Federal Court  Cour fédérale

Date: 20180216

Docket: T-2050-15

Citation: 2018 FC 189

Ottawa, Ontario, February 16, 2018

PRESENT: Madam Prothonotary Mireille Tabib

BETWEEN:

EPHREM COMMANDA, AND ACTING AS A REPRESENTATIVE ON BEHALF OF 22 MEMBERS OF THE NIPISSING FIRST NATION BAND

Plaintiff

and

HER MAJESTY THE QUEEN OF CANADA, AND THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF JUSTICE NIPPISING FIRST NATION BAND

Defendants

ORDER AND REASONS

[1] The Plaintiff, Ephrem Commanda, is a member of the Nipissing First Nation band and a resident of Reserve No. 10 on the northern shore of Lake Nipissing, in the Province of Ontario. On his own behalf, and in a representative capacity to 22 other members of the band, Mr. Commanda instituted this action seeking a variety of declarations as to the validity of Canada's

constitutional statutes, the duties of Her Majesty the Queen in right of Canada and the United Kingdom under the Royal Proclamation of 1763 and the right of access to the Judicial Committee of the Privy Council of the United Kingdom under the Royal Proclamation of 1763, as well as various declarations and relief in respect of land rights under the Robinson-Huron Treaty of 1850 and numerous alleged breaches of the Royal Proclamation of 1763, of the 1850 Treaty, and of the Crown and band leaders' duties surrounding a 1907 Surrender Agreement, a 1995 Specific Agreement and a 2013 Surrender Agreement.

[2] The Plaintiff has named as a first defendant Her Majesty the Queen of Canada and the United Kingdom of Great Britain and Ireland, as an entity separate and distinct from the second defendant, Her Majesty the Queen in Right of Canada, and as a third defendant the Nipissing First Nation band.

[3] All three Defendants have brought motions to strike the Statement of Claim without leave to amend. While the motions of Canada and the NFN raise similar grounds, the motion of the UK Crown asserts sovereign immunity under the *State Immunity Act* RSC 1985, c S-18. All three motions were heard together. I have allowed the Plaintiff, Canada and the NFN to serve and file additional submissions after the hearing on the specific issue of whether the Plaintiff's claim could be considered a permissible derivative claim.

[4] For the reasons that follow, all three motions will be granted, and the Plaintiff's action will be struck, without leave to amend.

I. The UK Crown's Motion to Strike

[5] The Plaintiff has designated the first defendant as "Her Majesty the Queen of Canada and the United Kingdom of Great Britain and Ireland", although this defendant has appeared, under reserve of its rights to claim immunity pursuant to s 4(3)(a) of the *SIA*, as "Her Majesty the Queen in Right of Her Government in the United Kingdom". By naming as the second defendant Her Majesty the Queen in right of Canada, the Plaintiff has indicated that he considers these two defendants to be separate and distinct from each other.

[6] The Plaintiff's move, of suing and naming as defendant an entity designated as Her Majesty the Queen of Canada and the United Kingdom, speaks to the deeply held belief amongst many indigenous peoples in Canada that the proclamations, assurances and promises given to them by the then sovereign of the United Kingdom, and the treaties negotiated between their chiefs and the head of the United Kingdom, remain binding on and owing from that sovereign. They consider that these solemn promises and obligations cannot, in good conscience and honour, be ignored, extinguished or entirely delegated, even through the constitutional division of the Crown between the United Kingdom and its now independent possessions and dominions, at least not without their participation and consent.

[7] The Plaintiff's intent in naming the first defendant as he has is thus to sue and implead Her Majesty the Queen Elizabeth II, as successor of King George III and Queen Victoria, in her capacity as Queen of the United Kingdom.

[8] I hasten to add that the above-mentioned belief is not unreasonable and could, at least at one time, give rise to an arguable legal argument. Indeed, prior to the patriation of the Constitution, various aboriginal organizations from Alberta, New Brunswick and Nova Scotia brought an application before the courts of the United Kingdom, seeking just such a declaration: "that treaty and other obligations entered into by the Crown to the Indian peoples of Canada are still owed by Her Majesty in right of her Government in the UK, and that the opinion that all treaty obligations became the responsibility of the Government of Canada with the attainment of independence, at the latest with the Statute of Westminster, 1931, is wrong in law". The Divisional Court of the Queen's Bench dismissed that application. On appeal, the Court of Appeal, Civil Division, through the detailed reasons of Lords Denning, Kerr and May, upheld the judgment. They concluded that all obligations of the once indivisible Crown under the 1763 Proclamation and 19th century treaties had, since the Crown became divisible in the early 20th century and at the latest by the *Statute of Westminster*, 1931 (UK), 22 & 23 Geo V, c 4, become obligations of the Crown in right of Canada, and not the Crown in respect of the United Kingdom (*R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta et al* [1982] 2 All ER 118, leave to appeal to the House of Lords refused).

[9] The Plaintiff's arguments in this action as against the UK Crown are not dissimilar to those of the aboriginal organizations in the *Secretary of State* case. However, beyond the fact that the arguments have been authoritatively and convincingly disposed of by the English Court of Appeal, the Plaintiff's attempt to bring up those same issues before this court is destined to fail for the simple and obvious reason that this action is directed against a foreign head of state, which is immune from the jurisdiction of this, or any court in Canada, pursuant to s 3 of the *SIA*.

[10] The relevant definition and provisions of the *SIA* read as follows:

2 In this Act,	2 Les définitions qui suivent s'appliquent à la présente loi.
foreign state includes	*État étranger* sont assimilés à un État étranger :
(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,	a) le chef ou souverain de cet État ou d'une subdivision politique de celui-ci, dans l'exercice de ses fonctions officielles;
3 (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	3 (1) Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.
(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.	(2) Le tribunal reconnaît d'office l'immunité visée au paragraphe (1) même si l'État étranger s'est abstenu d'agir dans l'instance.

[11] The Plaintiff's counsel, in response, did not attempt to assert that any of the exceptions to the presumptive immunity of the UK Crown set out in the *SIA* apply in this case, as indeed, it is plain that they do not. Rather, in convoluted, often incoherent and contradictory written and oral arguments, counsel for the Plaintiff argues that the *SIA* is inapplicable to a claim based on the Royal Proclamation of 1763, because its application would abrogate or derogate from the rights conferred on the Plaintiff by that Proclamation, which are constitutionally protected by the *Canada Act*, 1982 (UK), 1982, c 11 and thus outside the powers of the Parliament of Canada.

[12] The argument is fundamentally flawed for a variety of reasons, not least of which because it presupposes the continued indivisibility of the Crown and thus, the invalidity of the constitutional statutes by which Canada became an independent sovereign nation.

[13] The courts lack authority to adjudicate upon challenges to Canada's sovereignty and constitutional statutes (*Ro:Ri:Ni:Io v Canada (Attorney General)* 2007 ONCA 100, and *Reference re Secession of Québec* [1998] 2 SCR 2017, at para 32, referring to *Reference re Objection by Québec to a Resolution to amend the Constitution* [1982] 2 SCR 793, at p 806.)

[14] The *Statute of Westminster,* 1931, by which Canada gained full independence from the United Kingdom in respect of its internal affairs, and which confirmed the divisibility of the Crown, is a constitutional statute, affirmed as such by the *Constitution Act,* 1982 (s 52 (2) and s 17 of the Schedule). The courts of this country are constitutionally bound to recognize the UK Crown as distinct from the Crown in right of Canada or the Crown in right of the provinces, and to treat the UK Crown as a foreign government.

[15] Further, the *SIA* is a mere codification of one of the fundamental principles of international law, by which sovereign equality prohibits one state from purporting to exercise authority over another through its national courts (*Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62). The constitutional necessity for this court to recognize the separation of the Crown, together with the international law imperative of recognizing and respecting the sovereignty of the UK Crown would, even in the absence of the *SIA*, preclude this court from purporting to exercise jurisdiction over the UK Crown.

[16] The recognition and due enforcement of the Crown's obligations to aboriginal peoples under the Royal Proclamation of 1763 or any treaty entered into by the Crown prior to the *Statute of Westminster*, 1931, is, with the division of the Crown, fully effected through the devolution of these obligations to the Crown in right of Canada, as affirmed by s 35 of the *Constitution Act*, 1982.

[17] The last argument advanced by the Plaintiff's counsel to oppose the UK Crown's motion is that state immunity is not engaged because Her Majesty is sued in her personal capacity, as the successor and heir to King George III. The absurdity of this argument is apparent both from the fact that the Plaintiff's counsel invoked the mechanism of the *SIA* in order to effect service of the Statement of Claim on the UK Crown, and from the fact that the Royal Proclamation of 1763 is so obviously an exercise of sovereign power and prerogative that it negates any suggestion that it might have been issued in a personal capacity or and that the obligations derived from it can be inherited as a personal obligation.

[18] The Statement of Claim, as against Her Majesty the Queen of Canada and the United Kingdom of Great Britain and Ireland, will be struck for lack of jurisdiction.

[19] The UK Crown seeks its costs, in the amount of $1500. I find the amount suggested by the UK Crown eminently reasonable in the circumstances.

II. Canada and the NFN's Motion to Strike

[20] As mentioned earlier in these reasons, two categories of claims are included in the Statement of Claim.

[21] The first type of claims, to which I will refer as the "constitutional claims", are based on broad allegations that Indians have fundamental personal and land rights derived from the Royal Proclamation of 1763 which have been breached, undermined or unlawfully modified or abrogated by Canada's constitutional statutes, including the *Constitution Act*, 1867 and the *Constitution Act*, 1982, and by the *Indian Act*, RSC 1985 c I-5 and the *Supreme Court Act*, RSC 1985 c S-26. The relief sought in respect of these allegations reads as follows:

> 1. judicial declaratory declarations that:
>
> a) the Royal Proclamation, 1763 imposes on Her Majesty the Queen a primary, non-delegated duty to the Indians and the Plaintiffs, as well as a direct duty to establish an Indian constitution that is commensurate with those offered in the *Constitution Act*, 1867 and the *Constitution Ac*t, 1982.
>
> b) the *Constitution Act*, 1867 and the *Constitution Act*, 1982 were enacted without the material involvement of the Indians, and the system of government set up by Her Majesty the Queen undermines the primary and direct duties owed to the Indians.
>
> c) the Parliament of Canada is not supreme and its passage of s. 35.1 of the *Constitution Act*, 1982 violates the Proclamation and is inconsistent with s. 37 of Schedule B of the *Canada Act*, 1982.
>
> d) the *Indian Act*, 1985 a.m. and its use, cause irreparable harm to the Band and the Reserve No. 10, violate the duties owed to the Band, and are tools used for the racist control and genocide-type dealings against the Band.
>
> e) the Judicial Committee of the Privy Council of the United Kingdom is the final court of resort with respect to the duties of

> Her Majesty the Queen of Canada, and the United Kingdom, under the Royal Proclamation, 1763, the *Constitution Act*, 1867 and the *Constitution Act*, 1982.

[22] On their face, the vast majority of the constitutional claims asserted in the Statement of Claim are not justiciable, as they challenge the validity of the Constitution and the sovereignty of the Crown in right of Canada (see discussion at paras 13 and 14 of these reasons).

[23] The sole relief for which the Court might arguably not be required to question the validity of constitutional statutes is the claim in respect of the effect of the *Indian Act*. However, not only is the declaration sought so broad as to be ungovernable and amounting to a commission of inquiry, but the Statement of Claim is utterly lacking in any material fact to support that claim. That part of the relief must therefore also be struck as scandalous, frivolous and vexatious and failing to disclose a reasonable cause of action (see discussion in *R v Pamajewon* [1996] 2 SCR 821 at para 27 and *kisikawpimootewin v Canada* 2004 FC 1426).

[24] The second category of claims asserted in the Plaintiff's Statement of Claim arises from the Crown's improper survey and measurement of the lands that were to be set aside as Reserve No. 10 pursuant to the Robinson-Huron Treaty of 1850, which deprived the band of some 106,000 acres of land, and from the allegedly unconscionable conduct of the Crown in obtaining the surrender of additional Reserve lands under a 1907 Surrender Agreement and in entering into a 1995 Specific Agreement between the NFN, Canada and Ontario for the return of some of the lands surrendered in 1907.

[25] The Statement of Claim further takes issue with the validity of the 2013 Specific Land Claim Agreement, by which the claims arising from the improper survey and measurement of the Reserve lands were settled. The Statement of Claim alleges that Canada was in a conflict of interest, breached its fiduciary duties to the band and its members and unconscionably took advantage of the inequality of bargaining power between itself and the NFN in negotiating a settlement that is unfair, provides grossly inadequate compensation and fails to consider a host of factors and Treaty principles. It also alleges that the referendum held on March 23, 2013 to ratify the settlement agreement should be set aside on the basis that insufficient, misleading or wrong information was provided to the band members, that the process was rushed by the band council, that the band council coerced the members of the band by promising them payments if the referendum succeeded, and that the band leaders, to the knowledge of Canada, did not act in the best interest of the band members in respect of any of the 1907, 1995 or 2013 agreements. I will refer to this second category of claims as the "treaty and other agreements claims".

[26] The remedies sought in respect of the treaty and other agreements claims read as follows:

> 1. Judicial declaratory declarations that:
>
> f) the Queen wrongfully withheld, in or about 1853, 106,800 acres of the Reserve and its resources, in trust under s. 109 of the *Constitution Act*, 1867, for the Band who had aboriginal title, and aboriginal treaty and interests in the land, at all material times.
>
> g) the 2013 Surrender Agreement is inconsistent with the purpose of the Royal Proclamation, 1763 and the Robinson-Huron Treaty, 1850, s. 25 and s. 35 of the *Constitution Act*, 1982 and the Band's right to self-governance under international law.
>
> h) the Government of Canada was in gross conflict of interest for its role in the transfer of the Reserve property under to 2013 Surrender Agreement, which was not made at arm's length. Also, Canada did not act for the sole benefit and to the best advantage of

> the Band in the Reserve transfers under the 1907 Surrender Agreement, the 1995 Agreement and the 2013 Surrender Agreement.
>
> i) the 2013 Surrender Agreement was made without proper disclosure and consultations and in the absence of the appropriate, informed and valid consent of the Band members.
>
> j) the Government failed to act reasonably to disclose and account for the use of (a) the territories ceded under the Treaty and to adjust annuities and (b) the 106,800 acres for the purposes of formulating a suitable revenue-sharing agreement.
>
> k) Her Majesty the Queen is responsible for the acts of the government that have caused irreparable harm and loss to the property, pecuniary and other interests of the Band and its members.
>
> l) the Band leaders did not act in the interest of the Band on the 1907, 1995 and 2013 agreements, and the sharing of a large part of the 2013 compensation to the present members of the Band is unlawful.
>
> 2. the setting aside of the 2013 Surrender Agreement and for the return of 106,800 acres the land to the band, or alternatively, for the transfer of the land based on lawful and equitable terms.
>
> 3. an account of the economic activities on the territory ceded by the Band under the 1850 Huron-Robinson Treaty and for an independent valuation of the annuities payable to the Band.
>
> 4. an account for the use of the parts of the Reserve taken under the 1907 Surrender Agreement, as revised by the 1995 Agreement.

[27] It is abundantly clear that the treaty and other agreements claims assert collective treaty and aboriginal rights. It is also established at law that such rights are held by aboriginal people in common and can only be asserted by the lawful representatives of the collective to which they belong (see for example, *Delgamuukw v British Colombia* [1997] 3 SCR 1010). Although individual members of aboriginal communities who benefit from and may personally exercise treaty or aboriginal rights can assert these rights in defence to criminal or regulatory proceedings,

an individual member of these communities has no standing to sue for the recognition or enforcement of collective treaty or aboriginal rights without the support of the community that holds the rights (*Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655 at paras 173 to 185, upheld on limitations at [2008] 1 SCR 372; *Canadian National Railway Co. v Brant*, 2009 OJ No 2661 (OSCJ); *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)) . Proceedings may be struck on a preliminary motion where it is plain and obvious that they are brought without standing (*Wahsatnow v Canada (Minister of Indian Affairs and Northern Development)* 2002 FCT 2012).

[28] The Plaintiff's counsel accepts that general proposition of law and concedes that neither the named Plaintiff nor any of the band members he purports to represent allege that they have been authorized to represent the NFN in place of the elected Chief and council.

[29] The Plaintiff's counsel nevertheless argues that the Plaintiff has standing to pursue this action, as he is asserting individual rights, and as the case falls within the exceptions to the rule against derivative claims.

A. *Does the Statement of Claim assert individual rights?*

[30] The argument that the action asserts individual rights finds no support in the Statement of Claim as drafted, even read as generously as possible. The Statement of Claim does not assert the right to hold or occupy land in severalty, as was the case in *Waquan v Canada (Attorney General)* 2017 ABCA 279. It does not seek the payment of an annuity that has vested in any of

the Plaintiffs personally (see *Behn v Moulton Contracting Ltd* 2013 SCC 26 at para 33). The claim framed in the Statement of Claim is not about the payment or calculation of annuities, but about the right to Reserve lands and to an accounting of the revenues derived by the Crown from wrongfully taken lands, which revenues might then become payable as annuities. This is a claim for damages suffered by the band, not a claim for the payment of annuities under a treaty.

[31] The Plaintiff argues that he stood to exercise personal rights to reside, hunt, fish, and engage in business on the lands at issue or share in revenues from that land, and has thus suffered personal loss or damage as a result of the Crown's alleged breach of the duties owed to the band. This argument is ill-founded. The so-called personal interest and rights described by this argument constitute the very essence of impermissible derivative claims, further discussed below.

[32] The Plaintiff's attempt to rely on s 24 and 25 of the *Canadian Charter of Rights and Freedoms* as a source of personal rights is also devoid of merit. It has already been conclusively held in *R v Augustine*, [1986] NBJ No 115, 35 DLR (4th) 237 (NBCA), at para 50, that s 25 of the *Charter* is an interpretive provision and not an independent source of rights. There is, accordingly, no individual right to claim relief pursuant to s 24 of the *Charter* for a "breach" of s 25 of the *Charter*.

[33] Finally, counsel for the Plaintiff argues that the right to challenge the validity of the 2013 referendum process approving the 2013 settlement agreement is a right that may be exercised individually by any band member. That may be so, but the argument is of no assistance to the

Plaintiff, since it is plain and obvious that those rights cannot be asserted in the context of an action. Any right the Plaintiff may have had to challenge the validity of the 2013 referendum and the ratification of the 2013 settlement agreement had to be exercised using the administrative process provided in the *Indian Referendum Regulations* CRC, c 957 or by judicial review pursuant to s 18.1 of the *Federal Courts Act*.

[34] Counsel for the Plaintiff's argument that the Statement of Claim constitutes an exercise of the individual right to challenge the validity of the 2013 referendum makes it abundantly clear that the action, as it concerns the referendum, is "in its essential character a claim for judicial review with only a thin pretense to a private wrong", which the Court would be entitled to stay in accordance with the decision in *Canada (Attorney General) v Telezone* 2010 SCC 62.

[35] It is plain and obvious that the only individual rights asserted in the Statement of Claim are, in their essential character, claims challenging the validity of the 2013 referendum, that cannot be asserted in an action and can only be pursued under the mechanism provided in the *Indian Referendum Regulations* or by judicial review.

B. *Does the Plaintiff's claim fall within an exception to the rule against derivative actions?*

[36] As set out above, the proper plaintiffs in an action to enforce rights belonging to an aboriginal collective such as a band are the band itself, if it is a recognized legal entity, or if it is not, the duly authorized representatives of the band, usually it is Chief and council acting in a representative capacity for the band as a collective. Although individual members of the band do stand to suffer personal harm or damage when a wrong is committed against the band, the right

to sue for the recognition or enforcement of the band's collective rights rests with the band alone. The parallel has been drawn between this principle and the principles applicable to corporations, where it has long been held that shareholders have no standing to enforce rights belonging to the corporation, even though they personally stand to suffer losses where the value of the corporation is affected. This is known as the general prohibition against derivative claims (*Foss v Harbottle* (1843), 2 Hare 461 (Eng. V.-C.)).

[37] In the same way as the law recognizes exceptions to the rule against derivative claims, the courts have recognized that there are circumstances in which individual band members other than lawfully elected representatives might be permitted to institute representative actions to assert collective aboriginal rights. For example, in *Papaschase*, above, the Alberta Court of Queen's Bench concluded that the descendants of the Papaschase Band, which had ceased to exist when its members joined other bands, might have been permitted to sue on behalf of the band to assert treaty rights. That decision, as well as the trial and appeal decisions in *Waquan v Canada* (2016 ABQB 191 at para 34 and 2017 ABCA 279 at paragraph 52), also mention the other exception to the *Foss v Harbottle* prohibition, where the derivative claim concerns an act which constitutes a fraud against the minority and the wrongdoers are themselves in control of the company.

[38] It is this latter exception which the Plaintiff's counsel argues applies to make this case a permissible derivative claim. The Plaintiff's counsel states that the Statement of Claim contains serious allegations of wrongdoing against the NFN leaders, including providing insufficient, misleading or wrong information to band members in a rushed process, coercing the members

into ratifying the 2013 settlement agreement through monetary promises which were arbitrarily increased, and signing documents that either violated the terms of the Treaty or were not in the band's interest or benefit.

[39] It is not enough, for an individual member of a band to get around the rule against derivative actions, to merely allege wrongdoing against the leadership of the band. The exception requires that the alleged wrongdoers be in control of the collective organization whose rights are to be asserted. However, that exception will not easily find application in the context of aboriginal claims, because band leadership is subject to regular review by the majority through the electoral process. The following comments of the Alberta Court of Queen's Bench in *Waquan* are apposite and directly applicable to the present circumstances:

> 34. […] Moreover, I agree with MCFN that, if the majority of the Band members believe that they have not been appropriately represented by the Chief and Council, there is a method by way of an election to remedy the issue.
>
> 35. The exception to the Rule in *Foss v Harbottle* will not apply where, as here, the majority of the members of the MCFN have the power to remove the current Chief and Council and elect a Chief and Council that would authorize an action. The membership of MFCN is under no disability in this regard. […].

[40] It is noteworthy that the Statement of Claim takes issue with agreements made by the band through its Chief and council in 1907, 1995 and 2013, yet never mentions the identity of the council members or of the Chief who were in office at the time. There is no allegation that the Chief and council whose alleged wrongdoings vitiate the 2013 agreement (or for that matter, any of the prior agreements), were still in office when this action was commenced or that these individuals somehow "control" the NFN, such that their refusal to authorize the action might not

be redressed by way of an election. The Plaintiff has accordingly failed to plead sufficient material facts to make an arguable case for the application of an exception to the rule against derivative actions.

[41] I also note that the exceptions to the rule against derivative actions exist to allow individuals who are not otherwise legally authorized to bring an action on behalf of a collective to assert that collective's rights on its behalf. The proposed representative plaintiffs must still allege that they represent the will of the collective. Nowhere in the Statement of Claim is it alleged that the Plaintiff represents the will of the NFN or that he is an appropriate representative of the NFN as a whole. On the contrary, the Plaintiff specifically claims to represent only 22 members of the band, and he has named as defendant the NFN itself and not simply the leaders whom he alleges acted contrary to the band's interest.

[42] The Alberta Court of Appeal in *Waquan*, in upholding that part of the Queen's Bench's determination that the plaintiffs had no standing to assert the collective rights of the band, concluded as follows:

> [55] The MCFN is an organized Band with an elected government and governance policies and procedures. It is not interested in pursuing the action. Permitting three members to carry on an unauthorized action on behalf of the MCFN claiming rights that belong to the collective could result in a governance breakdown. Moreover, nothing suggests that the individual appellants have authority to represent unnamed MCFN members.
>
> [56] The conclusion that the rule in *Foss v Harbottle* applied was reasonable. The amended pleading do not disclose a reasonable cause of action or reasonable prospect of success as regards the individual appellants' claim for standing to pursue the collective rights of the members of the MCFN.

[43] The facts that the Plaintiff in this case might have authority to represent 22, or even 30 individual members of the band, rather than only two others, and that he may have named the band as defendant, do not serve to distinguish this case. The conclusion reached in *Waquan* in respect of the plaintiffs' standing to assert the collective rights of the band is equally applicable to the facts of this case.

C. *Conclusion*

[44] The conclusions I have reached, that the constitutional claims disclose no reasonable cause of action and that the Plaintiff lacks standing to assert the treaty and other agreements claims set out in the Statement of Claim, are sufficient to dispose of the motions and to strike the Plaintiff's action, without leave to amend. I therefore do not need to address in detail the other arguments raised by the defendants, to the effect that the Court has no jurisdiction over the claim against the NFN and that the Statement of Claim fails to plead sufficient material facts to establish a cause of action against Canada. I should however note that each of those grounds was also well founded and would have justified striking the relevant parts of Statement of Claim without leave to amend.

D. *Costs*

[45] The NFN and Canada both seek their costs against the Plaintiff, at the high end of Column III of the Tariff (as I calculate it, $3,500), plus counsel's reasonable travel fees in the case of the NFN. Given the number and the complexity of the issues, I find that this valuation is appropriate in the circumstances.

[46] The Plaintiff's counsel submitted however that the Court should use its discretion to reduce the award of costs to $800 in total for the NFN and $500 for the Crown, to take into account that the action raised issues of public importance and that the Plaintiff is an individual of limited means.

[47] I do not agree that the action raised issues of public importance. The action is struck on a preliminary motion because it plainly and obviously fails to disclose a reasonable cause of action and because it is brought without standing.

[48] With respect to the Plaintiff's means, that Plaintiff had the resources to consult and retain the services of a solicitor. While the Court might have shown indulgence for the Plaintiff's ill-considered impulse to issue the Statement of Claim and serve it on the defendants, that indulgence was forfeited when the Plaintiff took the considered and deliberate decision to oppose the defendants' motions to strike. To the extent the justiciability of the issues raised in the Statement of Claim or the Plaintiff's standing to sue might not have been fully thought out at the beginning, it should have become obvious, on reading Canada's thorough and thoughtful motion record, to which the NFN subscribed, how forlorn the Plaintiff's case was. The Plaintiff, being represented by a solicitor, is taken to have been advised of this. The Plaintiff's solicitor was given considerable time to review Canada's motion record, take instructions, and formulate his response. Yet the Plaintiff deliberately persisted in vigorously opposing all aspects of the defendants' motion, raising specious, incoherent and frivolous arguments. The Court sees no reason why the defendants should be deprived of their right to the appropriate measure of costs.

ORDER

THIS COURT ORDERS that:

1. The Plaintiff's Statement of Claim is struck, without leave to amend.

2. Costs shall be payable by the Plaintiff to the defendants, as follows: $1500 to Her Majesty the Queen in right of Her Government in the United Kingdom, $3500 to Her Majesty the Crown in right of Canada and $3500, plus counsel's reasonable travel costs, to the Nipissing First Nation.

"Mireille Tabib"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2050-15
STYLE OF CAUSE:	EPHREM COMMANDA, AND ACTING AS A REPRESENTATIVE ON BEHALF OF 22 MEMBERS OF THE NIPISSING FIRST NATION BAND v HER MAJESTY THE QUEEN OF CANADA, AND THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, THE ATTORNEY GENERAL OF CANADA AND THE MINISTER OF JUSTICE, NIPPISING FIRST NATION BAND
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	JANUARY 9, 2018
ORDER AND REASONS:	TABIB P.
DATED:	FEBRUARY 16, 2018

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