Date: 20030401

Docket No.: T-129-89

Citation: 2003 FCT 383

Ottawa, Ontario, this 1st day of April, 2003

PRESENT: THE HONOURABLE MR. JUSTICE BLANCHARD

BETWEEN:

THE FEDERATION OF NEWFOUNDLAND INDIANS, CALVIN WHITE, CLIFTON GAUDON, LAWRENCE JEDDORE, CALVIN FRANCIS, WILSON SAMMS, MARIE SPARKES and EFFIE SCANLON

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

First defendant

- and -

MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Second defendant

REASONS FOR ORDER AND ORDER

Introduction

[1] On November 14 and 15, 2002, the plaintiffs brought three motions: (i) a motion for an order

pursuant to Rule 104(1) to add four plaintiffs to the statement of claim, an order pursuant to Rule 104(2) for direction with respect to the necessary amendments as a consequence of the addition, and a further order to remove the name of a plaintiff now deceased; (ii) a motion for an order pursuant to Rule 75(1) to further amend the amended statement of claim to effect certain minor revisions, and an order adding FNI as a public interest litigant; (iii) a motion under Rule 225 for full disclosure by the defendants.

[2] The defendants brought a single motion to strike out the Federation of Newfoundland Indians ("FNI") as a plaintiff, to strike out the Minister of Indian Affairs and Northern Development ("Minister") as a defendant, and to strike out certain portions of the amended statement of claim as a consequence of these two changes.

[3] The underlying action is brought by a number of individual plaintiffs and the Federation of Newfoundland Indians ("FNI"), a group that represents the interests of non-status Micmac Indians resident in Newfoundland. The plaintiffs bring action against Her Majesty in Right of Canada and the Minister of Indian Affairs, seeking an order that they be declared "Indians" within the meaning of subsection 91(24) of the *Constitution Act, 1867*. The plaintiffs claim that their s. 15 *Charter* rights have been violated, given that they have been denied *Indian Act* benefits as compared to the Conne River Micmac, who were granted status in 1984 pursuant to the Canada-Newfoundland-Native Peoples Conne River Agreement. The plaintiffs also seek damages for breach of fiduciary obligations owed by the Minister in respect of his failure to extend *Indian Act* benefits to them.

[4] On 21 November, 2002, shortly after these motions were heard, the new Federal Court Rules concerning class actions came into effect, and Rule 114, which had governed representational actions, was repealed. New Rule 299.17 requires that a plaintiff seeking certification must bring a motion to certify an action as a class action, and must also meet the conditions specified in Rule 299.18.

[5] On December 5, 2002, I ordered that the parties file submissions concerning the impact of the new rules on the management of the proceeding. Submissions were received in January 2003.

[6] On March 6, 2003, a teleconference was held to allow the parties to address issues germane to the motions, including the procedure for certifying the action as a class action according to the new Federal Court Rules. As noted in my direction dated March 10, 2002, it was agreed that the plaintiffs will file a motion for leave to amend the statement of claim and a motion for certification of the action pursuant to the class action rules.

[7] I will now determine the motions under reserve to the extent that their determination does not affect the impending certification application.

Plaintiffs' First Motion: Joinder

[8] The plaintiffs state that a number of developments have occurred since the commencement of litigation in 1989. Audrey Stanford seeks to replace Lawrence Jeddore, who has died. The FNI has undergone reorganization in that "three regional bands" have ceased to exist, whereas the number of

affiliated local bands have increased by three. The plaintiffs submit that all ten local bands should be represented in the litigation and therefore seek an order to add Andrew Tobin (St. George's Indian Band), Benedict White (Stephenville/Stephenville Crossing Local Band), and Ignatius Paul (Exploits Local Band) as plaintiffs.

[9] In view of the plaintiffs' intention to seek certification, I will refrain from ruling on this motion at this time.

Plaintiffs' Second Motion: Further amend statement of claim & public interest standing

[10] The plaintiffs seek to amend the statement of claim in relation to a number of minor items, which are enumerated in the plaintiffs' motion record at tab 2, paragraphs 5, 6 and 7, and 12. Some of these amendments relate to the status of the plaintiffs, and need not be addressed in view of the plaintiffs' impending certification motion: namely those amendments requested in paragraphs 5(b), 5(e), 6(a), 6(b), and 7(b) at tab 2 of the plaintiffs' motion record.

[11] The following amendments requested by the plaintiffs are unrelated to the status of the plaintiffs and, accordingly, will be addressed. The amendments noted in paragraphs 5(a), 5(c), 5(d), 7(a) and 7(c) at tab 2 of the plaintiffs' motion record are granted. These items relate to minor changes in terminology. In addition, the amendments noted in paragraph 12(a)-(h) at tab 2 of the plaintiffs' motion record are granted. I am of the view that allowing these amendments would not prejudice the defendants.

[12] The plaintiffs state that the FNI's articles of continuance now create an obligation on the Federation to pursue standing as a public interest plaintiff. The plaintiffs submit that the FNI has standing under *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, to act as a public interest plaintiff and they request an amendment to paragraph 1 of the amended statement of claim to reflect this status.

[13] The test for public interest standing involves a consideration of three questions, as noted by Cory J. in *Canadian Council of Churches, supra,* at 253:

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court? (emphasis added)

[14] The jurisprudence on public interest standing suggests that requests by aboriginal groups are routinely denied when individual aboriginals are already listed as plaintiffs: see *Landry v. Canada (Indian and Northern Affairs)* [1994] F.C.J. No. 2004 (QL); *Nolan v. Canada (Attorney General)* [1997] O.J. No. 3361 (Q.L.). The major hurdle for aboriginal "umbrella" groups is the third branch of the public interest standing test. In the instant case, since individual aboriginal plaintiffs are already named as plaintiffs, it cannot be said there is no other way to bring the litigation. Therefore, I find that the plaintiffs have not satisfied the third branch of the test set out by the Supreme Court of Canada in *Canadian Council of Churches, supra,* and consequently the FNI will not be accorded

public interest standing.

Plaintiffs' Third Motion: Disclosure

[15] The plaintiffs bring a motion for disclosure under Rule 225 of the *Federal Court Rules, 1998*, SOR/98-106, as amended.

[16] The plaintiffs state that the defendants' affidavit of documents is limited to documents that pre-date the statement of claim, i.e. January 12, 1989. The plaintiffs argue that the failure to honour the fiduciary obligation constitutes "a continuing breach" that continues to this day, and accordingly, there may be post-1989 documents that are relevant to the pleadings as framed. The plaintiffs rely on *Samson Indian Nation and Band v. Canada (1999)*, 180 F.T.R. 243, [199] F.C.J. No. 2011 (QL), for the proposition that discovery obligations are not limited to documents that come into existence before the commencement of proceedings.

[17] In *Samson Indian Nation, supra*, the Ermineskin plaintiffs brought a motion for disclosure of documents, "including such documents as have come or may come into existence or to the attention of the Crown or have been or may be received by the Crown at any time subsequent to the commencement of these proceedings and up until the trial of this action". The defendant Crown argued that a cut-off date for discovery should be set, and that an obligation to discover new documents would be unduly onerous would cause the trial to be delayed. MacKay, J. held that the plaintiffs could rely on Rule 226 (continuing discovery) and that the Crown would have to apply for relief from production under Rule 230 "if the general obligation to continue production is to be

varied" (at para. 27). The Court refused to set a cut-off date after which documents would not be required to be produced.

[18] The defendants take the position that documents that came into existence after the pleadings were filed are not relevant and base their position on the proposition that facts arising after the date of an action cannot be relied upon to sustain it. The defendants contend that because the pleadings must contain material facts that occurred prior to the filing of the statement of claim, the "temporal scope of relevance is similarly confined".

[19] The defendants rely on *Canfran Investments Ltd. v. Glivar* (1983), 42 O.R. (2d) 601 (Ont. H.C.). In that case, a writ for foreclosure on a mortgage was issued at a time when there was no actual default on the mortgage, although default occurred subsequently. The defendants argued that the action was a nullity, since there was no valid claim when the writ was issued. The Court held that "a cause of action accrues only upon default on the mortgage and the action is a nullity."

[20] I am of the view that the *Canfran* case, supra, is not relevant to the issue of disclosure. In *Canfran, supra*, an essential element of the claim was absent at the time of commencement of proceedings: a default on the mortgage. In the case at bar, no analogous claim is made by the defendants. I am of the view that *Canfran, supra*, does not stand for the proposition that disclosure is necessarily limited to documents that pre-date the statement of claim.

[21] As with the defendants in *Samson, supra*, the defendants in the instant case appear to be

concerned about the onerous task of producing post-1989 documents. They submit an affidavit from Thomas Dale Pegg, a litigation project manager at the Department of Indian Affairs and Northern Development. Mr. Pegg states that post-1989 discovery is onerous because (i) he has no criteria with which to direct his staff to flag documents, and (ii) the time required to sort through post-1989 files is considerable. Mr. Pegg also states that the endeavour would require the work of three full-time workers for nine months.

[22] In his Order re continuing production in *Samson, supra,* Mr. Justice MacKay wrote in a recital:

> UPON reserving decision at the hearing and subsequently considering submissions then made and the Court considering that the obligation of a party, pursuant to Rule 226(2), to serve a supplementary affidavit of documents when it is aware that an affidavit of documents previously served is inaccurate or deficient, when reasonably applied in the circumstances of this case does not require periodic reconsideration of all sources of documents but rather requires reasonable steps to ensure that following provision of an affidavit of documents, any relevant documents subsequently acquired, or previously acquired but not earlier discovered, of which a party becomes aware, are included in a supplementary affidavit and produced;

[23] My learned colleague went on to allow the application on terms which I consider both reasonable and applicable to the case at bar. I do not believe, in the circumstances of this case, that a periodic reconsideration of all sources of documents is required. The parties will be required to take all reasonable steps to ensure that following provision of an affidavit of documents, any relevant documents subsequently acquired, or previously acquired, but not earlier discovered, of which a party becomes aware, are produced and eventually included in a supplementary affidavit of documents to be filed prior to the pre-trial conference.

[24] In summary, I am not prepared to find that discovery obligations are limited to the production of documents that pre-date the statement of claim, as urged by the defendants. Accordingly, I will order that the defendants produce all documents that are relevant to the plaintiffs' claims, such production to be circumscribed, however, by the above terms.

Defendants' Motion: Striking the FNI as plaintiff and the Minister as defendant

[25] In view of the plaintiffs' intention to apply for certification as a class action and to seek leave to amend the statement of claim, I decline to rule on the defendants' motion strike the FNI as a plaintiff at this time. The question of who is an appropriate plaintiff will be dealt with on the motion for leave to amend the statement of claim and for class action certification.

[26] In this motion, the defendants also move to strike the Minister as a defendant as they argue that he is not a necessary and proper party to this action. Rule 104(1) of the Federal Court Rules, SOR/98-106 provides:

At any time, the Court may	La Cour peut, à tout moment, ordonner :
(a) order that a person who is not a proper or necessary party shall cease to be a party;	(a) qu'une personne constituée erronément comme partie ou une partie dont la présence n'est pas nécessaire au règlement des questions en litige soit mise hors de cause;

[27] The defendants rely on *Cairns v. Farm Credit Corp.* (1991), 49 F.T.R. 308, [1991] F.C.J. No. 1143 (QL), wherein Denault J. stated, at QL para. 6, that a "Minister of the Crown cannot be sued in his representative capacity, nor can he be sued in his personal capacity unless the allegations against

him relate to acts done in his personal capacity" (emphasis added). In *Cairns*, *supra*, the Honourable William McKnight had been listed as a defendant. Denault J. struck all references to Mr. McKnight on the basis that the plaintiffs' claims did not relate to acts committed by Mr. McKnight in his personal capacity.

[28] The plaintiffs rely on a case in which a Minister of the Crown was ordered to remain as a defendant, although the claim related to acts done in his representative capacity. In *Liebmann v. Canada (Minister of National Defence)* [1994] 2 F.C. 3, the plaintiff, a Jewish member of the armed forces, brought a s. 15 *Charter* challenge to the Department of National Defence policy that precluded his posting to the Middle East during the Gulf War. The defendants brought a motion to replace the "Minister of National Defence" with either "Her Majesty the Queen" or "Attorney General of Canada". Reed J. held, based on her review of the Crown immunity jurisprudence and the Federal Court Rules, that the Minister of National Defence should remain as a defendant. However, in *Liebmann, supra,* the plaintiffs sought an injunction against the Minister of National Defence to preclude him from applying the impugned policy. Such circumstances do not arise in this case.

[29] The plaintiffs argue that the Minister is a necessary and proper party to this action and that matters in dispute cannot be completely and effectively determined without the Minister as a party. In particular, the plaintiffs note that, in 1982, the then Minister made a commitment to the FNI in his capacity as a servant of the Crown. They argue that the Minister's inclusion as a party is essential to determine the issues.

[30] I disagree with the plaintiffs' submission. As noted above, the jurisprudence of this Court has established, generally, that a Minister cannot be sued in his representative capacity, nor in his personal capacity, when acting on behalf of the Crown except in particular circumstances which are not applicable to this case. In my view, Her Majesty the Queen in Right of Canada is the proper party defendant and any documentation related to the Minister's alleged promise will no doubt be produced by the defendant Her Majesty the Queen in Right of Canada. In any event, the Minister does not have the statutory authority to give the plaintiffs the remedy of registration of a new Indian band. Under subsection 2(1) of the *Indian Act*, R.S. 1985, c. I-5, a "band" is declared to be a band by the Governor in Council, not the Minister. Consequently, I am of the view that the Minister is not a necessary party to the action. Accordingly, the motion to strike is allowed and the Minister will be struck as a defendant.

[31] I will reserve any decision dealing with costs until disposition of the motion for leave to amend the statement of claim and the motion for certification of the action.

ORDER

THIS COURT ORDERS that:

1. Further to my Order of October 8, 2002, Effie Scanlon ceased to be a party to this action, consequently, the name Effie Scanlon, one of the plaintiffs, is deleted from the style of

cause.

2. The plaintiffs are granted leave to amend the amended statement of claim with respect to the amendments noted at tab 2, paragraphs 5(a), 5(c), 5(d), 7(a), 7(c), and 12(a)-(h) of the plaintiffs' motion record for the second motion herein.

3. The plaintiffs' motion to be accorded public interest standing is denied.

4. The Crown shall continue to produce documents relevant to the issues in this action, and to provide appropriate supplementary affidavits of documents in accord with Rule 226(1), including:

   (i) new documents contained in active files identified by the defendants, on their initiative or by them in consultation with the plaintiffs, which may be of particular interest in regard to the issues in this proceeding.

   (ii) documents otherwise coming to the attention of Crown counsel and others concerned with issues raised in this action, whether or not previously existing or discovered, and known to be relevant in this proceeding.

5. The Minister is struck as a defendant and shall cease to be a party. The style of cause and statement of claim shall be amended accordingly.

6. Costs on these motions will be dealt with upon disposition of the motions respecting certification.

"Edmond P. Blanchard"
Judge

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-129-89
STYLE OF CAUSE:	The Federation of Newfoundland Indians et al. V. Her Majesty the Queen in Right of Canada et al.
PLACE OF HEARING:	Halifax, N.S.
DATE OF HEARING:	November 14, 2002
REASONS FOR ORDER AND ORDER:	**BLANCHARD J.**
DATED:	April 1, 2003

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