

CITATION: Chief John Fletcher v. Canada (Atty.-Gen.), 2011 ONSC 5196
COURT FILE NO.: 95-CU-93574
DATE: 20111205

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Chief John Fletcher, Jacqueline Fletcher and Roy Gideon on their own behalf and on behalf of The Missanabic Cree First Nation, Plaintiffs

AND:

Her Majesty the Queen in Right of Ontario and the Attorney-General of Canada, Defendants

BEFORE: STEWART J.

COUNSEL: *Michael Bailey* and *R. David House*, for the Plaintiffs

Gary Penner and *Michael Beggs*, for the Defendant, the Attorney-General of Canada

E. Ria Tzimas and *Michael E. Burke*, for the Defendant, Her Majesty the Queen in Right of Ontario

HEARD: April 27 and 28, 2011

ENDORSEMENT

Nature of the Motion

[1] The Plaintiffs, The Missanabic Cree First Nation ("MCFN") have brought this motion to seek an order requiring the Defendants to pay their interim costs forthwith and in advance, in any event of the cause on a scale and on terms to be determined.

[2] This motion is brought in the context of litigation relating to what the MCFN describes as a long-outstanding legal obligation owed by the Defendants and their alleged failure to set aside a reserve for the use and benefit of the MCFN. The MCFN asserts that this fundamental treaty obligation has been left unfulfilled for over 100 years.

[3] It has been agreed and accepted by all parties that the advance costs sought by the MCFN is for the trial of a "threshold issue" only, as described below.

The Test

[4] The parties agree that the test to be applied on a motion for advance costs has been set out by the Supreme Court of Canada in its decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371, as revisited in *Little Sisters Book and Art Emporium v. Canada (Commissioners of Customs and Revenue)*, [2007] 1 S.C.R. 38. In order to succeed on such a motion, a moving party is required to establish:

- (a) a meritorious case;
- (b) issues raised which are of public importance and transcend the litigant's individual interests; and
- (c) impecuniosity.

[5] Even if all three branches of the test have been met, it remains within the discretion of the Court to determine whether advance costs ought to be awarded in any individual circumstances.

Position of the Parties

[6] It is the position of the MCFN that all three branches of the test have been satisfied by the evidence filed concerning the appropriateness of an award of advance costs to permit it to litigate the threshold issue.

[7] The MCFN and Her Majesty the Queen in Right of Ontario ("Ontario") have reached an agreement with respect to this motion as set out in paragraphs 13 and 14 of Ontario's Factum. In general, they have agreed as follows:

- (a) The MCFN has agreed to pursue its motion only for advance costs in relation to the trial of a threshold issue, as defined in the "severance order" consented to by the parties, and ordered by the Court on April 12, 2011 (Order of Master Sproat);
- (b) The MCFN will seek advance costs on the partial indemnity scale only;
- (c) The MCFN and Ontario agree and will submit that further terms should apply to an interim costs order, if one is made by the court, similar in nature to the additional terms ordered in *Keewatin v. MNR & Abitibi*, either on consent or pursuant to a further hearing if necessary;
- (d) The MCFN will not seek costs against Ontario for the motion;
- (e) Subject to the terms of the bilateral agreement and a proposed draft order, Ontario will not oppose the MCFN's motion.

[8] Further, Ontario submits that an award of advance costs against Ontario should be made only if and to the extent the award is also made as against the Attorney-General of Canada (the "Federal Crown"). Ontario opposes any order for costs that provides for Ontario to be contributing more than the Federal Crown.

[9] The Federal Crown opposes the relief sought. It is its position that the MCFN have failed to adduce sufficient evidence that would justify the granting of such an extraordinary order. In particular, the Federal Crown argues that the MCFN have failed to demonstrate that the claim to be adjudicated is *prima facie* meritorious, have failed to demonstrate that the issue of the size of the reserve transcends individual interests such that it is an issue of public importance, and have failed to demonstrate that the MCFN genuinely cannot afford to pay and that no other realistic option exists such that the litigation would be unable to proceed if the order were not made.

Background Facts

[10] The MCFN is a small Indian band consisting of approximately 380 registered members. The MCFN's traditional territory centers around Missinaibi Lake, Dog Lake, and Wabatonguishi Lake, an area which lies approximately 60-75 kilometers northeast of Wawa, Ontario.

[11] The James Bay Treaty of 1905/1906 ("Treaty 9") deals with the provision of reserves for Ojibway, Cree and other Indian bands, including the MCFN.

[12] By virtue of Treaty 9, the King assured those inhabiting the Treaty 9 territory that, in exchange for the surrender of their rights to their vast lands they were to "count upon and receive His Majesty's bounty and benevolence" and would receive reserve land according to the formula of one square mile for each family of five or in proportion to the size of their families.

[13] The key relevant terms of Treaty 9 provide as follows:

"And, whereas the said Indians have been notified and informed by His Majesty's said commission that it is His desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to His Majesty may seem meet, a tract of country, bounded and described hereinafter mentioned, and to obtain the consent of His Indian subjects inhabiting said tract, and to make a treaty and arrange with them, so that there may be peace and good-will between them and His Majesty's other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty's bounty and benevolence".

"And whereas, the said commissioners have proceeded to negotiate a treaty with the Ojibway, Cree and other Indians inhabiting the district hereinafter defined the said Indians hereby cede, release, surrender and yield up to the government of the Dominion of Canada, for His Majesty the King and His successors forever, all their rights, titles and privileges whatsoever, to the lands ...".

"And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families; and the location of the said reserves having been arranged between His Majesty's commissioners and the chiefs and headmen, as described in the schedule of reserves attached hereto, the boundaries thereof to be hereafter surveyed and defined, the said reserves when confirmed shall be held and administered by His Majesty for the benefit of the Indians free of all claims, liens, or trusts by Ontario".

[14] As signatories to Treaty 9, the MCFN has brought this action against the Federal Crown for its failure to honour the specific terms of the treaty. Because of Ontario's obligation to set apart reserves, the joint Federal/Ontario obligation to determine location of reserves, and Ontario's obligation to pay annuities, the MCFN has also named Ontario as a party defendant in this action.

[15] In this action the MCFN claims a declaration that the Ontario and Federal Crowns are obliged to set aside a reserve for the MCFN based on the formula set out in the treaty (one square mile per family of five or 128 acres for each member of the MCFN) in the traditional territory of the MCFN. The MCFN also claims damages relating to, and arising from, breach of treaty and breach of fiduciary duty.

[16] Other claimed relief includes a request for declarations concerning status Indian entitlements and mineral rights, as well as injunctive relief with respect to Crown licensing, leasing and resource extraction in the MCFN's traditional territory. Punitive damages are also claimed.

[17] In 1993, the MCFN submitted a treaty land entitlement claim to both the Federal Crown and Ontario under the Specific Claims Process, a federal government initiative introduced in 1982 which provides a negotiation process under policy guidelines for the assessment, negotiation and resolution of claims. A "specific claim" refers to a specific treaty breach claim against the Crown (or Crowns) concerning a breach of particular treaty terms. A treaty land entitlement claim is a common claim under that process which often involves alleged discrepancies in the area set aside for the first nation based on population. It is worth noting that it is unusual for any treaty land entitlement claim to be based on an alleged complete and utter failure to set apart any reserve land under an historical treaty such as Treaty 9.

[18] This action was commenced in 1995. It was put into abeyance as a result of the negotiations between the MCFN and Federal and Ontario Crowns pursuant to the Specific Claims Process. The Federal Crown accepted the claim for negotiation in 1996 and Ontario accepted the claim for negotiation in 2000 under that process. Because of the Federal Crown's policy against simultaneously litigating and negotiating, the MCFN says that it was left with no choice but to negotiate in light of the high costs associated with litigation.

[19] In 2005, Ontario withdrew from negotiations. Negotiations with Canada broke down in 2008. As a result, the MCFN was obligated to pursue its action after several years of negotiations. The costs incurred as a result of the negotiation process are in excess of \$4 million and remain owing to the Federal Crown by way of a loan agreement.

[20] As noted above, the fundamental dispute between the parties to this action relates to the precise quantum of land entitlement and to damages. The MCFN takes the position that the reserve size must be based on the population of the MCFN at the date of "first survey". Because the "first survey" has yet to occur, the MCFN says this translates into a reserve entitlement based on the current population of the MCFN. The Crowns disagree with this proposition and also disagree with the MCFN's proposed method of quantifying damages.

[21] Although the Federal Crown has refused to accept that historian Joan Holmes is a qualified expert, certain aspects of the historical record to which she refers in the report prepared by her are not in serious dispute. Her report, filed by the MCFN on this motion, states that:

- (a) Ontario and the Federal Crown agreed that Ontario would pay to the Federal Crown the cost of annuities and Ontario would set aside reserves;
- (b) Treaty 9 was approved by Federal Order in Council on January 12, 1907 and Ontario Order in Council on February 13, 1907;
- (c) the Missanabie Cree have paid on their own paylists since 1906; and
- (d) a reserve has never been set aside for the Missanabie Cree.

[22] The MCFN argues that its paylists show that the Crown either knew or ought to have known of the MCFN's reserve entitlement and that therefore a reserve designated for the MCFN should have been set aside over 100 years ago.

[23] Indeed, the Federal Crown admits in these proceedings that it recognized the Missanabie Cree as a separate and distinct band by at least 1937 and that the band has not yet been provided with reserve land. In its Statement of Defence and Cross-Claim, the Federal Crown admits that:

- (a) the ancestors of the Plaintiffs adhered to the James Bay Treaty in 1906, and as such were entitled to benefits set out in the Treaty, including reserve land (para. 4);
- (b) although the reasons for this are at this point unclear, the result was that the treaty promise of reserve land remained unfulfilled (para. 7);
- (c) the present case is one of a treaty promise which has not yet been carried out and fulfillment of that promise is the appropriate remedy (para. 8);
- (d) requests were made for reserve lands which were rejected (para. 67);
- (e) the Federal Crown recognized the Missanabie Cree as a separate and distinct band by at least 1937 and that the band has not been provided with reserve land (para. 77);
- (f) that, absent a reserve, members of the Missanabie Cree may have been required to pay taxes that they might not otherwise have had to pay (para.78); and
- (g) the Plaintiffs are entitled to fulfillment of the terms of the Treaty.

[24] However, it is denied by the Federal Crown that the reserve land should be based on the MCFN population as at the date of judgment. Rather, it argues that the intention of the Treaty was that the population of the band at the time of adherence to the Treaty should be the basis for calculating reserve land entitlement. It is this dispute which gives rise to the threshold issue.

[25] On April 12, 2011, Master Sproat issued an order on consent which severed the threshold issue from the balance of the litigation. The first phase of the litigation is therefore intended to deal only with the threshold issue, composed of the following questions:

- (a) What is the size of the reserve the MCFN are entitled to have set aside for its benefit under Treaty 9?
- (b) As of what point in time should the population of the MCFN be determined for the purposes of applying the reserve entitlement formula stipulated by Treaty 9? and
- (c) What was or is the population of the MCFN at the point in time ultimately determined to be the answer to (b)?

[26] As a result, the threshold issue as described for the purposes of this motion does not concern the question of whether the MCFN are entitled to any reserve land but, rather, the extent of the land to which it is entitled.

[27] I note as well that the Federal Crown has cross-claimed against Ontario. The Federal Crown asserts that, pursuant to s. 109 of the *Constitution Act*, 1867, Ontario received the entire beneficial interest in the surrendered lands and it is Ontario alone that is in a position to manage and secure those lands. It claims that only Ontario can satisfy any liability owing to the MCFN for any damages suffered as a result of or any loss of or delay in providing reserve lands.

[28] In its Statement of Defence and Cross-Claim, Ontario admits and states that:

- (a) the Plaintiffs have in entitlement to reserve lands in accordance with the formula provided in Treaty 9 (para. 4(a));
- (b) as the Plaintiffs have never received a reserve pursuant to Treaty 9, they have an outstanding entitlement to reserve lands in accordance with the formula provided in Treaty 9. Ontario has the ability to make appropriate public lands available for this purpose, but pleads that Canada was the only Crown government in a position to appreciate whether the terms of the Treaty had been complied with and that the responsibility for identifying a reserve land entitlement was and is Canada's and Canada's alone (para. 34);
- (c) the request for reserve land made by James Fletcher was made to Canada and Canada alone. To the extent that Ontario was advised of the 1915 request (which was not conveyed by Canada as a treaty entitlement) Ontario was willing to make lands available and it was Canada that made the independent decision to reject the request (at para. 46); and
- (d) Ontario agreed to provide Canada with land for Indian reserves as selected by Treaty 9 commissioners and in accordance with the reserve formula established for Treaty 9 (para. 54).

[29] These disputes as between Ontario and the Federal Crown are not encompassed by the threshold issue for which advance costs are sought, but will have to be addressed if and when the litigation proceeds.

Have the Plaintiffs Established That They Have a Meritorious Case?

[30] Both Defendants admit in their pleadings that the MCFN is entitled to a reserve and that a reserve has never been provided. They take issue with the size of the reserve that should be set aside, and argue that reserve size should be based on the population of the MCFN in or around 1905 being the time of adhesion to treaty. The MCFN takes the position that the reserve size should be based on its current population based on the "date of first survey" requirement.

[31] The MCFN's position is supported by the decision of the Saskatchewan Court of Appeal, *Lac La Rouge Indian Band. V. Canada*, 2001 SKCA 109, which interpreted a similarly-worded Treaty as follows:

"Thus, the language of Treaty, while not specific, is sufficiently clear to find that the obligation of the Crown to set aside reserve lands is crystallized at the date of first survey, subject to bona fide adjustments for late adherents ... The Allotment is fixed or crystallizes at the time of the first survey or census adjusted. The failure to allot the entire land may result in a claim for damages, but it does not change the date for the calculation of treaty entitlement."

[32] The *Lac La Ronge Indian Band* decision considered a different fact situation where multiple surveys were conducted close to the treaty adhesion date. In the circumstances of this case, there has been a failure of the Federal Crown to conduct a first survey. It will be argued by the MCFN that only when the first survey is conducted – based on the then-current population – does the extent of the reserve allotment become fixed or crystallized. *Lac La Ronge* also may support an argument that failure to allot the entire reserve size may give rise to a claim for damages.

[33] If it is decided that the MCFN is entitled to a larger reserve based on date of first survey as of the present time, both quantum of land and claims for historical loss must be determined.

[34] Even if it is ultimately determined that the size of the reserve to be allotted is based on the population at or around the time of adhesion, a claim may nevertheless exist for damages for loss of use of that reserve land for the years that have passed during which this obligation has remained unfulfilled.

[35] In my view, it is evident that the MCFN have a meritorious case on the issue of their entitlement to some reserve land. Further, their position as to the proper method of calculation of this entitlement, that is, the threshold issue, is sufficiently meritorious so as to meet this branch of the *Little Sisters* test.

Have the Plaintiffs' Demonstrated the Issues are of Public Importance?

[36] The issues raised are obviously important to the dispersed population of the MCFN. They concern a significant territory of land – at least 15 square miles and potentially 75 square miles

and potentially 75 square miles. These issues may engage third party interests, including mining rights and forestry issues. Environmental issues will also need to be considered if land granted has previously been exploited and left unremediated.

[37] This case may set a precedent for the other First Nations who have not received reserve land. The Federal Crown has confirmed that three other First Nations under Treaty 9 have claimed that they have not been granted reserves.

[38] The MCFN case is comparatively unique fact scenario. For over 100 years the MCFN has not had Treaty 9 honoured and, despite more than a decade of expensive negotiation, the MCFN must now proceed with this litigation.

[39] Another consideration which bears on the resolution of the threshold issue and its proper characterization is that its determination will have implications that extend far beyond the arguably narrow and personal interests of the current members of the MCFN. The decision as to the proper size of the reserve lands will affect MCFN's future generations indefinitely and therefore the issue transcends individual interests such that, in my opinion, it becomes a matter of public importance.

[40] Accordingly, I am satisfied that the MCFN has demonstrated compliance with this aspect of the requirements established by the *Little Sisters* decision.

Have the Plaintiffs Established Impecuniosity?

[41] The MCFN has provided extensive financial disclosure on this motion in support of its argument that its impecuniosity is evident. In particular, the MCFN has provided consolidated audited financial statements from 2005 to the present which reveal that:

- (a) In 2010 and 2009, the consolidated financial position of the MCFN discloses net financial liabilities, respectively, of \$2,527,114 and \$2,492,641, and an accumulated deficit, respectively, of \$867,798 and \$867,117;
- (b) Liabilities exceed assets in all financial statements disclosed;
- (c) A significant long-term debt of \$3,525,698 (as at March 31, 2010) is still owing to Indian and Northern Affairs Canada (the Federal Crown) for funding of Specific Claims negotiation process; and
- (d) The MCFN carries an accumulated deficit of \$860,798 as a result of reserves set for unfunded treaty entitlement expenditures of \$3,955,095 to be recovered through future revenues.

[42] Almost the entire revenue of the MCFN is provided through government funding which is provided subject to strict conditions. The funds are restricted in the sense that they cannot be used at the MCFN's discretion, but must be used for specific programs and initiatives. These revenue sources are limited to fund local government and band administration, community support, economic development and post-secondary education funding. The MCFN receives significantly less funding than first nations with reserves. What government funding MCFN does receive is therefore not available to fund litigation.

[43] Its financial statements show that the MCFN has and will continue to receive funding from the Ontario First Nation Limited Partnership, which provides Ontario First Nations with revenue earned from Casino Rama (and, in the future, other Ontario casinos). This funding provides to the MCFN approximately \$250,000 annually. However, it appears that these funds are also restricted as to use. Pursuant to strict conditions imposed by the Province of Ontario, these funds may only be spent for health care, cultural development, community development and economic development. As a result, I accept that these funds likewise are not available to fund litigation such as this.

[44] The MCFN has canvassed public sources of funding. Inquiries have been made of funding sources such as Legal Aid Ontario, Indian Test Case Funding, Nishnawbe Aski Nation Legal Services, the Chiefs of Ontario and the Assembly of First Nations, but without success.

[45] With respect to attempts to obtain private financing, the MCFN and its counsel have made efforts to obtain alternative sources of funding. Attempts have been made to secure financing through insurance, private investment banks and insurers and other sources. However, these efforts have been unsuccessful. I accept that a contingency arrangement with legal counsel is not a viable option in this case because of the possibility that the only remedy obtained could be a reserve with no award of damages. Any land the MCFN may obtain as a result of its action is of a nature that cannot be pledged or encumbered to raise funds to repay indebtedness for legal fees.

[46] I am not persuaded that there is anything more that the MCFN reasonably can be expected to do to fund this litigation.

[47] For these reasons, I am of the view that the MCFN has satisfied this branch of the *Little Sisters* test and has established that without advance funding this litigation to seek a resolution of the threshold issue will not be able to proceed.

Conclusion

[48] Accordingly, I consider that the MCFN has satisfied all branches of the test applicable to the application for an order for advance costs. Having so decided, I also am of the view that fairness and justice require that this order be granted in these particular circumstances.

[49] For these reasons, the motion for advance costs is granted. The costs ordered are to be in relation to those incurred for the trial of threshold issue only, (as defined in the severance order consented to by the parties and ordered by Master Sproat on April 12, 2011) and are to be on a partial indemnity scale only. These advance costs shall be initially shared and paid equally by the Defendant Crowns, but subject to any possible re-adjustment between them as may be considered by the trial judge to be fair and just after determination of the threshold issue or at an appropriate later stage of these proceedings. It is premature to make that apportionment at this stage of the proceedings.

[50] It is contemplated by the parties that further terms shall attach to this order, which should be similar in nature to the additional terms ordered by Spies, J. in her decision in *Keewatin v. Minister of Natural Resources and Abitibi Consolidated Inc.*, 2006, Carswell B.C. 6463, 32 C.P.C. (6th) 258 (Ont. S.C.). Should they be unable to agree on the appropriate terms,

arrangements may be made to attend before me to make argument on that subject and to finalize the order.

Costs

[51] As agreed, the MCFN do not seek an order for costs of this motion from Ontario. If the MCFN and the Federal Crown cannot agree on the subject of costs of this motion, a timetable for written submissions in that regard will be established if so requested.



Stewart, J.

Date: December 5, 2011