



T-2078-96

BETWEEN:

KENNETH JAMES PAUL,

Plaintiff,

-and-

CHIEF AND COUNCIL OF KINGSCLEAR INDIAN BAND,
THE KINGSCLEAR INDIAN BAND,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS
REPRESENTED BY THE MINISTER OF INDIAN AND NORTHERN
AFFAIRS and CYNTHIA LORRAINE PAUL,

Defendants.

REASONS FOR ORDER

(Delivered from the Bench at Fredericton, New Brunswick
on Monday, October 6, 1997 as edited)

ROTHSTEIN J.

All defendants move to strike out the plaintiff's statement of claim under Rule 419(a)(c) and (f) of the *Federal Court Rules* on the ground that it discloses no reasonable cause of action, that is scandalous, frivolous or vexatious and that it is an abuse of a process.

On a motion to strike a statement of claim on the grounds that it fails to disclose a reasonable cause of action, the material facts set forth in the statement of claim must be deemed to have been proven. The statement of claim will only be struck out in plain and obvious cases where the case is clear and beyond doubt: see *Canada (Attorney*

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General) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735 at 740.

I accept the following facts set forth in the statement of claim or incorporated therein by reference as having been proven.

The plaintiff is a member of the Kingsclear Indian Band and is a status Indian. The defendant, Cynthia Paul, a non-native, was married to the plaintiff in 1980. The parties agree that she was never omitted or deleted from the Register and is entitled to have her name on the Register.¹ Under subsection 20(1) of the *Indian Act*, the Pauls obtained a Certificate of Possession for Lot 145 on the Kingsclear Indian Reserve Number 6 as joint tenants and not as tenants-in-common in 1985. A house was being constructed on the land. Both Pauls contributed to the expenses of construction, maintenance and improvement of the home.

In August, 1992 the Pauls separated. Mrs. Paul continued to reside in the home with her children and by 1993 with another man who is referred to as her common-law husband and is a member of the Kingsclear Indian Band.

In 1995 the Pauls were divorced. This action arises because the plaintiff is out of possession of the home of which he is a joint tenant under a Certificate of Possession and because he has been unable to obtain compensation in respect of his interest in the home.

¹ Under section 11 of the *Indian Act* in force at that time, she was entitled to be and was registered in the Indian Register as the wife of a band member.

The relief claimed in the statement of claim is set forth in paragraph 27:

- (a) An Order in the nature of mandamus directing the Minister of Indian Affairs and Northern Development to perform his public duty and pay to the Plaintiff compensation for the improvements made by him to Lot 145 of the Kingsclear Indian Reserve;
- (b) A declaration that the Plaintiff has made improvements to Lot 145 of the Kingsclear Indian Reserve;
- (c) An injunction preventing continued occupation of the residence located on Lot 145 of the Kingsclear Indian Reserve by the Defendant, Cynthia Lorraine Paul;
- (d) In the alternative an Order for mandamus compelling the Defendants to consult with the Plaintiff and to negotiate with the Plaintiff to settle the terms of compensation for the alienation of reserve lands from the Plaintiff;
- (e) In the further alternative and based upon the rental incomes available on the Kingsclear Indian Band Reserve, half of the annual rental income since August 10, 1992 to calculate the Plaintiff's life-interest in the property and payable to the Plaintiff by the Defendants;
- (f) Damages for pain and suffering to the Plaintiff in the amount of \$100,000.00 of such further or other sums as may be determined at trial;
- (g) Punitive and exemplary damages;
- (h) Interest on all monies from August 10, 1992;
- (i) Costs on a solicitor and client basis;
- (j) Such further and other relief as this Honourable Court may deem meet and just.

Connected to the Pauls' divorce is the decision of Sirois J. of the Court of Queen's Bench of New Brunswick, dated October 3, 1995 dealing with two questions, one of which is how the matrimonial home should be dealt with by that Court. Before the Court of Queen's Bench, Mr. Paul, relying on the Supreme Court decision in *Derrickson v. Derrickson* (1986), 65 N.R. 278 argued that that Court had jurisdiction to order compensation from Mrs. Paul to him and that it should order Mrs. Paul to pay him the sum of thirty thousand five hundred dollars (\$30,500.00) being one-half of his calculation of the replacement cost of the matrimonial home.

Sirois J. refused to order compensation. At page 9 of his decision, he stated:

I believe that firstly, we have here no value to deal with - that is a market value. Two - I believe that I have no jurisdiction to apply Section 10(f) (of the Marital Property Act of New Brunswick) to order a compensatory sum relating to land because property on reserve lands are under exclusive federal legislation. And three - even if I were to decide to utilize Section 10(f), and order compensation, it would very obviously be impractical, meaningless, and unfair to do so. What would be the basis for ordering such compensation? Even if the respondent is ordered to pay \$30,500.00 in compensation, what does she receive in return? She lives in a house she cannot sell. She is forced to continue to live there and does not have the option to move by selling and using the monies to purchase another home elsewhere.

Counsel for the defendants indicated that Sirois J.'s second reason for refusing compensation appears to be inconsistent with the dicta of Chouinard J. in *Derrickson v. Derrickson* at page 290:

...If the court may make an order for compensation because division is not possible where property has been disposed of, surely it must be empowered to make such an order "for the purpose of adjusting the division", where property exists but cannot be divided because no division can be made of reserve lands.

Compensation in lieu of a division of property is not a matter for which provision is made under the **Indian Act** and in my view there is no inconsistency or "actual conflict" between such a provision for compensation between spouses and the **Indian Act**.

It may be that Sirois J.'s observation regarding absence of jurisdiction was in relation to land as opposed to improvements because, under *Derrickson*, it appears the Court of Queen's Bench of New Brunswick would have jurisdiction to make a compensation order. In any event, he based his refusal to order compensation on two other grounds which appear to constitute a valid exercise of discretion under section 10(f) of the *Marital Property Act*, S.N.B., 1980, c. M-1.1.

Insofar as the claim against Mrs. Paul is concerned, the statement

of claim alleges that she has effectively excluded Mr. Paul from possession of the matrimonial home since August, 1992. However, Mr. Paul does not claim relief by way of an Order of Possession. He does ask that Mrs. Paul be prevented from continued occupation of the residence. However, the statement of claim states that she is a joint tenant under a Certificate of Possession. There is no indication in the statement of claim of the basis for removing Mrs. Paul.

He also seeks compensation. However in argument, counsel for Mr. Paul stated that he does not seek compensation from Mrs. Paul, but rather from the Minister of Indian Affairs and Northern Development and from the Kingsclear Indian Band. Even if Mr. Paul had sought compensation from Mrs. Paul, that issue has been decided by the Court of Queen's Bench of New Brunswick against Mr. Paul. That decision was not appealed and the matter is now *res judicata*. There now can be no cause of action against Mrs. Paul for compensation in this Court.²

As to the Kingsclear Indian Band, the only reference in the statement of claim to the Band is in paragraph 23 which states:

23. As a result of the breach of fiduciary duties owed to the Plaintiff by the Defendants the Queen and the Kingsclear Indian Band, the Plaintiff has been and is being treated in a discriminatory manner, having suffered damage and having been put to expense.

While breach of a fiduciary duty is alleged, the statement of claim does not set out the material facts out of which a fiduciary duty arises.

² I need not decide whether this Court has jurisdiction to entertain an action against Mrs. Paul.

Counsel for the plaintiff suggests that there is a fiduciary duty owed by each member of an Indian Band to all other members, but no authority was cited for such a proposition. It was not explained how such fiduciary duty, if it existed, would be carried out. Nor is there an indication of any facts which give rise to the alleged discrimination by the Band or its members against Mr. Paul. The statement of claim does not disclose any reasonable cause of action based on breach of fiduciary duty or discrimination by the Band.

I now turn to the allegations in the statement of claim involving Her Majesty the Queen as represented by the Minister of Indian and Northern Affairs [*sic*] and the Chief and Council of the Kingsclear Indian Band. I treat them together as they are largely parallel allegations. Although the statement of claim names Her Majesty the Queen in Right of Canada as represented by the Minister of Indian and Northern Affairs as defendant, the statement of claim refers variously to the Department of Indian and Northern Affairs (paragraph 10), Her Majesty the Queen in Right of Canada as represented by the Minister of Indian and Northern Affairs (paragraph 15), the Minister (paragraph 16) and the Queen (paragraphs 18, 21 and 23).

In paragraph 9, the plaintiff says the Chief and Council have effectively supported Mrs. Paul in excluding him from possession of the matrimonial home since August 10, 1992. No material facts supporting this assertion are pleaded. Plaintiff's counsel submitted a probation order dated December 14, 1992 ordering the plaintiff to refrain from initiating

contact with Mrs. Paul for two (2) years and an order of the Court of Queen's Bench of New Brunswick dated April 11, 1994 providing that Mrs. Paul continue to occupy the matrimonial home prior to final resolution of the division of matrimonial property. Normally, such evidence would be inadmissible on a motion to strike. However, at the request of plaintiff's counsel I received it. It was pursuant to those orders that the plaintiff was denied possession of the matrimonial home at least for much of the time since August 10, 1992 to the present. These facts do not support the plea that the Chief and Council supported Mrs. Paul in excluding the plaintiff from possession. In the absence of material facts supporting the plea, no reasonable cause of action is disclosed in paragraph 9 against the Chief and Council.

In paragraph 10, the plaintiff says that the Department of Indian and Northern Affairs and the Chief and Council have permitted Mrs. Paul to occupy the matrimonial home. However, the statement of claim says that she is a joint tenant under a Certificate of Possession. Paragraph 10 does not disclose a cause of action against the Department or the Chief and Council.

In paragraphs 14 and 15, the plaintiff says he made repeated attempts to obtain possession or compensation from the Chief and Council and the Queen. Paragraph 16 says that the plaintiff relies on section 23 of the *Indian Act* which states:

23. An Indian who is lawfully removed from lands in a reserve on which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by

the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.

Paragraphs 17 and 18 say that the plaintiff has on many occasions spoken with members of the Chief and Council and representatives of the Queen for the purpose of having the issue determined.

The plaintiff does not say what it is that the plaintiff expects of the Chief and Council or the Queen in respect of obtaining possession or what obligation they are under to provide possession to him. In argument plaintiff's counsel confirmed that what the plaintiff was seeking was compensation and not possession. There is no cause of action disclosed against the Chief and Council or the Queen respecting possession.

In respect of compensation, it is obvious that under section 23 of the Act, the Minister of Indian Affairs and Northern Development only directs if compensation is to be paid and if so whether it should be paid by the Band or the person who goes into possession. There is no obligation on the part of the Minister to pay compensation. Nor is there an obligation on the part of the Chief and Council to pay compensation in the absence of a direction from the Minister. There is no such direction referred to in the statement of claim. There is also considerable doubt that section 23 applies in circumstances such as these. On the basis of the pleadings, there is no reasonable cause of action disclosed in the statement of claim respecting compensation against the Chief and Council, the Queen or the Minister.

In paragraph 20, the plaintiff says the Chief and Council have failed to deal with the issue of compensation, thereby breaching their obligation to the plaintiff as a member of the Indian Band. As previously stated, the obligation to pay compensation by the Chief and Council, if there is such an obligation, could only arise from a direction by the Minister under section 23 of the *Indian Act*. There is no such direction and therefore no obligation on the Chief and Council.

In paragraph 21, the plaintiff says that the Queen has breached her fiduciary duty to him in acquiescing to the actions of the Chief and Council in excluding him from compensation. A mere allegation of a breach of a fiduciary duty does not disclose a cause of action. Certainly, in some circumstances, the Crown has a fiduciary obligation to aboriginal people, but this does not mean there is an absolute fiduciary duty in all circumstances. (See *Chippewas of the Nawash First Nation v. Canada (Minister of Indian and Northern Affairs et al.)* (1996), 116 F.T.R., 37 at 45). No material facts have been set out supporting a fiduciary duty on the part of the Queen in this case. Without a fiduciary duty being disclosed, there is no cause of action based on an alleged breach of such duty.

In paragraph 22 of the statement of claim, the plaintiff claims discrimination by the Chief and Council. In paragraph 23, the plaintiff claims discrimination based on breach of fiduciary duty by the Queen. The plaintiff cites section 15 of the *Canadian Charter of Rights and Freedoms*. As stated earlier, there is no breach of fiduciary duty

disclosed in respect of the Chief and Council and no basis disclosed for a claim of a breach of fiduciary duty against the Queen. Further, the statement of claim does not indicate in what way the plaintiff is differentiated from others, with whom he is attempting to compare himself or upon which enumerated or analogous ground of discrimination he relies in making his discrimination claim. A statement of claim that merely mentions section 15 of the Charter or uses the term "discrimination" does not disclose a reasonable cause of action in respect of the Charter.

The relief the plaintiff seeks in paragraph 27(a) to (d) of the statement of claim is mandamus, declaration and injunction. In these paragraphs, it is obvious the plaintiff's claim is against the Minister of Indian Affairs and Northern Development irrespective of the various ways in which the plaintiff characterizes the Federal Government in the statement of claim. The plaintiff's complaint is that the Minister has not carried out duties owed to the plaintiff. As such the claim is against a Federal Board, Commission or other Tribunal as that term is defined in section 2 of the *Federal Court Act*. With respect to the Chief and Council, there is no doubt that they constitute a Federal Board, Commission or other Tribunal (see *Canatonquin v. Gabriel*, [1980] 2 F.C. 792 (F.C.A.)). By reason of sections 18.1 and 18.3 of the *Federal Court Act* relief in the nature of mandamus, injunction or declaration may only be obtained against a Federal Board, Commission or other Tribunal upon application for judicial review made under section 18.1 of the *Federal Court Act*. Relief is not available by way of action. Therefore, apart

from the other problems already noted, there is no reasonable cause of action disclosed in the statement of claim in respect of the prerogative remedies sought against the Minister or the Chief and Council.

Finally, the plaintiff in the statement of claim claims damages for pain and suffering, punitive and exemplary damages, interest and costs. The damage claims are contingent on the alleged Charter breaches. I have found that the statement of claim does not disclose a reasonable cause of action in respect to alleged Charter breaches. The claims for interest and costs are also dependent on the existence of a cause of action. There being no reasonable cause of action disclosed in the statement of claim, the claim for damages, interest and costs cannot stand.

Plaintiff's counsel says that had the defendants sought particulars, some of the deficiencies of the statement of claim would have been remedied. There is no obligation on defendants to demand particulars and a plaintiff cannot bootstrap a statement of claim by arguing that defendants have not sought particulars.

Plaintiff's counsel says that if this Court does not entertain this action, the plaintiff is denied any recourse in view of the decision to deny him compensation by the Court of Queen's Bench of New Brunswick. It is true the Queen's Bench denied him compensation. But that does not mean there is no recourse for an individual in the circumstances of the plaintiff. It appears that the Court of Queen's Bench of New Brunswick

would have the jurisdiction to award compensation in an appropriate case (see *Derrickson v. Derrickson, supra*). It seems that the Court did not consider this to be such a case.

The plaintiff's statement of claim shall be struck out. The defendants are entitled to costs from the plaintiff.

"Marshall E. Rothstein"

J U D G E

TORONTO, ONTARIO

OCTOBER 15, 1997

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

COURT NO: T-2078-96

STYLE OF CAUSE: KENNETH JAMES PAUL

- and -

CHIEF AND COUNCIL OF KINGSCLEAR
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DATE OF HEARING: OCTOBER 6, 1997

PLACE OF HEARING: FREDERICTON, N.B.

REASONS FOR ORDER BY: ROTHSTEIN, J.

DATED: OCTOBER 15, 1997

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