Federal Court  Cour fédérale

**Date: 20180118**

**Docket: T-474-17**

**Citation: 2018 FC 49**

**Ottawa, Ontario, January 18, 2018**

**PRESENT: Madam Prothonotary Mireille Tabib**

**BETWEEN:**

**JOSEPH HUBERT FRANCIS**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

## ORDER AND REASONS

[1] The Plaintiff, Hubert Francis, is a Mi'kmaw and member of the Elsipogtog First Nation in the province of New Brunswick. Mr. Francis engaged in the shrimp fishery in the Gulf of St. Lawrence, as he asserts he is entitled to do pursuant to treaty and aboriginal rights, without having first obtained a license issued by the Department of Fisheries and Oceans. On three occasions in 2015, officials from the DFO boarded his vessel and seized his catch for fishing without authorization, i.e., without a valid fishing licence. The Plaintiff, together with the aboriginal crew of his vessel, have now been charged with fishing without authorization in

respect of the last two incidents, and are facing summary conviction proceedings under the *Fisheries Act* before the courts of the province of Québec.

[2] Mr. Francis seeks, before this Court, declarations to the effect that the prohibitions and restrictions placed upon him as a result of these seizures and charges constitute an unjustifiable infringement of his treaty rights to access the fishing resource and trade in fish in order to attain a moderate living, and to his aboriginal right to access the fishing resource and trade in fish, as well as a declaration that this aboriginal right is not limited to the purpose of attaining a moderate living.

[3] Mr. Francis brings this motion for an interim order requiring the Defendant to pay advanced costs in accordance with the principles enunciated in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, without which he would be unable to proceed with this action.

[4] There is general agreement between the parties as to the criteria the Plaintiff has to meet before the Court may consider if the interests of justice would be served by the order sought. They were set out at paragraph 40 of *Okanagan* as follows:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[5] Where the parties disagree is as to how these factors should be applied in the circumstances of this case, and whether the criteria have therefore been met.

[6] In particular, while the Defendant concedes that the Plaintiff is genuinely unable to pay for this litigation and that he would not have the resources to proceed with this action without advanced costs, it takes the position that the Plaintiff has other realistic options to bring the issues that concern him to trial, namely, in the context of the pending summary conviction proceedings.

[7] The Defendant further submits that the Plaintiff has not made out a strong, *prima facie* case for three reasons: Because the Supreme Court has already conclusively determined that the mere requirement of a license does not constitute an unjustified infringement on aboriginal or treaty rights; because the Plaintiff lacks standing to assert aboriginal and treaty rights in a civil declaratory action; and because the Plaintiff's action constitutes an impermissible collateral attack on the summary conviction charges and on the Elsipogtog First Nation's decision not to grant him access to the fishery under its communal license.

[8] The Defendant further submits that because of previous decisions to the effect that the mere requirement of holding a license does not constitute an unjustifiable infringement of aboriginal rights, and because the plaintiff's action is limited to his own circumstances, the third criteria of the *Okanagan* test has not been met.

[9] Finally, the Defendant submits that the arguments and circumstances mentioned above should also inform the Court's consideration of the interests of justice and lead to the conclusion that the order of advanced costs should not be made.

[10] For the reasons that follow, I agree with the Defendant that the pending summary conviction proceedings constitute another realistic option to bring the Plaintiff's issues to trial that can and must be taken into account by the Court, and that the Plaintiff has not explored possible funding options in those proceedings. I also agree that the Plaintiff has not made out a *prima facie* case that he has the required standing to bring this action.

[11] As a result of these conclusions, the Plaintiff cannot meet two of the three criteria required before the Court can even consider whether an order of advanced costs would serve the interests of justice, and his motion is bound to fail. There is accordingly no need to consider or determine whether the arguments for put forward by the Plaintiff in support of his action are *prima facie* meritorious, or to rule on the other arguments advanced by the Defendant, and I decline to do so.

## I. Is there another realistic option to bring the issues to trial?

[12] The Plaintiff has adduced a substantial record to show that he genuinely cannot afford to pay what is expected will be the very substantial costs of litigating the issues raised in this proceeding. The record further establishes that the Plaintiff is not eligible for legal aid funding in Québec, New Brunswick or Nova Scotia for bringing this declaratory action. Finally, it has been established that Mr. Francis and others on his behalf have investigated and attempted other

avenues of funding this litigation, succeeding only in raising $10,000, an amount which is clearly insufficient.

[13] The evidence on record however is silent as to whether Mr. Francis is eligible to obtain legal aid funding, whether from Québec or from New Brunswick, to defend the summary conviction proceedings now pending against him in Québec in respect of the charges of fishing without a license in waters adjacent the province of Québec. The evidence does not show whether any attempt was made by the Plaintiff, by his co-accused aboriginal crew or on their behalf, to raise funds for their defence, including for a common defence based on treaty or aboriginal rights. On the contrary, some of the evidence on record suggests that assistance with the defence of the summary conviction charges was offered by the Elsipogtog First Nation. However, it seems that Mr. Francis and those assisting him in this litigation deliberately focused their funding efforts on the civil litigation before this Court, accepting assistance in the Québec criminal matter only insofar as it was necessary to preserve Mr. Francis' rights.

[14] The evidence, on the whole, is to the effect that the intentions of Mr. Francis and of his advisors were to obtain funding, or failing this an order for advanced costs, for the purpose of pursuing this declaratory action, and then to apply for a stay of the criminal proceedings pending resolution of this action.

[15] Mr. Francis has not demonstrated, and not even attempted to demonstrate, that he genuinely cannot access resources, and therefore afford to pay for his defence to the summary conviction proceedings. To the extent the issues he wishes to bring to trial in the present

litigation can be brought to trial in the context of those other proceedings, then it is clear that he has not overcome his burden of showing that "no other realistic option exists to bring the issues to trial".

[16] Mr. Francis argues that this approach mischaracterizes the first branch of the advanced costs test. He submits that the words "no other realistic options", as used in paragraph 40 of *Okanagan*, relate to funding options, not to litigations options. Mr. Francis' submissions focus on this last part of the sentence " – in short, the litigation would be unable to proceed if the order were not made" and on the use of the words "the litigation", as narrowing the scope of the analysis to the "realistic options" to fund the very litigation in which the funding motion is brought, without considering the availability of other fora or processes in which the issues could be resolved. Other than the textual interpretation of that one sentence of *Okanagan*, Mr. Francis' argument rests on the failure of the Supreme Court to mention the availability of other fora under the specific heading of impecuniosity in both *R v Caron*, 2011 SCC 5 and *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2.

[17] The argument, however, ignores that the overarching concern in a decision to award advanced costs is that they be used only as a last resort, to prevent an injustice for the litigant and the public at large that would result from the failure of having issues of public importance properly resolved. The Supreme Court cautioned that these concerns must guide the Court in analyzing all of the requirements of the *Okanagan* test, as well as in the final exercise of the Court's discretion (see *Little Sisters*, at para 37). Further, the majority reasons in *Little Sisters*

reiterated how these general principles should inform even the analysis of the specific criterion of impecuniosity:

> 71 The impecuniosity requirement from *Okanagan* means that it must be proven to be impossible to proceed otherwise before advance costs will be ordered. Advance costs should not be used as a smart litigation strategy; they are the last resort before an injustice results for a litigant, and for the public at large.
>
> (emphasis added)

[18] That passage echoes the comments the majority had previously made at paragraph 41, addressing more specifically the availability of other means or fora to determine the issues at stake:

> 41 Third, no injustice can arise if the matter at issue could be settled, or the public interest could be satisfied, without an advance costs award. Again, we must stress that advance costs orders are appropriate only as a last resort. In *Okanagan*, the bands tried, before seeking an advance costs order, to resolve their disputes by avoiding a trial altogether. Likewise, courts should consider whether other litigation is pending and may be conducted for the same purpose, without requiring an interim order of costs. Courts should also be mindful to avoid using these orders in such a way that they encourage purely artificial litigation contrary to the public interest.
>
> (emphasis added)

[19] Finally, the circumstances in *Caron* were such that there could have been no suggestion that another forum was available at the time the motion for funding was made. The Supreme Court's failure to mention the availability of other proceedings or fora in the context of its discussions of impecuniosity in that case is therefore meaningless.

[20] There is no basis for the Court to ignore, in considering the impecuniosity criterion, the possibility that funding might be available for the Plaintiff to bring the issues to trial in another forum or through a different process.

[21] The Plaintiff, however, argues that summary conviction proceedings are inadequate and inappropriate for dealing with aboriginal rights claims. That argument finds support in the dicta of LeBel J. in concurring reasons delivered in *R v Marsh*all; *R v Bernard*, 2005 SCC 43 at paras 142-144. It is also true that Binnie J., writing for the majority in *Caron*, above, cited LeBel J.'s dicta in expressing the opinion that "prosecution in a provincial court does not generally provide, from a procedural point a view, an efficient institutional forum to resolve this sort of major constitutional litigation". The inherent limitations in the ability of summary conviction proceedings to achieve a broad determination of the complex and wide-ranging issues involved in determining aboriginal rights and title is also evident from the multiplicity of such cases through which the extent of the aboriginal and treaty rights to which Mi'kmaws of Atlantic Canada are entitled have, so far, been incrementally determined.

[22] That said, neither that fact nor the authorities support the sweeping assertion that criminal proceedings are necessarily and in all circumstances inappropriate or inadequate to resolve issues of aboriginal rights, including those Mr. Francis wishes to raise. It must be remembered also that Mr. Francis bore the burden of establishing every aspect of the *Okanagan* test on this motion. Where a *prima facie* adequate alternative mode or forum for redress exists, that includes the burden of showing why it is not, in the circumstances, appropriate or adequate.

[23] Mr. Francis asserts that the summary conviction proceedings are inadequate or inappropriate to determine the broader aboriginal and treaty rights issues raised in his action and to end the confusion and ambiguity that have surrounded the rights derived from the Mi'kmaw treaties of the 18th century since *R v Marshall*, [1999] 3 SCR 456. This assertion is however belied by the limited scope of the declarations sought in his statement of claim. The declarations he seeks are that the prohibitions and restrictions placed upon him personally, as a result of the three specific incidents described in paragraph 1of these reasons, are an unjustifiable infringement of his own aboriginal and treaty rights. To the extent a broader declaration is sought, is it that his own aboriginal right to access the fishing resource and to trade in fish is not limited to the purpose of attaining a moderate living. That last declaration is however not the main thrust of this action and would likely also be raised as part of Mr. Francis' defence to the criminal charges.

[24] Further, while the procedural trappings of a declaratory action in the Federal Court might be preferable for the determination of the issues raised by Mr. Francis to those available in the summary conviction proceedings, it has not been demonstrated that these issues, as they concern Mr. Francis, cannot be determined fairly, adequately and without injustice to Mr. Francis in the context of the Quebec criminal proceedings. Advanced cost orders must be used only as a last resort to avoid an injustice. They cannot appropriately be made simply because they would permit a "preferable" mode of determining issues, where an adequate alternative mode exists.

II. Does the Plaintiff have *prima facie* standing to bring this action?

[25] Although the declarations sought by Mr. Francis in his statement of claim are limited to his own rights, it remains that the rights he asserts are, by their nature, collective rights held by the relevant aboriginal communities or collectives, whether it be the Elsipogtog First Nation or the broader Mi'kmaw Nation. As such, they cannot be advanced as the basis of a civil claim or a declaratory action without the support of the community or collective which holds the rights:

> 50 Aboriginal title, treaty rights and Aboriginal rights are a right held by Aboriginal people in common and they cannot be asserted by individual members of the community. To put it in the words used by Prothonotary Hargrave in *Wahsatnow v. Canada (Minister of Indian Affairs and Northern Development)* [2002] F.C.J. No. 1665, 2002 FCT 2012, the claims in this case are not a right that the defendants themselves may claim. If the right exists, it is a right that belongs to the Band and can only be asserted by its lawful representatives or in a representative action.
>
> 51 There is good reason for this. If, as the statement of defence alleges, the Tyendinaga Mohawk Nation has Aboriginal title to the lands in question, any claims for trespass to those lands should be enforced by the authorized representatives of that Nation and not by individuals who may or may not represent its will. In *Te Kiapilanoq v. British Columbia*, 2008 BCSC 54, [2008] B.C.J. No. 50, Parrett J. stated, at para. 25:
>
> > In my respectful view, the elected Council representing the Squamish Nation is the proper party with the authority of this defined class of people to conduct a case which is aimed at determining the questions of Aboriginal rights and title. The collective nature of these rights requires an authority from the people who are, in this case, collectively represented by their elected Council.
>
> 52 Although Aboriginal law is evolving, it is settled law that Aboriginal title and Aboriginal rights, such as those asserted in the counterclaim, cannot be the subject of a personal action. These claims are, therefore, dismissed.

*Canadian National Railway Co. v Brant*, 2009 OJ No 2661 (OSCJ).

[26] While the Plaintiff is correct that the ancestral rights and treaty rights to fish he asserts are susceptible of being exercised by individuals such as Mr. Francis, they remain unique, collective rights that individuals have no right to seek to have defined, recognized or enforced in civil proceedings such as the present (see, for example, *R v Sundown*, [1999] 1 SCR 393 at paras 35 and 36, *Marshall*, above, at para 17; for a full discussion of the distinction between collective and individual rights, see paras 173 to 183 of *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655, upheld at [2008] 1 SCR 372). Individuals can, without the support of the relevant collective that holds the rights, assert these communal rights and have them adjudicated, to the extent necessary, in defence to criminal or regulatory offence proceedings, but individuals may not invoke them as the basis of a claim for determination of rights (*R v Chevrier*, [1989] 1 CNLR 128 at para 24 (Ontario District Court); *Queackar-Komoyue Nation v British Columbia*, 2006 BCSC 1517 at para 34(3)).

[27] Mr. Francis submits that the present action is distinguishable because it is an ostensible part of or adjunct to his defense to the criminal proceedings, in keeping with LeBel J's suggestion in *Marshall* that "when issues of aboriginal title or other aboriginal rights claims arise in the context of summary conviction proceedings, it may be most beneficial to all concerned to seek a temporary stay of the charge so that the aboriginal claim can be properly litigated in civil courts" (para 144). Mr. Francis submits that this advice would be illogical if the individual defendant in the criminal proceeding had no standing to bring a civil action.

[28] The suggestion that "all concerned" may benefit from moving aboriginal claims to the civil courts when they arise in the context of criminal proceedings, read in its proper context,

presupposes the active involvement of the collectives and other parties who may be interested in or affected by the determination of the issues. The passage on which Mr. Francis relies is immediately preceded by the observation that "all interested parties should have the opportunity to participate" in such litigation. It is notable that, in the present matter, there is no evidence that any of the aboriginal bands or nations whose collective rights are asserted have supported Mr. Francis' proposed civil action, or have expressed an interest in participating in the action or in seeking a broader determination of the issues raised in the criminal proceedings.

[29] To recognize to individuals the right to institute and maintain, without the support of the appropriate collective, civil actions asserting aboriginal rights whenever they are brought "in parallel" to criminal proceedings would sidestep the important principles that the proper stewards of collective aboriginal or treaty rights are the bands or nations to which these rights belong. It would ignore the unique nature of those rights and undermine the authority of the lawful representatives of the relevant band or nation to determine when and how to assert these rights.

[30] Given Mr. Francis' lack of standing to bring this action, the second criterion of the *Okanagan* test, that the claim be *prima facie* meritorious, has not been met.

[31] I would add that even if, as argued by Mr. Francis, his standing to bring the action presented an arguable case, his failure to show that his efforts have the support of the lawful leadership of the rightful holders of the rights asserted would prevent me from finding that the protection of the public interest requires that an advanced costs order be made. I could not

conclude that the situation is sufficiently compelling or unique for the Court to exercise its discretion to grant such an exceptional remedy.

## ORDER

**THIS COURT ORDERS that:**

1. The Plaintiff's motion is dismissed, with costs in favour of the Defendant.

"Mireille Tabib"
Prothonotary

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-474-17 |
| **STYLE OF CAUSE:** | JOSEPH HUBERT FRANCIS v HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | HALIFAX, NOVA SCOTIA |
| **DATE OF HEARING:** | NOVEMBER 17, 2017 |
| **ORDER AND REASONS:** | TABIB P. |
| **DATED:** | JANUARY 18, 2018 |

**APPEARANCES:**

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|---|---|
| Michael Kennedy<br>Sarah J. Emery<br>Robert H. Pineo | FOR THE PLAINTIFF |
| Reinhold M. Endres<br>Susan L. Inglis | FOR THE DEFENDANT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Patterson Law<br>Barrister and Solicitor<br>Halifax, Nova Scotia | FOR THE PLAINTIFF |
| Nathalie G. Drouin<br>Deputy Attorney General of Canada<br>Ottawa, Ontario | FOR THE DEFENDANT |