Federal Court Cour fédérale

Date: 20150528

Docket: T-503-13

Citation: 2015 FC 687

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 28, 2015

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

THE INNU OF UASHAT MAK MANU-UTENAM,
THE INNU OF MATIMEKUSH-LAC-JOHN,
THE INNU OF EKUANITSHIT,
THE INNU OF UNAMEN SHIPU,
THE INNU OF PAKUA SHIPI

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

and

THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

Intervener

JUDGMENT AND REASONS

I. Overview

[1] The federal Crown and the Attorney General of the Province of Newfoundland and Labrador (NFL) are seeking to have the plaintiffs' statement of claim struck out in its entirety on the ground that the Federal Court has no jurisdiction over the conclusions sought by the plaintiffs. In the alternative, they are asking the Court to exercise its discretion pursuant to paragraph 50(1)(*b*) of the *Federal Courts Act*, RSC 1985, c F-7 (FCA) and to stay the proceeding in the interests of justice, or essentially to encourage the plaintiffs to assert their rights before the Supreme Court of Newfoundland and Labrador.

[2] The plaintiffs, all Innu of Quebec, are challenging the motion and are essentially arguing that their action, which applies only to the federal Crown, concerns the negotiation and the entering into, in violation of their Aboriginal and treaty rights, of an agreement-in-principle between the federal Crown, the Government of NFL and the Innu of Labrador, namely to recognize the rights of the Innu of Labrador in Labrador.

[3] At the hearing before the Court, the position of the plaintiffs was further clarified: because the plaintiffs are simply seeking to have the federal Crown's constitutional duty to consult them and accommodate them recognized, this Court has the jurisdiction to hear and dispose of their action.

[4] For the following reasons, the motions to strike of the defendant and the intervener will be granted and the plaintiffs' action will be stayed pursuant to paragraph 50(1)(*b*) of the FCA.

II. The facts

[5] The plaintiffs claim to be the descendants of the Innu bands that historically occupied and used the Nitassian–Labrador land for subsistence purposes, by practicing their unique way of life based on hunting, fishing, trapping and gathering.

[6] In paragraph 24 of their statement of claim, they thus describe the activities that are integral to their distinctive culture and, hence, their Aboriginal rights:

> [TRANSLATION]
>
> (a) Hunting, fishing, trapping and gathering activities, including the harvesting of wildlife such as hunting caribou, moose and partridge for subsistence, cultural, social, ritualistic and commercial purposes;
>
> (b) The harvesting of plant, water, mineral and timber resources for subsistence, cultural, social, ritualistic and commercial purposes;
>
> (c) The construction of camps, caches, residences or other facilities necessary to their way of life and to the pursuit of their traditional activities;
>
> (d) The use of land, including watercourses, to exercise their traditional activities, such as harvesting, as well as for transportation purposes;
>
> (e) The exercise of their spiritual and cultural practices.

[7] The plaintiffs allege that they have been exercising their traditional activities on Nitassinan-Labrador land since before the arrival of the Europeans and well before the establishment of the provincial Quebec-NFL border and NFL's entrance into the Canadian federation.

[8] In November 2011, the Government of Canada, the Government of NFL and the Innu of Labrador signed an agreement-in-principle concerning Labrador Innu land claims and self-government. Part 2.1 of the Agreement-in-Principle reads as follows:

> 2.1.1 - The Agreement-in-Principle does not create legal obligations binding on the Parties and does not define, create, recognize, abrogate, derogate, deny or amend any of the rights of the Parties.
>
> 2.1.2 - The Agreement-in-Principle shall form the basis for concluding the Agreement [which is defined under 1.1.1 as being the Labrador Innu final land claims settlement agreement] and the Parties agree to begin to negotiate the Agreement in good faith as soon as possible following the signing of the Agreement-in-Principle.

[9] The plaintiffs are criticizing the federal Crown for not having consulted them before it signed the Agreement-in-Principle, even though it knew of the potential existence of asserted Aboriginal rights and that the Agreement-in-Principle was likely to have an adverse impact on those rights.

[10] However, it seems that, instead, the plaintiffs were consulted in the context of the negotiations for the Agreement-in-Principle. That is at least what is reflected in a letter dated April 1, 2015, by the Aboriginal Affairs and Northern Development Canada negotiator to the plaintiffs' respective chiefs (the letter was filed by consent at the hearing of the motions). Pages 3 and 4 of the letter state the following:

> [TRANSLATION]
>
> We would like to reiterate that the entire consultation process will be complete when the groups that have the potential to suffer harm from a potential treaty with the Innu of Labrador have had the opportunity to be consulted on the draft of the final agreement. For the moment, as you explained in your letter dated

> January 15, 2015, we understand that the only accommodation that is satisfactory to you would be to put eliminate any overlaps and remove all benefits, advantages or rights of the Labrador Innu in areas where you deem that only your communities are impacted.
>
> Taking all of these elements into consideration, we find that the time has come to end the consultations for the Agreement-in-Principle and to prepare for the consultations for the draft of the final agreement where you may see the changes made by the negotiation table since November 2011. We will contact you before the end of the negotiation of the final agreement to initiate the last phase of the consultation process.

[11] Unsatisfied with the federal government's position, the plaintiffs brought this action, by which they are seeking

> [TRANSLATION]
>
> 1. A declaration that the plaintiffs have, at least, *prima facie*, Aboriginal and treaty rights in and with respect to a large portion of the land commonly called "Labrador", which is part of the plaintiffs' traditional land (Nitassinan);
>
> 2. A declaration that the plaintiffs' Aboriginal and treaty rights include the right to exercise in the part of Nitassinan in Labrador (Nitassinan-Labrador) the Innu way of life, their culture, customs, traditions and traditional practices, including the right to harvest;
>
> 3. A declaration that the defendant breached Her obligations towards the plaintiffs by virtue of the honour of the Crown as well as Her fiduciary duty to the plaintiffs regarding those rights and breached Her constitutional duty to extensively consult with and accommodate the plaintiffs regarding those rights before the conclusion in November 2011 of the Labrador Innu Land Claims and Self-Government Agreement-in-Principle (Agreement-in-Principle) by the Labrador Innu, the Government of Newfoundland and Labrador (NFL) and the Government of Canada (Canada);
>
> 4. A declaration that the Agreement-in-Principle, attached herein as Exhibit P-1, is unlawful, unconstitutional and of

no force and effect with respect to the plaintiffs and the plaintiffs' traditional Innu land in Labrador.

5. A declaration that the Agreement-in-Principle breaches, at least *prima facie*, the plaintiffs' Aboriginal and treaty rights, breaches the defendant's duty to extensively consult with and accommodate the plaintiffs with respect to the Agreement, breaches the defendant's fiduciary duties towards the plaintiffs and contravenes the honour of the Crown.

6. A declaration that any final agreement or final agreement to settle the land claims covered by the Agreement-in-Principle (final agreement) that is entered into, without the plaintiffs' consent, between the Labrador Innu, Canada and NFL will be inconsistent with the plaintiffs' rights, will breach the plaintiffs' Aboriginal and treaty rights, will breach the defendant's duty to extensively consult with and accommodate the plaintiffs with respect to that final agreement, will breach the defendant's fiduciary duties to the plaintiffs regarding their rights and will contravene the honour of the Crown.

7. A declaration that the defendant has at least the duty to extensively consult with and accommodate the plaintiffs before negotiating or signing any final agreement concerning Labrador Innu land claims and self-government or any other agreement concerning land claims in Nitassinan-Labrador.

8. A declaration that, under the common law, treaties between the French Crown and the British Crown, on the one hand, and the Grand Innu Nation, on the other, and various constitutional instruments, including the *Royal Proclamation of 1763*, the *Terms of Union of Newfoundland with Canada* and the *Newfoundland Act*, the defendant has, among Her fiduciary and constitutional duties, the duty to recognize, protect, respect, preserve and promote the plaintiffs' freedom and right to exercise without interference their Aboriginal and treaty rights in Nitassinan-Labrador.

9. A declaration that the defendant contravened the honour of the Crown and breached those fiduciary and constitutional duties to recognize, protect, respect, preserve and promote the plaintiffs' freedom and right to exercise without interference their Aboriginal and treaty rights in

> Nitassinan-Labrador, including by signing the Agreement-in-Principle and by continuing negotiation of a final agreement, both without the plaintiffs' consent.
>
> 10. A permanent injunction ordering the defendant, Her officers, directors, employees, servants, agents and those in active concert and participation with Her, (a) to take the necessary measures to prevent or to stop any implementation of the Agreement-in-Principle by the defendant, (b) to fulfill Her Majesty's constitutional and fiduciary duties relating to the plaintiffs in accordance with the honour of the Crown and Her Majesty's constitutional jurisdiction under subsection 91(24) of the *Constitution Act, 1982*, (c) to not participate in the negotiations in relation to signing the final agreement without the plaintiffs' consent or without having extensively consulted with and accommodated the plaintiffs regarding their Aboriginal and treaty rights in Nitassinan-Labrador, and (d) to not sign the final agreement without the plaintiffs' consent or without having extensively consulted with and accommodated the plaintiffs regarding their Aboriginal and treaty rights in Nitassinan-Labrador.

III. Issues

[12] The following issues arise in the motions of the defendant and the intervener:

- *Does the Federal Court have jurisdiction to issue the orders sought by the plaintiffs?*
- *Is it in the interests of justice to stay the plaintiffs' action so that the issues raised by the plaintiffs can be argued before the Supreme Court of NFL?*

IV. Analysis

- *Does the Federal Court have jurisdiction to issue the orders sought by the plaintiffs?*

[13] In the context of a motion to strike a pleading, the facts as alleged must be taken as proven. The issue is therefore whether, assuming that the facts can be proven, it is "plain and obvious" that the plaintiffs' statement of claim fails to disclose a reasonable cause of action (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 33). In the case at bar, the absence of a cause of action would result from the Federal Court's lack of jurisdiction on the very essence of the plaintiffs' claim.

[14] The defendant and the intervener are arguing in that respect that the FCA does not allow the Court to grant an injunction order against a province or any remedy that would affect a province's property rights. They are arguing that that issue was determined by the Federal Court of Appeal in *Conne River Band v Canada* (1983), 49 NR 198 (FCA), upheld by the Supreme Court of Canada in *Joe v Canada*, [1986] 2 SCR 145 (*Joe*) and by the Federal Court of Appeal in *Vollant v Canada*, 2009 FCA 185 (*Vollant*). No distinction can be made, according to them, and those precedents apply in this case.

[15] The plaintiffs instead suggest that there is a distinction between a claim for Indian title on provincial land (raised in *Joe*), a claim for Aboriginal rights (raised in *Vollant*) and having the Court recognize the federal Crown's duty to consult them and accommodate them when it negotiates agreements that are likely to have an adverse impact on their asserted Aboriginal rights that are established only *prima facie*. Even though their statement of claim and written representations are worded in a much broader manner, the plaintiffs are arguing that their action is restricted to the federal Crown's duty to consult and accommodate and that the Federal Court has jurisdiction to hear it.

[16] If the essence of the plaintiffs' action was indeed that the federal Crown had failed to consult them before signing the Agreement-in-Principle and its duty to consult them before signing the final agreement with the Government of NFL and the Innu of Labrador, and if the remedies sought by the plaintiffs, as a result of those violations by the federal Crown, concerned only the federal Crown, I would agree with the plaintiffs.

[17] This Court certainly has substantial jurisdiction over Aboriginal matters and particularly to recognize the federal Crown's duty to consult and accommodate, to determine its degree based on the quality of the alleged potential Aboriginal rights and to force the federal Crown to fulfill its duties (see *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204 and *Huron-Wendat Nation of Wendake v Canada*, 2014 FC 1154).

[18] The plaintiffs refer the Court to the Supreme Court of Canada's decision in *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 (*Haida*), in which the source, scope and content of the duty to consult, as well as when it arises, were discussed in detail. The Chief Justice explained that the duty is grounded in the honour of the Crown (federal or provincial) and that it is a procedural duty that arises when the Crown has knowledge of Aboriginal rights that have been asserted, but that have still not been defined or proven, and contemplates conduct that might adversely affect those Aboriginal rights, if eventually proven.

[19] It is admitted, at least by counsel for the Innu of Matimekush-Lac John (counsel for the Innu of Uashat mak Manu-Utenam is not in agreement), that this Court does not have jurisdiction to rule on the plaintiffs' substantive rights and to confirm their Aboriginal and treaty rights in

Labrador. Because such confirmation would have a clear impact on NFL's property rights in the land and involve several activities under provincial jurisdiction, only the Supreme Court of NFL would have jurisdiction over all of the issues raised by such an action. It is well known that section 17 of the FCA concerns only the federal Crown, and does not include the provincial Crowns, and that this Court does not have jurisdiction to issue orders, of any nature, against the government of a province.

[20] However, a close reading of the plaintiffs' statement of claim and all of the remedies they are seeking before this Court instead reflects a dispute between the plaintiffs, on the one hand, and the Innu of Labrador and NFL, on the other hand. Counsel for the plaintiffs acknowledged before the Court that in the plaintiffs' opinion, the Agreement-in-Principle grants too many rights to the Innu of Labrador in Labrador. Almost all of the relief sought by the plaintiffs (with the exception of perhaps paragraphs 3, 5 and 7, reproduced in paragraph 11 of these reasons) would, if granted by this Court, impact the rights of the Innu of Labrador and those of NFL, which are not defendants in the action brought by the plaintiffs.

[21] For example, in paragraph 4 of their conclusions, the plaintiffs are seeking "[a] declaration that the Agreement-in-Principle . . . is unlawful, unconstitutional and of no force and effect with respect to the plaintiffs and the plaintiffs' traditional Innu land in Labrador". Such a conclusion, clearly, adversely impacts all of the signatories of the Agreement-in-Principle.

[22] As another example, at paragraph 6 of the relief claimed, the plaintiffs are seeking "[a] declaration and any final agreement or final agreement to settle the land claims covered by the Agreement-in-Principle . . . that is entered into, without the plaintiffs' consent, between the Labrador Innu, Canada and NFL . . . will breach the plaintiffs' Aboriginal and treaty rights . . . ". To make that declaration, this Court would have to confirm, definitively, the plaintiffs' Aboriginal and treaty rights. In *Haida*, the following was well stated by the Chief Justice:

> [48] This process does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. . . .

[23] However, because the Aboriginal rights in question are directly linked to the land of the province of NFL, the province of NFL has a certain interest in any action that would definitively establish and prove the plaintiffs' Aboriginal and treaty rights.

[24] For the first issue that arises in the motions of the defendant and the intervener, I find that this Court has jurisdiction to recognize the federal Crown's duty to consult and accommodate, to determine its degree based on the quality of the alleged potential Aboriginal rights and to force the federal Crown to fulfill its obligations. However, those claims are only incidental to the plaintiffs' action and this Court does not have jurisdiction over the very essence of their action.

[25] In short, if each allegation that exceeded the factual elements required to demonstrate that the federal Crown has the duty to consult the plaintiffs in its negotiations concerning the land of Labrador needed to be struck from the plaintiffs' statement of claim, but especially if each of the sought conclusions or remedies that do not arise from a breach of that duty to consult needed to

be struck, the plaintiffs' action would be distorted and the result would be a multitude of proceedings. It would be contrary to the interests of justice and the parties and to a constructive use of judicial resources to allow the plaintiffs' "cleansed" action to continue before this Court and to force the parties to debate a significant portion of the issues raised in their original action before the Supreme Court of NFL.

- *Is it in the interests of justice to stay the plaintiffs' action so that the issues raised by the plaintiffs can be argued before the Supreme Court of NFL?*

[26] The following was well stated by Justice Décary in *Vollant*, at paragraph 7, "[t]he striking out of an entire statement of claim is nonetheless an extreme remedy in a case in which the Court's concurrent jurisdiction over some aspects of the dispute has been established". In this case, given my finding that this Court has jurisdiction over a portion, even though incidental, of the plaintiffs' action, I will exercise my discretion pursuant to subsection 50(1) of the FCA and like the Federal Court of Appeal in *Vollant*, I will stay the plaintiffs' action before this Court to allow the debate to be pleaded before the Supreme Court of NFL, between the parties involved in the dispute.

V. Conclusion

[27] In light of the foregoing, the motions of the defendant and the intervener will be granted and the matter will be stayed pursuant to paragraph 50(1)(*b*) of the FCA. Given the particular circumstances of this matter and the partial jurisdiction of this Court over the subject of the dispute, regarding the defendant, costs will be awarded only to the intervener.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The motions of the defendant and intervener are granted;

2. The action of the plaintiffs is stayed pursuant to paragraph 50(1)(*b*) of the *Federal Courts Act*;

3. Costs are awarded only to the intervener, the Attorney General of Newfoundland and Labrador.

"Jocelyne Gagné"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-503-13
STYLE OF CAUSE:	THE INNU OF UASHAT MAK MANU-UTENAM ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AND THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR
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