5124

Of Counsel for the Congress of Aboriginal Peoples

Andrew K. Lokan

Paliare Roland Rosenberg Rothstein LLP
Barristers & Solicitors
250 University Avenue, Suite 501
Toronto, Ontario M5H 3E5

ph.: (416) 646-4324
fax: (416) 646-4323

Solicitors for the Congress of Aboriginal Peoples