Federal Court  Cour fédérale

Date: 20210420

Docket: T-69-20

Citation: 2021 FC 342

Ottawa, Ontario, April 20, 2021

PRESENT: Case Management Judge Mireille Tabib

BETWEEN:

GEORGE FRANK QUINN, FLOYD WILLIAM QUINN, FRANCES DOREEN WABASCA, VIOLET ANDRES AND THE PASS-PASS-CHASE (PAHPAHSTAYO) FIRST NATION ASSOCIATION OF ALBERTA BAND 136

Plaintiffs

and

HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA, CALVIN DUDLEY BRUNEAU, JOYCE BRUNEAU (ALSO KNOWN AS LENA DESJARLAIS), EZRA BERGSMA, SHEILA DESJARLAIS, LYLE DONALD, CYNTHIA PAUL, DALE WHITE, GREGORY PAUL,
RON MAURICE AND WILL WILLIER

Defendants

ORDER AND REASONS

[1] The Plaintiffs identify themselves as the descendants and authorized representatives of other descendants of members of the Papaschase Band 136, a historic first nation who adhered to Treaty 6 in 1877. The historical record of how the Papaschase Band ceased to exist, and which

gives rise to the Plaintiffs' claims against the Crown in this matter, is fairly well established and is not disputed for the purposes of this motion. It was summarized as follows in *Canada (Attorney General) v Lameman* 2008 SCC 14 ("*Lameman SCC*"), at para [3]:

> In 1877, the Papaschase Indians adhered to Treaty No. 6 and were allotted a reserve on what is now Southeast Edmonton. In 1886, Chief Papaschase and a number of other members of his Band – the Band's core leadership group – "took Scrip". This meant that in exchange for a cash payment they surrendered their treaty rights connected with the Reserve. These members left the Reserve. A few years later in 1889, the people whom government officials found to be remaining members of the Band – three men and their families – entered into an agreement to surrender their interest in the Reserve to the government with a view to its sale or lease, on condition that the proceeds be held in trust and paid to Band members and their descendants. It appears that these people ended up joining Enoch Band. Over the years, the government paid monies from the sale of the Papaschase Reserve to the members of the Enoch Band, in accordance with the agreement signed in 1894 between the government and the two surviving Band members who had agreed to the Reserve's surrender".

[2] Thus, through the main membership's taking of scrip and the incorporation of remaining members of the Band into the Enoch Band, the Papaschase Band came to be dissolved.

I. Procedural Framework

[3] The action was originally commenced by George Frank Quinn and Floyd William Quinn, both of whom claim to be direct descendants of Chief Papaschase, by Frances Doreen Wabasca and Violet Andres, who claim to be descendants of one of the Edmonton Stragglers (a group who joined the Papaschase Band but was never formally recognized or included in the Band list), and the Pass-Pass-Chase (Pahpahstayo) First Nation Association of Alberta Band 136 (the "Association"). The Association is not a recognized Indian Band, but a registered society

incorporated under the laws of Alberta, whose stated objective is to "promote, pursue and defend" the rights of the descendants of the Papaschase Band. It asserts to have as members more than 200 declared descendants of the Papaschase Band.

[4] The Statement of Claim initially sought three declarations against Canada, including: a declaration of unconstitutionality of the *Indian Act,* the recognition of the descendants of the original Band members and of the Edmonton Stragglers as a First Nation Band, and the Treaty Land Entitlements promised under Treaty 6.

[5] The Statement of Claim also originally named 10 individuals, who also identify as descendants of the Papaschase Band, and who were elected as "Chief" and "councillors" of an unincorporated group named "Papaschase Descendants Council". The Statement of Claim sought injunctions preventing those individuals from acting on behalf of the descendants of the Papaschase Band and from dealing with any business or monies received on behalf of the descendants. The claims against these individuals were eventually discontinued, leaving only the Crown as defendant.

[6] The Crown brought this motion, seeking to strike the Statement of Claim on the basis that it discloses no reasonable cause of action, seeks remedies that fall outside the Court's jurisdiction, and is otherwise an abuse of process, because the same matter has already been litigated and dismissed in the context of an action brought before the Courts of Alberta (*Lameman et al v Canada Attorney General) et al,* 2004 ABQB 655 ("*Lameman ABQB*"), reversed in part at 2006 ABCA 392 ("*Lameman ABCA*"), restored at *Lameman SCC*, above).

[7] Following receipt of the Crown's motion to strike, but before responding to it, the Plaintiffs filed a motion for leave to amend their Statement of Claim. As part of that motion, they concede that their initial challenge to the scrip provisions of the *Indian Act* (underlying the declarations sought) is not justiciable, that their claim for Treaty Land Entitlement fell outside the Federal Court's jurisdiction because it affects lands in the province of Alberta, and that the Federal Court lacks jurisdiction to compel Canada to create a Band. They propose to reframe their action by making the following changes:

1. To withdraw Frances Doreen Wabasca and Violet Andres as plaintiffs, and remove the allegations and relief in respect of the Edmonton Stragglers.

2. To remove all three existing requests for declaratory relief in respect of the constitutional validity of the *Indian Act*, Treaty Land Entitlement, and the recognition of the Band.

3. To add instead the following requests for relief: a declaration granting the Association public interest standing to seek redress on behalf of the descendants of "Treaty Children", damages for breach of fiduciary duties, and an accounting of the profits of the proceeds of the sale of the reserve.

4. To change the basis of the claim. The original Statement of Claim cited the Crown's general conduct in inducing Band members at large to take scrip as being unconstitutional and in breach of its fiduciary duties. The proposed amendments more particularly focus on the Crown's conduct, in accepting scrip declarations

from or on behalf of minors, as being both contrary to the enabling legislation and in breach of the Crown's fiduciary duty towards the children.

5. To replace Floyd William Quinn as plaintiff with Clifford Lawrence Gladue, in order to support the claim as reframed. Gladue claims to be a descendant of Alexandre Gladieu-Quinn a minor child who was two months old when his father, Charles Gladieu-Quinn Treaty #2 and the brother of Chief Papaschase, took scrip on his behalf in 1885. The other remaining named Plaintiff, George Frank Quinn, claims as a descendant of Joseph Sarcine Quinn, who took Scrip for himself at the age of 18 (it is alleged that the age of majority in 1886 was 21, and that he was therefore still a minor at the time).

[8] Later still, in their formal response to the Crown's motion to strike, the Plaintiffs proposed further refinements to the proposed Amended Statement of Claim, to clarify that a finding that the Crown's acceptance of scrip declarations from or on behalf of minors should result in a declaration that the descendants of these children continued to be Treaty Indians, with membership in the Papaschase Band 136, such that the Band still exists, with the descendants of the children as its members.

[9] The Crown consents to the amendments that would remove, as if properly struck, some of the relief initially sought and related allegations. However, it objects to the Plaintiffs' other proposed amendments. The Crown's objections to the amendments include: that they do not arise from the same facts as those originally pleaded, fail to plead sufficient material facts, do not

disclose a reasonable cause of action, are not justiciable, are an abuse of process, and are barred by the passage of time.

II. The Issues

[10] Given the Plaintiffs' concession that all declarations originally sought in the Statement of Claim ought to be struck, and their motion to amend to modify the basis of the claim and to add new forms of relief, it seems to the Court that the Crown's motion to strike has largely become moot. The only remaining issue from the motion to strike is whether the Plaintiffs should be granted leave to amend, as proposed in the Plaintiffs' cross-motion to amend and their responding motion record.

[11] The resolution of that issue in turn rests on whether the claims the Plaintiffs seek to raise in the amended pleadings were substantively determined in the earlier case of *Lameman*, such that allowing them to be litigated in this action would constitute an abuse of process.

[12] For the reasons that follow, the Court concludes that the proposed amendments would indeed constitute an abuse of process and should not be allowed.

III. ANALYSIS

A. *The doctrine of abuse of process*

[13] Once an issue has been finally determined by the Courts and all avenues of appeal have been exhausted, the public interest demands that the determination stand and not be undermined

or put in doubt by re-litigation. The doctrines of *stare decisis, res judicata,* cause of action estoppel, issue estoppel and abuse of process have evolved to give effect to this imperative. The policy grounds supporting it are that there be an end to litigation and that no one should be twice vexed by the same cause, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice (see *Toronto (City) v CUPE, Local 79,* 2003 SCC 63, at para 38).

[14] Claims arising from the events surrounding the disintegration and dissolution of the Papaschase Band were litigated in the case of *Lameman et al v Canada (Attorney General) et al,* above. That action was instituted by a group of plaintiffs who, like Messrs. Quinn and Gladue, identified themselves as descendants of the original members of the Papaschase Band and claimed on behalf of all the descendants of the original Band members. Rose Lameman, the lead plaintiff, was said to be the great-great granddaughter of Chief Papaschase, and thus shared the same ancestry as the proposed Plaintiffs Quinn and Gladue. She also purported to claim on behalf of all other descendants of the original Band members, including therefore, Quinn and Gladue.

[15] *Lameman* was dismissed on a motion to strike and for summary judgement. The Court having not found a triable issue or sufficient standing in the proposed representative plaintiffs, it declined to consider whether Ms. Lameman and Calvin Bruneau, the other proposed representative, should be appointed as representatives of the class (*Lameman* ABQB, para 223). The doctrines of *res judicata,* cause of action estoppel and issue estoppel apply only to

determinations of fact and law made in prior litigation between the same parties or "their privies". The parties did not argue before the Court whether Quinn, Gladue, the Association, or other descendants of other original Band members can be considered to be "privies" of Ms. Lameman and Mr. Bruneau, and the factual record before the Court is insufficient to make that determination. Nevertheless, the Court is satisfied that the issues in this case can adequately be disposed of through the application of the doctrine of abuse of process.

[16] The doctrine of abuse of process is more flexible that the classic doctrines of *res judicata* and cause of action or issue estoppel. It allows the Court to prevent re-litigation through "the repeated attempts by [a party] to litigate essentially the same dispute, by naming slightly different parties, or applying in different capacities and relying on slightly different statutory provisions when earlier attempts have failed" (*Black v Creditors of The Estate Nsc Diesel Power Inc* (2000) 183 FTR 301, [2000] FCJ No 725, at para 11). It is clear that the lead plaintiff in *Lameman* intended to represent and assert claims on behalf of Quinn, Gladue, and the same group which they and the Association wish to represent in this case. The proposed Plaintiffs in this action, as the proposed plaintiffs in *Lameman*, are clearly not intending to restrict their action to their own personal claims, but to act as representatives of the same group or subgroup of descendants. To the extent the causes of actions or issues proposed to be raised in the amended pleadings were in their essence raised and determined in *Lameman*, it would be an abuse of process to allow them to be raised again by, and on behalf of, the same persons on whose behalf the prior litigation was ostensibly brought.

[17] Indeed, the Plaintiffs do not rely on the lack of perfect identity between the named plaintiffs in *Lameman* and in this case as a defence to the Defendant's argument of abuse of process. There has been no suggestion that Rose Lameman was not authorized to seek to represent them in *Lameman*. Rather, the Plaintiffs assert that their proposed amended pleading does not constitute an abuse of process because it raises claims that are distinct from those asserted in *Lameman* and have therefore not previously been dismissed. The Court will therefore consider the nature of the claims asserted in *Lameman*, the basis upon which they were dismissed by the Court, the nature of the claims proposed to be asserted here, and whether the determinations made in *Lameman* are dispositive of those claims.

B. *The claims asserted in Lameman*

[18] The *Lameman* action covered a vast array of causes of action and claims for relief, including a declaration of invalidity of the surrender of the Reserve, the recognition of the continued existence of the Papaschase Band, the enforcement of Treaty 6 rights, an accounting of the proceeds of sale of reserve lands, and claims for damages based on tort, breach of fiduciary duty, fraud, malice and bad faith. The claims were based on events that ranged from the time the Papaschase Band joined Treaty 6, through to the distribution and payment of the proceeds of sale of the reserve to members of the Enoch Band, including the establishment of Band lists for the Papaschase Band, the measurement of the promised reserved lands, the accomplishment of the Crown's duties under Treaty 6, the acceptance of scrip by the Band members, the treatment of remaining Band members and their transfer to other Bands, the surrender of the Reserve and the sale of the reserve lands.

[19] The Plaintiffs have abandoned their earlier request for declaratory relief and enforcement of Treaty rights, and the only rights they now seek to assert are those which stem directly from the acceptance of scrip by some original members in the 1885-1886 period. In examining the claims made in *Lameman*, the Court will therefore confine its analysis to the claims that stem from those specific events.

[20] The amended statement of claim in the Alberta Court of Queen's Bench, as it stood when the decision in *Lameman* was issued, was put before this Court for the purposes of this motion. The following are its relevant passages:

> 20. On July 3, 1886, the Half-Breed Scrip Commission returned to Edmonton. Motivated by starvation, poverty, and general discord over the Defendant's failure to honour the terms of Treaty 6, the entire Papaschase Band requested scrip so that they could homestead lands within IR 136. Inspector Wadsworth rejected this proposal because the majority of the Papaschase Band was made up of widows, old people, and children who would not be able to earn their own livelihood if they accepted scrip and were discharged from Treaty 6.
>
> […]
>
> 22. On July 19, 1886 [Commissioner Dewdney] instructed Inspector Wadsworth to grant discharge to Chief Papaschase and his brothers, constituting a family of 58 members […] A total of 102 members of the Papaschase Band, who were in a starving condition and of poor health, were induced without the benefit of independent legal advice into accepting scrip by the misrepresentations of speculators and discontent over the Defendant's failure to honour the terms of Treaty 6. The Papaschase Band was reduced to only 82 members, most of whom were elders, women and children.
>
> 23. The Defendant's actions in offering scrip to treaty Indians and allowing the discharge of 102 members of the Papaschase Band from Treaty 6 constituted bad faith, equitable fraud and a breach of its Treaty and fiduciary obligations to the Papaschase Band, particulars of which are as follows:

[…]

(b) in 1885, Commissioner Dewdney […] Had actual knowledge that most of the Papaschase Band, including Chief Papaschase and other members of the Band who allegedly accepted scrip, lived a predominantly Indian mode of life.

[…]

(f) Inspector Wadsworth allowed some applicants to withdraw from treaty even though he knew they were pure Indians who were not eligible for scrip.

WHEREFORE THE PLAINTIFFS CLAIM AGAINST THE DEFENDANTS:

[…]

(g) A declaration that the direct descendents of any person who would have been a member of the Papaschase Band at the time of the impugned surrender on November 19, 1888 but for the misconduct of the Defendant, is entitled to be recognized as a lawful descendent of the Papaschase Band and shall be entitled to the benefit of any relief granted by this Honourable Court. For greater certainty, this shall include the bona fide descendants of any person who was […] discharged from treaty through the issuance of Metis scrip […].

(h) A declaration that the Papaschase Band has never ceased to exist as an Indian Band […].

[…]

(k) An order for an accounting of:

[…]

(ii) the amounts paid out of monies held in trust for the Papaschase Band and its descendants by the Defendant […] pursuant to the surrender instrument and the expressed trust created thereunder.

(l) General and special damages […].

[21] In *Lameman ABQB*, Justice Slatter summarized the relevant claims as follows, at para 48:

> (f) The Defendant has not properly accounted for the proceeds of the sale of IR 136 and specifically should not have applied those proceeds for the benefit of the Enoch Band.
>
> (g) The Defendant should
>
> i) not have permitted Chief Papaschase and the other members of the Band to accept Metis scrip […]
>
> and the descendents of all these departing Band members are entitled to be readmitted to the Papaschase Band.
>
> […]
>
> (i) A declaration that the Papaschase Band never ceased to exist and should now be reinstated or recognized by the Defendant.

[22] Upon careful review of the amended statement of claim and the judgement in *Lameman ABQB* as a whole, it seems that the relevant facts in support of those claims were that Chief Papaschase's family was not really living a Metis lifestyle, and should accordingly have been considered Indians, such that they would not have qualified to take scrip. The Plaintiffs also alleged that other members of the Papaschase Band who were allowed to take scrip were of pure Indian blood, and thus not eligible for scrip under the applicable legislation (*Lameman ABQB* para 98). The claim as articulated was therefore that the Crown breached its fiduciary duty towards Chief Papaschase and the other members of the Band by not preventing them from taking scrip, because it was improvident to do so, and that offering them scrip was also in breach of the existing statute. The plaintiffs' claim in *Lameman* went on to assert that if the taking of scrip was vitiated, then the original members of the Band never ceased to be members and their descendants should be recognized as members.

C. *The dispositions and determinations made in Lameman*

[23] The Defendant in *Lameman* brought a motion to strike the action as disclosing no reasonable cause of action, that was determined as a matter of law assuming the facts alleged to be true, as well as a motion for summary judgement, for which evidence was considered to determine whether a triable issue existed. Justice Slatter made several determinations, both of fact and of law, in respect of the claims stemming from the taking of scrip, each of which were independently determinative of these issues. The relevant determinations are set out below.

[24] Justice Slatter held, on the motion for summary judgement, that Chief Papaschase and his family "were clearly of mixed blood" and as such, had a strict entitlement to withdraw from treaty. The applicable provision of the statute did not require, as a legal precondition to an aboriginal person of mixed blood to take scrip that he or she not be "living an Indian mode of life". He also found no evidence to support the contention that any members of the Papaschase Band who were allowed to take scrip were of pure Indian blood, and there was accordingly no triable issue on that allegation (*Lameman ABQB* para 98). Finally, he found that no genuine issue for trial was made out in respect of breach of fiduciary duty (*Lameman ABQB* para 95, 97, 99 and 100).

[25] While these determinations were dispositive of all claims brought by the Plaintiffs stemming from the taking of scrip by the original members of the Band, Justice Slatter also considered, as part of the motion for summary judgement, the Defendant's argument that "all possible claims have long since been barred by the passage of time", even if there had been some

genuine issue for trial at a factual level (para 109). In this regard, he determined, at para 115, that:

> The limitation period for obtaining a writ of certiorari would potentially block any direct challenge to a number of the key decisions made in this case:
>
> […]
>
> (c) The decision of the Department to allow Chief Papaschase to take Scrip.

[26] He further held that the limitation period for challenging such a decision, whether it be by way of a motion to quash or a declaration of invalidity was, as of 1968 at the latest, of six months. As such, the time would have run out by 1968 at the latest. To the extent any decisions challenged were amenable to *certiorari*, then, "the time to challenge them has elapsed" (paras 113-114).

[27] With respect to all remaining claims, with the exception of a claim for an accounting of the proceeds of sale of the reserve, (assuming some proceeds are still in the Crown's possession and suitable claimants exist), Justice Slatter found that all claims in the action were subject to a 6-year limitation period, subject to the discoverability principle (paras 116, 127 and 128). As to discoverability in respect of the taking of Metis scrip specifically, Justice Slatter made the following findings, at par 152:

> With respect to the complaints about the taking of Metis scrip, all of the facts surrounding this claim were known immediately upon the applications for scrip having been accepted. If the applicants for scrip were not really half-breeds, or were living an Indian mode of life, or were otherwise arguably not eligible for scrip, the material facts would have been known to them at once. If the taking of scrip was improvident, such that all the scrip money was gone within a year or two, that would have been known by the late

> 1880's. Assuming those taking scrip were left with the mistaken impression that they could remain on the Reserve, they would have discovered the error by about 1887 when they were forced to leave. Further, all of the general facts surrounding the taking of scrip were actually known by the time of the publication of the study by the Metis Association of Alberta. The specific circumstances surrounding the taking of scrip by the Papaschase Band were known at the very latest by the time of the Tyler Thesis in 1979.

[28] Thus, he concluded that all of the claims asserted, with the sole exception of an accounting for any proceeds of the sale of IR 136 that may still be in the Crown's possession, were bound to fail as barred by the passage of time (para 157).

[29] Justice Slatter treated the issues of standing and status as overlapping issues. He started his analysis by considering whether such claims were collective, derivative or individual claims. The right to claim an accounting of the profits of the sale of the reserve he described as a collective claim belonging to the Papaschase Band, which can only be asserted as a derivative claim on behalf of the Band (para 185). As to the claims regarding membership in the Band, such as those that would stem from the taking of scrip by original Band members and its effect on their descendants, he analysed them as individual rights, that may be pursued by an individual, either for themselves or as a representative member of a class. He categorized such rights in two subcategories, as follows, at par 186:

> […] <u>There are two subcategories of claims based on private rights:</u>
>
> <u>(a) Claims based on a wrong to an original and member, for example the claim that an ancestor was allowed to take scrip in breach of a duty to that ancestor</u>; or that misrepresentations induced him to take Scrip;
>
> <u>(b) Claims based on a wrong to a present day descendant of an original Band member, for example the claim that a present day descendant is entitled to be a member of the Papaschase Band</u>.

> Obviously the two types of claims are linked. If, for example, Chief Papaschase had decided in the 1890s to challenge his withdrawal from Treaty, that would have been a claim personal to him. He could have personally sued for breach of fiduciary duty or misrepresentation. If he had died, his personal representatives could possibly have pursued his claim. Success for Chief Papaschase would have had implications for his descendants: if he could establish his status as a Papaschase Band member, then all of his descendants would benefit from that status. This is no different from any other common law action to establish "status". For example, if a litigant successfully establishes paternity or a right to a hereditary title or honour, then the descendants of that litigant benefit from the success. This leads into the second subcategory of claim, namely the claim to present membership in the Band. This is a personal claim to the Plaintiffs themselves, although it depends to some extent on the status of their ancestors. In part the success of their claim depends on their being able to establish the entitlement of their ancestors to membership. However, the claim itself is personal to the present Plaintiffs, and only they can assert it, not the Band and not the Papaschase Descendants as an organization. To the extent that the Plaintiffs seek to prosecute these claims in a class action, they are suing "on behalf of the class of individual Papaschase Descendants". They are not however entitled to directly advance the claim of their ancestors (i.e. subcategory (a) above) merely because of ancestry; to assert those claims they would have to demonstrate that they are the personal representatives of their ancestors.
>
> (Emphasis added)

[30] It is important to note that Justice Slatter held, as a matter of law that present-day descendants of original Band members could not, simply based on their ancestry, assert the claims that would have belonged to the original members of the Band. For example, Ms. Lameman, as direct descendant of Chief Papaschase, did not have standing to challenge his entitlement to scrip or his withdrawal from Treaty, unless she could establish that she was his personal representative. That conclusion was reiterated as a finding of law and a conclusion that certain portions of the amended statement of claim disclosed no reasonable cause of action, at paragraph 215: “the Plaintiffs have no capacity to prosecute private claims that would have

devolved on the personal representatives of their ancestors, as opposed to claims that descended to them merely by ancestry".

[31] With respect to the second subcategory of individual claims, including claims that a present-day descendant is entitled to be a member of the Papaschase Band, he found that s. 12 of the 1951 *Indian Act* precluded the two proposed representatives from claiming Band membership: "However, Chief Papaschase was a half-breed who took scrip, and by virtue of s. 12 of the 1951 Act his descendants were not entitled to be included in any Band list, be it the Papaschase Band list or any other list. Accordingly, Ms. Lameman has no basis to claim to be a member or potential member of the Papaschase Band." (at par 207). The same finding was made at para 208 in respect of Mr. Bruneau, who also claimed Chief Papaschase as his ancestor.

[32] Dealing, finally, with the question of standing to pursue the derivative claim for an accounting of any proceeds of the sale of IR 136 still in possession of the Crown, Justice Slatter stated that only a plaintiff "who is a descendant of the Papaschase Band, other than through a former member who took scrip" might be entitled to pursue that claim (para 226, emphasis added).

[33] On appeal, (*Lameman ABCA*, above), the Judgement of Slatter J. was reversed. The Court of Appeal, however, discussed only some specific findings of the summary judgement motion, notably: that there was insufficient evidence and no triable issue in respect of claims for malice, fraud or bad faith, that there was no triable issue in respect of the validity of the surrender of the

reserve, that there existed no descendant with standing to assert the collective Band claims, and that the claims were discoverable prior to 1999, and thus, barred by limitations.

[34] Notably, the Court of Appeal did not discuss or express disagreement with the following conclusions reached by the lower Court:

> a) that Chief Papaschase's family were of mixed blood and entitled to take scrip;
>
> b) that the 6-month limitation period for *certiorari* would prevent a challenge to decisions made in respect of the acceptance of scrip;
>
> c) that descendants do not have standing to assert individual claims of their ancestors in respect of taking Metis scrip; and
>
> d) that being a descendant of an original member who took scrip disqualifies a person from claiming entitlement to Band membership.

[35] On that latter point, the reasons of Coté. J, with which the majority concurred, recognize that the descendant of a person who took scrip, or who joined another Band (other than Enoch) prior to the cancellation of the Papaschase Band, would not qualify for membership in the Papaschase Band, and would lack standing to sue (see paras 117 to 132 *Lameman ABCA*).

[36] On appeal to the Supreme Court, (*Lameman SCC*, above), the judgement of the Court of Appeal was reversed, and the Judgement of the Court of Queens Bench restored. The Supreme Court discussed only the limitation issue, finding that:

> […] assuming that the claims disclosed triable issues and standing could be established, the claims are barred by the operation of the *Limitations of Actions Act*. There is "no genuine issue" for trial. Were the action allowed to proceed to trial, it would surely fail on this ground. Accordingly, we agree with the chambers judge that it must be struck out, except for the claim for an accounting of the

> proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*.

[37] The result was that the original Order (which recognized the absence of a plaintiff with standing to assert the claim for accounting), was restored. The Supreme Court did not overturn the trial Judge's conclusion that the proposed representative plaintiffs did not have standing to pursue the claim for an accounting of proceeds.

D. *The claims asserted in the proposed amended statement of claim*

[38] As mentioned earlier, the factual basis for the proposed amended claim is that the ancestor of one of the proposed representative Plaintiffs was a minor of 18 years old at the time he accepted scrip for himself, and that the ancestor of the other proposed representative Plaintiff was a minor at the time his father accepted scrip on his behalf. The Plaintiffs submit that s. 14 of the *Indian Act*, 1880, amended in 1884 and re-written as s. 13 of the *Indian Act* 1886, did not authorize Canada to accept scrip declarations from minors, nor from the parents on behalf of minor Treaty children. The provisions further only applied to half-breeds who had been admitted to Treaty. The children were born Indian, and were never half-breed. Canada's conduct in accepting scrip declarations and the withdrawal from Treaty of Indian children thus constituted both a breach of statute and a breach of its fiduciary duty towards minor children. The children never ceased to be members of the Papaschase Band, and their descendants are thus entitled to be recognized as members of the Band.

[39] Based on those facts, the Plaintiffs seek the following remedies:

a) a declaration that the PASS-PASS-CHASE (PAHPAHSTAYO) FIRST NATION ASSOCIATION OF ALBERTA BAND 136 be granted public interest standing to seek redress resulting from the breach of fiduciary duty on behalf of the descendants of the Treaty children of the Papaschase Band 136, who, but for the breach, would have continued members of the Papaschase Band 136 or alternatively, members of the Enoch Band;

b) damages in the amount of $100,000,000 for breach of fiduciary duty to the descendants of the Treaty children of Papaschase Band 136 who but for the breach would have continued as Treaty Indians with membership in the Papaschase Band 136 or Enoch Band;

c) damages in the amount of $100,000,000 for breach of fiduciary duty to the descendants of Joseph Quinns Gladu aka Joseph Sarcine Quinn who but for the breach would have continued as Treaty Indians with membership in the Papaschase Band 136 or Enoch Band;

d) an accounting of the proceeds of sale of IR 136 and an amount payable to the descendants of both the Treaty children and Joseph Quinns Gladu aka Joseph Sarcine Quinn of Papaschase Band No. 136 to be determined after an accounting of the proceeds is provided.

[40] It is true that facts concerning the age of some of the Band members who took scrip in 1885-1886, and concerning the acceptance of scrip for some minor children by their parents, were not specifically mentioned in the *Lameman* pleadings. It is equally true that the legal

validity of the acceptance of scrip in light of those facts and of the statute at the time was not raised in the pleadings or addressed in the judgements rendered.

[41] However, the broad issue of the legal entitlement to scrip of all members of the Papaschase Band who accepted scrip in the period of 1885-1886, and the validity of their withdrawal from Treaty was very clearly raised as a cause of action in *Lameman*. That the allegations centered on their status as full-blood Indians and on whether they "lived an Indian mode of life" does change the fact that the issue of the validity of the acceptance of scrip by those very same Band members was cited as giving rise to a cause of action in *Lameman.* That cause of action was framed as a breach of statute, and a breach of fiduciary duty, which would invalidate the withdrawal from Treaty of those Band member, paving the way for their descendants to to seek remedies in the form of damages, entitlement to membership in the Papaschase Band, and entitlement to assert collective Band rights, including an accounting of the proceeds of sale of IR 136. A cause of action, based on a challenge to the validity of all original Band members' taking of scrip, was thus litigated and determined.

[42] When a particular incident gives rise to a cause of action, a party's choice of which details from that incident should be pleaded does not carve out and preserve additional factual details of the same incident so that they can be used in future litigation to craft different arguments in support of the same cause of action. Cause of action estoppel, which is a component of *res judicata*, contemplates that:

> "[…]where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the

> same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. It is plain that litigation would be interminable if such a rule did not prevail."

(*Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Eng. V.-C.), at 319, cited with approval in *Beattie v R* 2001 FCA 309, at para 23).

[43] Additional grounds for the alleged invalidity of the withdrawal from Treaty of original Band members, including allegations based on their status as minors, on the capacity of parents to accept scrip on behalf of their children, or on their status as Indian, properly belonged to the litigation in *Lameman*. They could and should, with reasonable diligence, have been brought forward at the time. The composition of the Papaschase Band in 1885-1886, including the age and family relationships of its members, was clearly known at the time *Lameman* was argued and determined, since those facts were recited in the pleadings as supporting some of the allegations of breach of fiduciary duty. The alleged lack of authority, in the *Indian Act*, for minors or Indian children to accept scrip, whether on their own behalf or through their parents, is an argument that could have been formulated with the exercise of diligence. To the extent the specific ages and status of all the members of the Band who took scrip were not already set out in the voluminous historical evidence filed in *Lameman*, there is no reason to believe that they could not have been brought forward through the same means as were used to identify them for the purpose of this action.

[44] The Court is mindful that the doctrine of cause of action estoppel forms part of the broader category of *res judicata*, and would normally apply only where the prior litigation was between the same parties or their privies. The Court is however satisfied that because the plaintiffs in *Lameman* and in this case form part of the same group and purport to claim as representatives of the same group, it is appropriate to adopt the principles of cause of action estoppel in the abuse of process analysis. To paraphrase the passage of *Henderson v Henderson* cited above, it is plain that litigation involving descendants of the Papaschase Band would be interminable if each descendant was allowed to sift through the historical record with a view to bringing forward a point or argument that could have been, but was not, raised in *Lameman*.

[45] Even if the Court were to find the issues raised by the Plaintiffs to be sufficiently distinct to justify a new action, the Court cannot see how this action could fail to be dismissed, for the same reasons as *Lameman.*

[46] It is useful to recollect here some key findings from *Lameman*, and relate their applicability to the proposed claim:

[47] With respect to the period to challenge the decisions relating to scrip:

> The limitation period for obtaining a writ of certiorari would potentially block any direct challenge to a number of the key decisions made in this case:
>
> […]
>
> (c) The decision of the Department to allow Chief Papaschase to take Scrip. (para 115)

[48] A challenge to the validity of the decisions of the Department to allow Mr. Quinn's ancestor to take scrip and to allow the father of Mr. Gladue's ancestor to take scrip on his son's behalf would equally be blocked by limitation.

[49] With respect to application of the *Limitations of Actions Act* to claims arising from the taking of scrip:

> "With respect to the complaints about the taking of Metis scrip, all of the facts surrounding this claim were known immediately upon the applications for scrip having been accepted. If the applicants for scrip […] were otherwise arguably not eligible for scrip, the material facts would have been known to them at once. […]. Further, all of the general facts surrounding the taking of scrip were actually known by the time of the publication of the study by the Metis Association of Alberta. The specific circumstances surrounding the taking of scrip by the Papaschase Band were known at the very latest by the time of the Tyler Thesis in 1979. (para152)

[50] While the children who took scrip, or on whose behalf their parents took scrip, were not competent to challenge the decisions while they were still minors, they would have been able to do so as soon as they reached the age of majority. They would at that time have known immediately the facts material to the alleged illegality of the Department accepting their declaration of scrip: that they were no longer members of the Band and that they had not accepted scrip for themselves after reaching the age of majority. In any event, the specific circumstances surrounding the taking of scrip by all members of the Papaschase Band were known at the very latest by the time of the Tyler Thesis in 1979. Claims based on that alleged illegality are therefore bound to fail as barred by the passage of time.

[51] With respect to the standing of descendants to assert their ancestors' claims with respect to the taking of scrip:

> If, for example, Chief Papaschase had decided in the 1890s to challenge his withdrawal from Treaty, that would have been a claim personal to him. He could have personally sued for breach of fiduciary duty or misrepresentation. If he had died, his personal representatives could possibly have pursued his claim. Success for Chief Papaschase would have had implications for his descendants: if he could establish his status as a Papaschase Band member, then all of his descendants would benefit from that status. […] [The Plaintiffs] are not however entitled to directly advance the claim of their ancestors (i.e. subcategory (a) above) merely because of ancestry; to assert those claims they would have to demonstrate that they are the personal representatives of their ancestors. (para 186)

[52] To paraphrase, if the proposed Plaintiffs' ancestors had decided, upon reaching the age of majority, to challenge their withdrawal from Treaty, that would have been a claim personal to them. If they had died, their personal representatives could possibly have pursued their claim, and if successful, the proposed Plaintiffs would benefit from that status. The proposed Plaintiffs are not however entitled to directly advance the claim of their ancestors to challenge their withdrawal from Treaty merely because of ancestry. To assert those claims, they would have to at least allege, and then demonstrate, that they are the personal representatives of their ancestors.

[53] With respect to the entitlement of present-day descendants of members who took scrip to be recognized as members or potential members of the Papaschase Band:

> However, Chief Papaschase was a half-breed who took scrip, and by virtue of s. 12 of the 1951 *Act* his descendants were not entitled to be included in any Band list, be it the Papaschase Band list or any other list. Accordingly, Ms. Lameman has no basis to claim to be a member or potential member of the Papaschase Band. (para 207)

[54] Both of the proposed Plaintiffs claim ancestry from original Band members who took scrip, and as such, they can have no basis to claim to be members or potential members of the Papaschase Band. While the proposed Plaintiffs wish to challenge the validity of their ancestors' taking of scrip, they have no standing to do so, and therefore cannot claim membership in the Band.

[55] With respect to standing to assert a claim for an accounting of the proceeds of sale of IR 136:

> There is one exception [to the absence of a genuine issue for trial] which relates to the possible continued possession by the Defendant of some of the proceeds of the sale of I.R. 136. The *Limitations of Actions Act* does not bar a claim to any such proceeds (*supra*, para. 127). The Defendant did not bring forward any evidence to show that there is no genuine issue for trial on this claim (*supra*, para. 94). If a plaintiff came forward who is a descendant of the Papaschase Band, other than through a former member who took scrip, he or she might be entitled to pursue this claim. The Defendant could then argue the equitable defence of laches. The parties may apply for further relief on this point.

[56] As mentioned above, because the proposed Plaintiffs claim to be descendants of the Papaschase Band through former members who took scrip, they cannot be entitled to pursue a claim for an accounting of the proceeds of the sale of IR 136.

[57] The determinations made in *Lameman* are such that any cause of action relying on the alleged unlawfulness of Papaschase Band members' withdrawal from Treaty would necessarily be barred by the passage of time; that a present-day descendant would have no standing to challenge the validity of his or her ancestor's taking of scrip by reason of ancestry alone; and that, because their withdrawal from Treaty is no longer amenable to challenge, a descendant who

claims ancestry from a Band member who took scrip remains barred from claiming entitlement to membership in the Band and from pursuing a claim for an accounting of the proceeds of sale of reserve lands.

[58] The Plaintiffs in this case simply cannot succeed in this action without undermining the validity of the findings made in *Lameman.* That is an unmistakeable hallmark of an abuse of process.

[59] One could argue that the application of *Limitations of Actions Act* requires a finding of fact as to discoverability, and that the factual conclusions of the Court in *Lameman* cannot be binding on the Plaintiffs here unless the pre-condition of identity of parties has been met. Even if that were the case, the Plaintiffs' action would still be bound to fail on the issues of the expiration of the time to challenge the Department's decisions relating to scrip, the lack of standing to assert claims on behalf of ancestors, and the inability to claim membership in the Band though a former member who took scrip. Each of those determinations are fatal to the Plaintiffs' claim, and each of those are conclusions of law that apply on the facts the Plaintiffs propose to allege, assuming them to be true.

[60] Given that claims by descendants of Band members who were children at the time of taking scrip constitute an abuse of process and have no chance of success, that part of the Statement of Claim seeking a declaration that the Association has public interest standing to pursue those claims on behalf of the descendants of Treaty Children equally has no chance of success.

IV. Conclusion

[61] The Plaintiffs concede that all the causes of action raised in their Statement of Claim, as it currently exists, ought to be struck. To avoid their action being struck, they seek the Court's leave to amend their Statement of Claim so as to entirely change the causes of action and relief originally claimed, and to substitute to them a cause of action and prayers for relief that have already been considered and dismissed in a previous action brought for their benefit. On its face, what the Plaintiffs propose to do is to replace an action that is bound to fail by one that relitigates issues already considered and determined in favour of the Defendant. This would constitute an abuse of process. The Plaintiffs have not alleged any fact, which, if it could be established, would lead to a different result than that reached in *Lameman*. The Court is satisfied that it is not in the interest of justice to allow the proposed amendments to the Statement of Claim.

V. Costs

[62] The Court requested that parties make submissions at the hearing as to an appropriate amount at which costs should be fixed, whatever the outcome of the motions. The Defendant submitted that costs ought to be assessed at the high end of Column III of the Tariff, which it calculated to equate to $5850, including the cost of serving and filing its Statement of Defence to the action, in the event it was successful on both motions. The Plaintiffs submitted that costs should be calculated by reference into the middle of Column III, an amount which the Court calculates to be of approximately $4100. The Court is satisfied that the diffuse and changing nature of the Plaintiffs' claims justifies an award of costs in excess of the middle of Column III. The amount of $4750 is appropriate in the circumstances.

ORDER

THIS COURT ORDERS that:

1. The Defendant's motion to strike the Plaintiffs' Statement of Claim is granted.

2. The Plaintiffs' motion to amend their Statement of Claim is dismissed.

3. The Statement of Claim is struck, without leave to amend.

4. Cost, in the amount of $4750, are awarded in favour of the Defendant.

"Mireille Tabib"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-69-20
STYLE OF CAUSE:	GEORGE FRANK QUINN et al v. HMTQ
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 2, 2020
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APPEARANCES:

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