Date: 20050815

Docket: T-2172-99

Citation: 2005 FC 1109

Vancouver, British Columbia, Monday, the 15th day of August, 2005

Present: THE HONOURABLE MR. JUSTICE MARTINEAU

BETWEEN:

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 (Appellants)

REASONS FOR ORDER AND ORDER

[1] In this appeal, the Appellants attack the exercise of discretion of Case Management Prothonotary Hargrave to permit Gabriel Daniels and Terry Joudrey (the intended Plaintiffs) to be added as Plaintiffs to this action following the death of the first named Plaintiff, Harry Daniels.

[2] The Appellants, who are Defendants in this action, concede that the questions raised in the motion are not vital to the final issue of the case.

[3] The present appeal must fail. In this regard, I accept the Plaintiffs' (Respondents) submissions made in their written representations. I am satisfied that there is no material error in the learned Prothonotary's decision that justifies the intervention of this Court, in the sense that the exercise of the Prothonotary's discretion was based upon a wrong principle or upon a misapprehension of the facts. Case management judges or prothonotaries must be given latitude to manage cases. This Court will interfere only in the clearest cases of a misuse of judicial discretion (*Sawridge Band v. Canada*, [2002] 2 F.C. 346; 2001 FCA 338; [2001] F.C.J. No. 1684 (C.A.), at paragraph 11). This is certainly not the case here. In any event, even if this Court should exercise its discretion *de novo*, it would reach the same conclusion as Prothonotary Hargrave.

[4] The references made by the Prothonotary in his reasons (and order) to the assumption that "[t]his proceeding was and remains a representative action, commenced under former Rule 114" (my underlining) are technically inaccurate. However, nothing turns on this point. Moreover, Prothonotary Hargrave was not clearly wrong in relying on the following general view taken by Mr. Justice Hugessen in *Shubenacadia Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2001 FCT 181; [2001] F.C.J. No. 347 (F.C.T.D.) (QL):

> [...] The rules of the Court are extremely generous in respect of both amendments and joinder of parties and causes of action and as a matter of principle, it would seem to me that there is nothing that can be said against the joinder in a case such as this. Indeed, as I mentioned during an earlier hearing, if the plaintiffs were to institute a separate action claiming damages, it is entirely probable that the Court

> would, at some stage, order either the consolidation or the joinder of the two proceedings. If, at a later date the joinder turns out to be cumbersome or otherwise inappropriate, the Court retains a discretionary power under Rule 107 to order separate trials. [...]

In *Shubenacadia, supra*, Mr. Justice Hugessen approved the addition of other plaintiffs who asserted that they were beneficiaries of aboriginal rights by way of treaty and common law.

[5] The Appellants further submit that "[t]he only reason which makes it necessary to make a person party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question in the action which cannot be effectually and completely settled unless he is a party" (Devlin J.'s (as he then was) comments in *Amon v. Raphael Truck & Sons Ltd.*, [1956] Q.B. 357 (Q.B.D.) at page 380, cited with approval by the Federal Court of Appeal in *Stevens v. Canada (Commissioner, Commission of Inquiry)*, [1998] 4 F.C. 125, at paragraph 20). Those comments, while generally relevant, have to be adapted to the present context and take account of the fact that this is not an ordinary commercial or a civil action.

[6] Indeed, what is being essentially sought here is a judicial declaration by this Court that federal jurisdiction under s. 91(24) of the *Constitution Act, 1867* includes Metis and non-status Indians and also that the present Defendants owe a fiduciary duty to Metis and non-status Indians and must negotiate with representatives of Metis and non-status Indians respecting "all their rights, interests and needs as Aboriginal peoples." In these circumstances, the present action is more akin to that in *Dyson v. Attorney General*, [1911] 1 KB 410, a decision of the

Court of Appeal. I note that Rule 104, which the Appellants submit applies here, speaks to situations in which a party might "be added"; typically defendants who are being brought into the action against their will. In this regard, the motion made in this case by the Plaintiffs certainly does not raise the same considerations as a motion to compel other parties to be added involuntarily in an ordinary civil or commercial case. I reiterate that these proceedings raise questions of constitutional law that are of profound importance to the Metis and the non-status Indians of Canada and present a number of features that render this affair unique and quite distinguishable from the factual situation that was present in the cases which the Appellants cited in their written representations, some of which were considered by the Prothonotary in his reasons.

[7] The general declaratory relief sought in this action by the present Plaintiffs is specifically authorized by Rule 64. In "test case" litigation as here, it is necessary to have appropriate parties before the Court to raise the factual context required for the Court to rule upon. Following Harry Daniels' death, I note that there is no individual Metis plaintiff before the Court. Moreover, I also note that the Appellants have challenged the standing of the Congress of Aboriginal People in their Statement of Defence, and that this issue remains open for determination at trial. Unless Gabriel Daniels is added as a Plaintiff, the Respondents fear that there will be no party with standing to raise the issue of Metis status, an issue of great importance to an estimated 200,000 people. Further, the Respondents submit that both Gabriel Daniels, as a Western Canadian Metis, and Terry Joudrey, as a non-status Indian from the Atlantic provinces, will provide necessary

and appropriate factual context to the Court in deciding the various issues that arise in this "test case". Prothonotary Hargrave was not clearly wrong in endorsing the submissions made in this regard by the Respondents.

[8] I also agree with Respondents' counsel's further submissions that Rule 104 which applies here should not be read in isolation and that Rules 3, 102 and 105 permit such joinder. The Supreme Court and subsequently provincial courts have repeatedly stressed that constitutional cases should be decided with an appropriate factual context (*R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Van der Peet* [1996] 2 S.C.R. 507; *R. v. Marshall*, [1999] 3 S.C.R. 533; *Sandy Ridge Sawing Ltd. v. Norrish and Carson* (1996), 140 Sask. R. 146; *Ochapowace First Nation v. Canada*, [1999] S.J. No. 56). In my opinion, the Rules can be read flexibly enough to permit the addition of the intended Plaintiffs, where this would be just and appropriate. Indeed, Rule 3 directs the Court to adopt such a reading and I fail to see how such an addition would be contrary to the Rules. Moreover, the voluntary addition of two new Plaintiffs does not cause prejudice to any of the parties and will not result in further delays. In this regard, I note that the proceedings are still at an early stage despite the fact that the action was commenced in December 1999. Multiplicity of proceedings should be avoided whenever possible. As noted by Prothonotary Hargrave in his reasons for order, if each of the intended Plaintiffs were to institute their own actions, there is a good probability that the Court would at some point order either consolidation or joinder, a point also made by Mr. Justice Hugessen in *Shubenacadia*, *supra*, upheld on appeal (2002) 291 N.R. 393.

[9] In any event, all these elements justify that, in the exercise of its discretion, the Court orders that the intended Plaintiffs be added as parties at this stage of the proceedings, instead of forcing them to institute separate actions seeking the same declaratory relief. In conclusion, there is no reason why this Court should interfere with the order rendered on May 13, 2005, by Prothonotary Hargrave, except to the extent that the word “representative” should be deleted from same. Finally, Respondents shall have their costs in this appeal.

ORDER

THIS COURT ORDERS that:

1. The Order rendered on May 13, 2005 by Prothonotary Hargrave is varied by the deletion of the word “representative” found in the first sentence of same, and which presently reads as follows:

> Gabriel Daniels and Terry Joudrey are added as Plaintiffs in this representative action.

2. Costs of this appeal are awarded in favour of the Respondents.

(Sgd.) “Luc Martineau”

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2172-99

STYLE OF CAUSE: HARRY DANIELS ET AL.

- and -

HER MAJESTY THE QUEEN ET AL.

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: August 8, 2005

REASONS FOR ORDER AND ORDER: MARTINEAU J.

DATED: August 15, 2005

APPEARANCES:

Mr. Andrew K. Lokan	FOR PLAINTIFFS
Ms. Cynthia J. Dickins Ms. Karen Metcalfe	FOR DEFENDANTS

SOLICITORS OF RECORD:

Paliare Roland Rosenberg Rothstein LLP Toronto, ON	FOR PLAINTIFFS
John H. Sims, Q.C. Department of Justice Edmonton, AB	FOR DEFENDANTS