Federal Court  Cour fédérale

Date: 20160309

Docket: T-799-15

Citation: 2016 FC 296

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 9, 2016

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

DOMINIQUE CÔTÉ

Applicant

and

HER MAJESTY THE QUEEN AND ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] In a highly complex statement, the applicant, who describes herself as a "non-status Indian and Chief of the Antaya Abenakis Algonquian Nation and the Antaya Aboriginal Community," makes numerous claims on her own behalf and that of the members of the group she represents concerning recognition of their status, their ancestral rights and treaty rights and

various payments in the form of royalties, contributions, salaries and legal fees, as well as compensatory, punitive and exemplary damages.

[2] The respondents have brought a motion to strike out this statement chiefly on the ground that the matter is beyond the Court's jurisdiction and, subsidiarily, due to lack of sufficient factual basis to support its conclusions and the theoretical nature of the declarations sought.

[3] At the hearing, the solicitor for the respondents recognized from the outset the monumental effort that went into preparing the application. He stated further that the issue raised in the present matter is not whether the applicant or the group she represents has valid rights to assert, but whether the Federal Court has jurisdiction to hear the case and provide remedies and, presuming even its partial jurisdiction in this regard, whether their factual basis is sufficiently substantiated in the statement to allow for discussion thereof.

[4] Although the respondents' written motion record raises the applicant's lack of standing as an additional ground to strike out, this ground was not addressed at the hearing.

[5] The statement is 22 pages long and has more than 63 numbered paragraphs. The list of reparations sought is nearly five pages in length.

[6] To facilitate understanding of this application, its contents might be divided among the following categories:

A. Declarations and remedies relating to recognition of the identity and status of the applicant and the members of her group as Aboriginals within the meaning of constitutional law and as Abenakis and/or status Indians under the *Indian Act*.

B. Declarations and remedies relating to the recognition and status of the Antaya Abenakis First Nation as an Aboriginal people or First Nation within the meaning of constitutional law and as a band officially recognized and funded under the *Indian Act*.

C. Declarations to the effect that the Antaya Nation, including its members and the applicant, have certain ancestral rights and treaty rights, including declarations and remedies in respect of the territories and specific rights in question.

D. Declaration and order to pay various amounts in the form of punitive, exemplary and other damages for harm caused by inaction of the government and the violation of ancestral and treaty rights.

E. Ancillary declarations and orders to pay various amounts in the form of funding, salaries, fees and representation expenses and provision for litigation costs.

I. Jurisdiction

[7] Unlike the provincial superior courts, such as the Superior Court of Québec, which have original, general and inherent jurisdiction, the Federal Court is a court of statutory jurisdiction created by Parliament under section 101 of the *Constitution Act, 1867*. Whereas the superior courts of the provinces are presumed to have jurisdiction over their territory except as otherwise expressly withdrawn under law, the Federal Court has no jurisdiction or authority except as

otherwise expressly assigned to it under federal law (*Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at page 474; *Roberts v. Canada*, [1989] 1 S.C.R. 322, at page 331). The fact that the application is made against Her Majesty the Queen in Right of Canada and concerns the federal government's jurisdiction over Aboriginal issues does not automatically give the Federal Court jurisdiction.

[8] Moreover, even if the Federal Court may have jurisdiction over a portion of a dispute brought before it, case law states clearly that the Court shall decline to exercise this jurisdiction where the law imposes an adequate administrative procedure not yet exercised or where another court of competent jurisdiction may more adequately determine the true essence of the dispute.

A. *Remedies relating to Aboriginal or Indian status*

[9] The statement seeks multiple remedies relating to the individual rights of the applicant and the members of her group to recognition as Aboriginals within the meaning of constitutional law and to have their names entered in the Indian Register under the *Indian Act*, RSC 1985, c. I-5. The reparations sought include highly general declarations as to the "Abenakis origin" of the applicant and the other members of the group and their identity as Abenakis under constitutional law as well as more specific reparations pursuant to the rights set out in the *Indian Act*, such as the rights to have their name added to the Indian Register, to be issued a status card and to enjoy the other rights granted under the Act.

[10] At the hearing, the applicant acknowledged that no specific rights resulted from recognition of a person's "Aboriginal" identity and that in this regard, her seeking a declaration is more a part of an overall effort to achieve recognition of the ancestral and treaty rights of the

Antaya Nation and the band's rights to be recognized and registered under the *Indian Act*. The ancestral and treaty rights guaranteed under the *Constitution Act, 1982* are those of "aboriginal peoples," while the *Indian Act* confers rights upon Indian "bands." However, until the applicant's group is recognized as an Aboriginal people or an Indian band, neither the group nor its members can gain recognition of these rights. Meanwhile, the terms "Aboriginal people" and "band" presuppose the existence and formation of a community of individuals who are recognized or recognizable as "Aboriginals," hence the utility of the declarations sought concerning the "Aboriginal" identities of the applicant and those she represents.

[11] The preceding makes clear that the general declarations sought by the applicant concerning her "Aboriginal" identity and that of the members of her group have an intent only within the context of her seeking recognition of the group as a band under the *Indian Act* or recognition of ancestral or treaty rights. If the Federal Court had jurisdiction to hear her applications, the fact that her action includes applications for more general declarations not carrying any specific rights would not pose a problem or provide any reason to strike them out. However, since the Court does not have jurisdiction to hear these applications, as discussed below, the applications for general declarations of Aboriginal status are purely academic. The sound administration of justice requires the striking out of applications of solely academic or theoretical interest that cannot truly serve in resolving a genuine problem.

[12] With respect to the remedies relating specifically to the individual rights conferred by the *Indian Act*, these are all based on the right claimed to be entered in the Indian Register. Now, as indicated by the respondents in their written representations, the *Indian Act* confers the power to enter a person's name in the register upon the Indian Registrar. According to the applicant's

statement, she has made an application in this regard on multiple occasions unsuccessfully. The *Indian Act* prescribes a specific procedure for contesting decisions of the Registrar concerning inclusion in the Register. This procedure first requires making a "protest" to the Registrar followed by an appeal to the Superior Court of Québec (subsection 5(3) and sections 14.2 and 14.3 of the *Indian Act*). The statement does not indicate clearly whether the applicant has already made use of this dispute mechanism. Regardless, and as determined previously by this Court in *Callihoo v. Canada*, 2004 FC 1312, at paragraphs 11 to 17, affirmed in 2008 FCA 368, the very existence of this mechanism excludes the jurisdiction of the Federal Court. In the circumstances, the Federal Court manifestly does not have jurisdiction with respect to the applications for reparations concerning the claimed right to be entered in the Indian Register. Insofar as the Court cannot rule on the rights of the applicant or the other members of her group to be entered in the Register, reparations concerning recognition or declaration of any other rights arising from that act are bound to fail and must also be struck out.

B. *Remedies relating to nation or band status*

[13] In her statement, as the applicant seeks concerning her individual status, she also seeks highly general declarations concerning the status of the group she represents as an Aboriginal people or First Nation under constitutional law as well as more specific declarations of rights conferred upon Indian bands by the *Indian Act*.

[14] The reasoning applied above to remedies relating to individual status is equally applicable to remedies relating to the status of the group: general declarations serve only within the context of seeking overall and definitive recognition of ancestral and treaty rights or recognition of the band under the *Indian Act*. In light of the conclusion set out later herein to the

effect that the Court has no jurisdiction over these ultimate issues, the general declarations sought are of solely academic interest and shall consequently be struck out.

[15] With regard to recognition of the band under the *Indian Act*, that Act confers the power to constitute new bands if requested to do so upon the Minister of Indigenous and Northern Affairs (subsection 17(1)). The respondents submit that this power is exercised entirely at the Minister's prerogative and is not justiciable before the Federal Court or any other court. The Court does not find the issue to be as clear and manifest as does the applicant. The Court does not exclude the possibility that it may have jurisdiction under section 18 of the *Federal Courts Act* to conduct a judicial review of the Minister's refusal to constitute a new band if requested to do so. Manifestly, however, in the absence of an existing decision from the Minister, the Court may not substitute itself for the Minister in a proceeding and declare the right of a new band to be constituted. This power to recognize a new band is assigned to the Minister, not the Federal Court, and the Court cannot acquire a jurisdiction that has not been specifically assigned to it.

[16] The statement also seeks a series of orders to pay amounts to which the band could have or would have had right if it had official recognition as a band, including contributions, band council funding, salaries and administration fees, etc. These applications presuppose recognition of the band under the *Indian Act*, which is outside of the Federal Court's responsibility. These applications are consequently bound to fail. Moreover, although the amounts sought are in many cases exact, the statement is devoid of any allegations of fact that it may be necessary to produce in order to establish the right to these amounts, presuming once again that the band were officially recognized under the Act. To cite just one example, the statement seeks payment of salaries to the band council as far back as its first application for registration but contains no

allegations as to the actual constitution of a band council or the council's performance of the roles for which salaries could or should have been paid. Statements not containing adequate allegations of fact to justify the remedies sought are bound to fail and must be struck out.

C. *Remedies relating to ancestral and treaty rights*

[17] The true essence of the applicant's action is to seek recognition of the collective rights of the Antaya Nation to ancestral rights and interests concerning a specific tract of land, Mechatigan or Sartigan, located in the Chaudière-Appalaches region of Quebec, and to rights under treaties including the Treaty of Swegatchy of August 1760. Now, although the purpose of such recourse is in part to seek reparations from the federal government and the jurisdiction of the Federal Court may consequently appear to be engaged pursuant to section 17 of the *Federal Courts Act*, this recourse may not be determined without directly affecting the property rights, resources, interests and jurisdiction of the Province of Quebec in relation to its territory. The Federal Court jurisprudence is clear and well established in this regard: the Federal Court has no jurisdiction to make any order whatsoever against a province even in a matter that would otherwise fall exclusively within federal jurisdiction (*Canada v. Toney*, 2012 FCA 167). The Federal Court and the Federal Court of Appeal have recognized expressly, in multiple proceedings in which Indian bands have requested recognition of ancestral or territorial rights, that they did not have jurisdiction to declare such rights: *Conne River Indian Band v. Canada (FCA)*, [1983] F.C.J. No. 531, 49 NR 198, affirmed in [1986] 2 S.C.R. 145, *Vollant v. Canada*, 2009 FCA 185 and *Innu of Uashat mak Manu-Utenam v. Canada*, 2015 FC 687. In the latter two cases, having recognized its lack of jurisdiction and the fact that the applications could be struck out on that ground, the Court debated whether it was preferable to strike out the applications without possibility of amendment or to suspend them so that they might be argued

before the provincial court having jurisdiction. In the circumstances of the present matter, where no other applications are currently pending before the Superior Court of Québec and the statement is weighed down with numerous additional applications that are bound to fail, suspending the action is not in the interest of justice. It is also important to note that striking out the application does not determine the merit of the rights sought by the applicant or the band and consequently will not extinguish or interfere with these rights should the application be brought before the appropriate tribunal.

D. *Compensatory, punitive and exemplary damages*

[18] The statement seeks that the respondents be ordered to pay damages for the harm allegedly caused to the applicant as well as to her family, the members of her Nation and the members of the Nation's band council. These amounts allegedly correspond to royalties the band would have received as a First Nation plus compensation for financial, emotional and psychological harm and inconvenience. The cause of this harm is identified summarily as the government's inaction toward the applicant, the damages incurred as a result of previous logging and mining activities on the Nation's land, the violation of ancestral and treaty rights, the violation of rights recognized in the Quebec *Charter of Human Rights and Freedoms* and the *Canadian Charter of Rights and Freedoms* among other documents, the violation of identity rights and deprivation of the applicant's culture, traditions and origin as well as the government's failure to fulfil its fiduciary obligation to Aboriginal peoples. The statement also seeks an order to pay exemplary and punitive damages.

[19] However extensive and complex the statement may be with respect to the legal and historical merit of the claims of the applicant and her Nation to their Aboriginal and band status,

it is lacking in terms of substantial material facts to support the payment orders sought. Even if the rights of the applicant or her Nation to legal status or ancestral or treaty rights were ultimately recognized, this would not necessarily give rise to financial compensation. Crown liability depends on the existence of a fault (*Crown Liability and Proceedings Act*, RSC 1985, c. C-50), a contractual obligation or some other legislative provision. No facts are alleged in sufficient specificity to demonstrate the existence of a fault giving rise to the liability of the respondents or of other facts giving rise to a right to compensation. No facts are alleged to justify the amount of damages sought. This is not to say that the general circumstances discussed in the statement could not give rise to compensation. However, the capacity of a respondent to defend itself against a claim and of the Court to hear and settle a matter fairly and effectively depends upon the orderly and complete presentation of specific facts giving rise to the reparations sought. As indicated by the respondents in their written representations, the complexity of the issues raised by the applicant does not exempt her from her obligation to allege all material facts to support the remedies identified.

[20] An application failing to allege the necessary facts to establish the right sought must be struck out, but in doing so, the Court may allow the possibility for amendment to address shortcomings. The appropriate remedy in the circumstances is not to strike out with permission to amend. Despite the lack of sufficient factual information, the financial reparations outlined in the application are clearly linked closely to and, in fact, based entirely on the recognition of status and the presumed existence of ancestral and treaty rights sought by the applicant. As stated, the Court does not have jurisdiction with respect to establishing the rights on which the applications for financial reparation are based. Under the guise of the very broad applications in the statement, there were some other monetary claims concerning which the Court may have

jurisdiction; however, extracting them from the mass of allegations to be struck out would require rewriting the statement to the point of making it unrecognizable. Nothing of the original statement would remain to justify continuing this proceeding. Once again, striking out does not affect the determination of substantive rights. To the extent that the statement included applications for reparation that may reasonably be tried independently of the claims of ancestral rights, the applicant is free to seek their recognition in another action of more limited scope.

E. *Ancillary reparations*

[21] The statement sets out a series of remedies that may be deemed ancillary to the application itself, including applications to recognize the applicant's mandate to represent the band, applications for funding to maintain and present the present action, reimbursement of fees and costs incurred in relation to the present action, legal costs, judicial and extrajudicial costs, exemption from costs, etc. In light of the striking out of the statement, these ancillary applications become moot and shall also be struck out.

ORDER

THE COURT ORDERS that:

1. The statement of May 15, 2015, be struck out.

2. Without costs.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-799-15
STYLE OF CAUSE:	DOMINIQUE CÔTÉ v. HER MAJESTY THE QUEEN AND ATTORNEY GENERAL OF CANADA
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APPEARANCES:

Dominique Côté	FOR THE APPLICANT (ON HER OWN BEHALF)
Éric R. Gingras	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

William F. Pentney, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS