Federal Court  Cour fédérale

Date: 20200717

Docket: T-1929-19

Citation: 2020 FC 769

Vancouver, British Columbia, July 17, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MARGUERITE MARY (MARGARET) BUCK, DOROTHY ANNE SAVARD, SYLVIA M MCGILLIS, FRANCES JUNE MCGILLIS, FLORENCE JOYCE L'HIRONDELLE, AND MARILYN MCGILLIS

Plaintiffs

and

ATTORNEY GENERAL OF CANADA AND ENOCH CREE NATION

Defendants

ORDER AND REASONS

[1] This is a motion brought by the Plaintiffs seeking an interlocutory injunction, pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106, enjoining the Minister of Crown-Indigenous Relations and Northern Affairs Canada [Minister] from executing a proposed settlement agreement [Proposed Settlement Agreement] with the Enoch Cree Nation [Enoch] until this

Court renders its judgment in an action commenced by the Plaintiffs as against the Attorney General of Canada and Enoch.

[2] As I have concluded that the Court has no jurisdiction to grant the injunction, the motion is dismissed and the related motions of the Attorney General and Enoch challenging the admissibility of certain portions of the Plaintiffs' evidence filed in support of the injunction motion are accordingly rendered moot.

Background

[3] Although the Plaintiff and Enoch have submitted highly detailed descriptions of the background to this matter, for the purposes of this injunction motion, the facts can be summarized as follows.

[4] Enoch is a First Nation and a band as defined in s 2(1) of the *Indian Act*, RSC 1985, c I-5 with over 2200 members. Pursuant to Treaty 6, to which Enoch adheres, the Stoney Plain Indian Reserve No. 135, also known as the Enoch Cree Nation 135, was established [Enoch Reserve].

[5] In 1942, Canada leased a portion of Enoch Reserve lands, known as the Yekau Lake Bombing Range, to the Department of Munitions and Supply [DMS] for use as a practice bombing range.

[6] Since 1973, First Nations have been able to avail of the Specific Claims Policy, which provides an alternate dispute resolution process for resolving historic grievances that are related

to Canada's obligations pursuant to historic treaties or the way Canada managed First Nations' lands, funds or other assets. In 2008, Canada enacted the *Specific Claims Tribunal Act*, SC 2008, c 22 [SCTA] pursuant to which First Nations could file specific claims with the Tribunal as specified therein.

[7] A specific claim submitted by a First Nation can be accepted for negotiation by Canada. In that event, the parties aim to negotiate a final settlement agreement, which, if achieved, must be approved by both the First Nation and Canada before it can be finalized. The negotiation and settlement of a specific claim avoids recourse to adjudication before the Specific Claims Tribunal. The Specific Claims Policy establishes the principles and process for resolving specific claims through negotiation and that such claims can only be submitted by a First Nation. Similarly, only First Nations can file specific claims with the Tribunal.

[8] In 2007, Enoch submitted a specific claim in respect of the use by DND of Enoch Reserve lands as a bombing range [Enoch Specific Claim]. The Enoch Specific Claim alleged breaches of fiduciary duty and breaches of the 1927 *Indian Act*. More particularly, that the Crown improperly utilized Enoch's Reserve lands as a practice bombing range during the Second World War without Enoch's consent and without regard to the damage that would be done to the Reserve lands.

[9] The Affidavit of Jennifer O'Neil, a negotiator with the Department of Crown-Indigenous Relations and Northern Affairs, Canada, sworn on March 9, 2020 [O'Neil Affidavit], deposes that in 2013 Canada offered to negotiate the Enoch Specific Claim and in 2016 Enoch agreed.

While these dates are not entirely consistent with those found in the Affidavit of Chief Morin, sworn on March 9, 2020 [Morin Affidavit] and filed by Enoch, this is of no relevance to the motion before me.

[10] A negotiation protocol was effected between Canada and Enoch, and in April 2018, the negotiating committees of Canada and Enoch reached mutual agreement as to the settlement of the Enoch Specific Claim that they would respectively be prepared to recommend to their stakeholders. The proposal was for payment of a significant figure by Canada to Enoch in full and final settlement of the Enoch Specific Claim. On June 11, 2019, Canada issued a formal offer to settle the Specific Claim. On August 29, 2019, Enoch Chief and Council passed a Band Council Resolution accepting the June 11, 2019 offer to settle. On December 18, 2019, Enoch provided all of its members with a Notice of Ratification Vote, attaching a 3-page summary of the Proposed Settlement Agreement, a copy of that agreement, a 2-page summary of the Yekau Trust Agreement and a copy of that agreement. On January 8, 2019, Enoch Chief and Council held an information meeting for its members to explain the terms and conditions of the Proposed Settlement Agreement and proposed trust agreement. On January 31, 2020, Enoch held a ratification vote at which the large majority of Band members who voted did so in favour of accepting the Proposed Settlement Agreement. On February 24, 2020, Enoch Chief and Council passed a Band Council Resolution accepting the Proposed Settlement Agreement.

[11] The Plaintiffs are members of Enoch. On May 10, 2019, Deborah Hardy, daughter of Florence L'Hirondelle, a Plaintiff herein, wrote to the Minister stating that she did so on behalf of the Plaintiffs. In her letter, Ms. Hardy stated that the Enoch Specific Claim included land held

by the McGillis family by way of a Certificate of Possession [CP]. Amongst other things, Ms. Hardy stated that Enoch had recently engaged directly with the McGillis family, but despite a February 21, 2019 letter from their counsel to the Department of Justice outlining what the Plaintiffs viewed as the legal obligations of the Crown to the CP holders, there had been no direct engagement with the Crown. Ms. Hardy alleged that Enoch and the Crown could not proceed with the Enoch Specific Claim settlement without reaching prior agreement with the Plaintiffs as to their interests in the land held under the CP [CP Lands].

[12] The Plaintiffs' motion record discloses correspondence sent by counsel for the Plaintiffs between January 2019 and March 2020 to counsel for Enoch and Canada. In his many correspondences, counsel for the Plaintiffs repeatedly reiterated the Plaintiffs' legal position. Enoch provided a substantive response by letter of May 15, 2019 and by other correspondence, including by letters of September 3, September 23, and October 9, 2019. The written submissions of the Plaintiffs and Enoch, as well as their respective records, also indicate that there were meetings between Ms. Hardy, counsel for the Plaintiffs, and Enoch and its counsel to discuss the Plaintiffs' position. In the affidavit of Deborah Hardy sworn on March 17, 2020 [Affidavit #2 of Deborah Hardy], Ms. Hardy deposes that there were five meetings between the Plaintiffs and Enoch and their respective legal counsel over the course of 2019, but agreement was not reached "on how the legal rights of the CP Holders will be addressed by the proposed settlement" of the bombing range claim.

[13] On June 24, 2019 counsel for Enoch provided the Plaintiffs, on a without prejudice basis, with a copy of the June 11, 2019 offer to settle as sent to Chief Morin by Ms. O'Neil. The

Plaintiffs took the view that as CP holders they were entitled to be a party and require changes to the offer. These changes primarily aimed at achieving a separate agreement with Enoch to be referenced in the settlement offer and agreement.

[14] As to communications from Canada, by letter of December 27, 2019, Mr. Joe Wild, Senior Assistant Deputy Minister, Treaties and Aboriginal Government, Indigenous and Northern Affairs Canada, responded to Ms. Hardy's letter of May 10, 2019 to the Minister and advised that Canada's negotiations with Enoch were undertaken on a confidential basis, and for that reason, the Minister was unable to meet with Ms. Hardy to discuss them. However, that through the specific claims negotiations, Canada encourages First Nations elected leadership to share information about the claim with all community members and that Mr. Wild understood that, with respect the Enoch Specific Claim, there had been recent calls, meetings, and correspondence between Enoch and members of the McGillis family to discuss their CP interests. The letter encouraged Ms. Hardy to continue this communication in the interests of having her concerns considered by the Enoch Chief and Council.

[15] By letter of April 4, 2019 to Plaintiffs' counsel, counsel with the Department of Justice [DOJ] addressed, amongst other things, the Plaintiffs' view that Canada should engage directly with the Plaintiffs. Because this, and other letters from DOJ to Plaintiffs' counsel are likely subject to settlement privilege, I reference them here only to the extent necessary to describe Canada's stated position with respect to the Plaintiffs' view that Canada should engage directly with the Plaintiffs with respect to their CP interests. In the April 4, 2019 letter, DOJ counsel stated that he appreciated the efforts of Plaintiffs' counsel to explain the Plaintiffs' interests and

positions as holders of a CP on lands implicated in the Enoch Specific Claim. Further, and as DOJ had previously advised, and contrary to counsel for the Plaintiffs' correspondence, the Plaintiffs' CP was not a matter that was being ignored by Canada. Canada was aware of the existence of the CP and of the claims the Plaintiffs were making and appreciated the seriousness of the issue. DOJ stated that Canada regularly discussed these matters with Enoch and, that since July 2018, DOJ had been encouraging the Plaintiffs' current and past counsel, and Enoch, to communicate amongst themselves with a view to resolving the matter. The letter also pointed out that DOJ had previously advised that Canada is not in a position to release to the Plaintiffs' information or documentation pertaining to the negotiations between Canada and Enoch because they are confidential and subject to settlement privilege. Further, that specific claims generally deal with past wrongs against First Nations, as collectives. In that regard, Enoch's Specific Claim negotiations arose as a result of matters which occurred between Canada and Enoch between 1941 and 1949 and, for that reason, DOJ had urged the Plaintiffs, through their counsel, to direct their requests to Enoch.

[16] DOJ repeated this position by letters of July 15, 2019, September 12, 2019 and November 21, 2019, in which DOJ again explained, in response to a request by Plaintiffs' counsel that Canada provide an assurance that it would deal directly with the CP holders, that negotiations between Canada and Enoch were confidential and that Canada's mechanism for dealing with historic grievances is the specific claim process, which deals with past wrongs against First Nations as collectives. Accordingly, Canada continued to urge the Plaintiffs to direct their claims to Enoch. DOJ also noted that in its November 21, 2019 letter that it had canvassed key legal principles related to fiduciary law, judicial review and trespass, to the extent

that could be expected in the circumstances, and that although the Plaintiffs had subsequently raised arguments relating to the tort of conversion, based on its examination of the law, DOJ saw no application to the settlement of the Enoch Specific Claim.

[17] On November 29, 2019, the Plaintiffs filed a Statement of Claim in this Court, commencing an action against Canada alleging ongoing trespass caused by alleged munitions scraps on the lands that were leased to DMS for use as the bombing range, including those lands held under the CP.

[18] On January 10, 2020, the Plaintiffs filed an Amended Statement of Claim asserting that Canada breached its fiduciary duties owed to the Plaintiffs with respect to the CP Lands, including by finalizing the terms of the Proposed Settlement Agreement to the prejudice of the Plaintiffs. They further alleged the tort of conversion on the basis that as holders of the CP, only they can sue for trespass, seek remediation and receive damages and that Enoch was not authorized to make the Specific Claim in relation to the CP lands. They allege that Canada is therefore liable to the Plaintiffs through the tort of conversion as the result of the Enoch Specific Claim negotiation and purported settlement.

[19] On March 2, 2020, the Plaintiffs filed a Notice of Motion seeking an interlocutory Injunction.

Confidentiality Order

[20] In support of this motion, the Plaintiffs filed copies of correspondence, some of it marked without prejudice, and documents that either directly or indirectly referred to the Proposed Settlement Agreement, including the settlement offer and the Proposed Settlement Agreement itself. The Attorney General took issue with this on the basis of settlement privilege. Although the Plaintiffs were offered the opportunity to revise their affidavits and exhibits they declined to do so and instead insisted that the admissibility of the documents proceed by way of a separate motion. The Attorney General duly brought a motion seeking an order striking out paragraphs of Affidavit #2 of Fiona Scott, affirmed on February 28, 2020, together with related exhibits, which affidavit was filed by the Plaintiffs [Attorney General Motion to Strike].

[21] Enoch similarly filed a motion seeking an order striking out paragraph 7 of Affidavit #2 of Deborah Hardy and to strike the evidence of Fiona Scott or, alternatively, striking out the cross-examination answer to question #1 on her written cross-examination [Enoch Motion to Strike].

[22] Because the Plaintiffs also insisted that it was necessary to address the specifics of the documents, the admissibility of which was challenged, when the motions to strike and, if admissible, the injunction were heard, the Case Management Judge ordered that the hearing would not be open to the public unless otherwise ordered.

[23] The hearing before me was conducted by Zoom. It was closed, other than to the parties, their respective counsel and other agreed observers, because it was impossible to know in advance if, as the Plaintiffs submitted, it would be necessary to speak to the specifics of the

content of those documents. During the hearing, counsel made efforts to refer the Court to documents as necessary but without verbally disclosing the majority of the settlement terms, the proposed settlement amount or other amounts. However, it did prove necessary to review the specifics of certain of the Proposed Settlement Agreement provisions. In my view, there is no question that the Proposed Settlement Agreement, as well as the settlement offer, is covered by settlement privilege. Accordingly, in this decision I will refer only generally to the very few provisions of the Proposed Settlement Agreement that are relevant to the injunction motion.

Jurisdiction

[24] The determinative issue is this matter is whether this Court has jurisdiction to grant the requested injunctive relief.

[25] The Plaintiffs assert that this Court has jurisdiction to grant the injunction referencing *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 54 [*Hupacasath*] and *Stagg v Canada (Attorney General)*, 2019 FC 630 at para 51 [*Stagg*].

[26] The Attorney General submits that pursuant to s 22 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, this Court does not have jurisdiction to grant an injunction against the Federal Crown within an action. While the *Federal Courts Act*, RSC 1985, c F-7 permits injunctive relief against federal boards, commissions and officers within judicial review application, the *Crown Liability and Proceedings Act* prevents the issuance of an injunction against the Federal Crown in any other proceedings (*Mundle v Canada*, (1994), 28 Admin LR

(2d) 69, 1994 CarswellNat 861 at paras 9-10 (FCTD) [*Mundle*] referring to *Grand Council of Crees (of Quebec) v Canada*, [1982] 1 FC 599, 1981 CanLII 2759 (FCA) [*Grand Council of Crees*], leave to appeal to the SCC refused, 41 NR (1982)). Further, that the clear distinction between the availability of injunctions against the Crown in the context of judicial reviews as opposed to actions is also made clear in *Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 579 at paras 69-71 [*Musqueam*].

[27] Enoch agrees with the Attorney General and adds that in *Paul v Canada*, 2002 FCT 615 at paras 1-2, 81, s 22 of the *Crown Liability and Proceeding Act* was interpreted to prevent the exact type of injunction that the Plaintiffs now seek to be granted.

Analysis

[28] Section 22(1) of the *Crown Liability and Proceedings Act* states:

> **22(1)** Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.

[29] Section 18 of the *Federal Courts Act* states

> **18(1)** Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> > **(a)** to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

> **(b)** to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> **(2)** The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.
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> **(3)** The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[30] In my view, these provisions are clear. I note, in particular, that the remedies provided for in s 18(1)(a), which specifically includes injunctions, may only be obtained on an application for judicial review.

[31] Here, the Plaintiffs have proceeded by way of an action, demonstrated by the Amended Statement of Claim. There is no underlying application for judicial review that could be the basis for the Court's jurisdiction to grant an interlocutory injunction.

[32] In *Grand Council of Crees*, the Federal Court of Appeal rejected a submission that the traditional rule had been modified by either case law or the provisions of the then *Federal Court Act*. With respect to the latter, the Federal Court of Appeal stated that the provisions do not have the effect of abridging the traditional immunity of the Crown from injunctive relief and that if Parliament had wanted to modify or repeal such a well established principle, much clearer language would have been used (*Grand Council of Crees* at paras 3-5).

[33] In *Centre d'information et d'animation c La Reine*, 7 Admin LR 157, 1984 CarswellNat 184 (FCA) the appellants' land was expropriated for the construction of an airport. By an action, they attacked the validity of the expropriation. Having learned during the course of the proceeding that the Crown intended to dispose of the land in dispute, they made an application for an interlocutory injunction seeking to suspend the project until the action was decided. The Federal Count of Appeal noted that the interlocutory injunction sought by the appellants was directed against the Crown and, in effect, what the appellants wanted to prevent was the cession by Her Majesty of the lands that were the subject of the dispute. The Federal Court of Appeal stated at paragraph 8 that, "There is a rule of long standing that the courts cannot issue an injunction against the Crown. This rule may seem archaic, but this Court has recently held that it still applies and that it was not abolished by the *Federal Court Act*…In these circumstances, I consider that this recent decision must be followed until the legislator or the Supreme Court of Canada decides otherwise" [footnote removed].

[34] The Plaintiffs' point to no subsequent legislation or decision of the Supreme Court of Canada that would support that this long-standing rule has subsequently been abolished.

[35] Rather, in *Mundle*, the applicant sought a stay or an interlocutory injunction preventing the defendants from requiring the applicant report for duty. This was denied, and Justice Strayer addressed the intersection of s 22(1) of the *Crown Liability and Proceedings Act* with s 18(1) of the *Federal Courts Act*:

> 9 In my view, the relief sought can only be obtained in judicial review proceedings. This action is framed as an action as against the Crown and against one of the Minsters of the Crown. According to the jurisprudence of the Federal Court of Appeal an

> injunction may not be granted against the Crown. It has also been held in the Trial Division that injunctive relief is not available against any Minister of the Crown in Crown proceedings except perhaps where it is alleged he is doing something beyond his authority. This position has been codified by statute in s 22 of the *Crown Liability and Proceedings Act*…This, it must be emphasized, pertains to proceedings against the Crown. Such proceedings properly involve the contractual or proprietary obligations or interests of the Crown, its civil liability, its fiduciary duties, etc. Judicial review under s. 18 of the *Federal Court Act* is not a proceeding against the Crown. Rather it is a proceeding to review decisions of federal boards, commissions or other tribunals, or federal officers, and is normally brought against those who were adverse in interest to the applicant in respect of that decision. Section 18 is also broad enough to cover proceedings against the Attorney General of Canada to obtain declaratory relief against him. It is clear that pursuant to paragraph 18(1)(*a*) the court can issue an injunction against federal boards, commissions, officers, etc. in such proceedings. It was surely not the intention of Parliament to abolish, by s. 22 of the *Crown Liability and Proceedings Act*, the right to an injunction under s. 18 of the *Federal Court Act*. This makes clear that the two sections are dealing with different kinds of proceedings.
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> 10 **The net result is that an injunction or a stay in the nature of an injunction can be sought against servants of the federal Crown in the course of judicial review but not otherwise**. The power to grant such a stay has been expressly given to the Trial Division in the present s. 18.2 of the *Federal Court Act*, and that power had been held to exist by implication prior to that time. Thus **the plaintiff cannot succeed on this application for an injunction, made in the course of an action against the Crown because in such an action he cannot obtain injunctive relief either against the Crown or against a servant of the Crown.**
>
> 11 Nor can the plaintiff obtain a stay or injunction under subs 18(1) of the Federal Court Act because of the provisions of subs 18(3)…This is not an application under s 18.1 which has its own procedure and a timetable thought appropriate for judicial review.
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> [Emphasis in bold added]

[36] *Musqueam* is referenced by both the Plaintiffs and the Attorney General. That case concerned an application for judicial review. There, Canada argued that the Court had no

jurisdiction to issue an interlocutory injunction against it based on s 22 of the *Crown Liability and Proceedings Act*. The Court adopted the reasoning of Justice Strayer in *Mundle* and rejected the argument:

> [68] There is a further important distinction in *Paul, supra*; the proceeding was an action under s. 17 of the *Federal Court Act*, R.S.C. 1985, c. F-7 and the *Crown Liability and Proceedings Act*. These proceedings are by way of judicial review under s. 18 of the *Federal Court Act*.
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> [69] In my view, *Paul, supra* has no application to a proceeding under s. 18 of the *Federal Court Act*. Judicial review is not a proceeding against the Crown, it is a challenge to decisions (acts or refusals to act) of a "federal board, commission or other tribunal". Those words are broadly defined in s. 2 of the *Federal Court Act* to encompass any body exercising jurisdiction or powers under a federal statute. The Canada Respondents fall into this class of body.
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> [70] It would have been inconsistent for Parliament to have established, on the one hand, a detailed scheme for the review of the exercise of statutory powers and to enshrine effective remedies, including injunctive relief under the *Federal Court Act*, and, on the other hand, have it rendered nugatory by the *Crown Liability and Proceedings Act*.
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> [71] In view of the legislative history of s. 18 of the *Federal Court Act*, its enactment subsequent to s. 22 of the *Crown Liability and Proceedings Act*, Parliament intended to address different matters under s. 18 of the *Federal Court Act* than those found in actions against the Crown.
>
> [72] If the Canada Respondents were correct, then the Federal Court would have no power (and never had such power) to issue stays or interim or interlocutory injunctions no matter how necessary such remedy may be to preserve the status quo until a final decision on the merits. I cannot accept this as a proper reading of the two legislative provisions.

[37] In addition to the cases referenced by the Attorney General and Enoch, I note that in *Meggeson v Canada (Attorney General)*, 2012 FCA 175, the Federal Court of Appeal stated the following about remedies under the *Federal Courts Act*:

> [34] As noted by Binnie J. in *Canada (Attorney General)) v. Telezone Inc.*, [2010] 3 S.C.R. 585 ("*Telezone*") at para. 52, the remedies available on an application for judicial review pursuant to the *Federal Courts Act* are traditional administrative law remedies and declaratory and injunctive relief in the administrative law context, and these remedies do not include an award of damages. Moreover, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality, since subsection 18(3) of the *Federal Courts Act* specifically provides hat [*sic*] the administrative law remedies set out in subsection 18(1) of that act "may be obtained only on an application for judicial review made under section 18.1.

[38] The above passage emphasises the point made in *Mundle* that ss 18(1) and (3) of the *Federal Courts Act* carve out the ability of the Federal Court to grant remedies, including injunctions, on applications for judicial review, but that these remedies are not similarly available in actions.

[39] Further, in *Attawapiskat First Nation v Canada*, 2012 FC 146 [*Attawapiskat*] the Attawapiskat First Nation [AFN] sought several forms of interlocutory relief including "an order enjoining the Minister from imposing third party management on the AFN pending hearing of AFN's judicial review application" (at para 1). The underlying application for judicial review was filed to quash the appointment of a third party manager. The respondent in *Attawapiskat* argued that an interlocutory injunction was not available because of s 22(1) of the *Crown Liability and Proceedings Act*. Justice Phelan rejected the respondent's argument because the relief sought was related to an application for judicial review:

> [38] As was clear from *Zenon Environmental Inc v Canada*, 2005 FC 210, where Justice Strayer described the immunity of the Crown from general law to be an anomaly, the provision operates where there is an action against the Crown, but not where there is an attack on the authority exercised by a public official on the grounds that the official was acting outside of his statutory or constitutional powers. Section 22 of the *Crown Liability and Proceedings Act* merely codified the common law. Most particularly, s. 22 does not apply where the proceeding is a proper *Federal Courts Act* s. 18.1 application for judicial review.
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> [39] This Court has in several cases, including *Musqueam Indian Band v Canada (Governor in Council)*, 2004 FC 579, ordered injunctive relief in the context of s. 18.1 *Federal Courts Act* judicial review proceedings. The prohibition of injunctions against the Crown is a long held common law principle which predates the more specific language of the *Federal Courts Act*.

(Also see *Federation of Newfoundland Indians v Canada*, 2011 FC 683 at para 81.)

[40] In short, there is a clear line of authority standing for the proposition that where an action is brought against the Crown, s 22(1) of the *Crown Liability and Proceedings Act* will, in the normal course, preclude the granting of an injunction against the Crown. This Court has no jurisdiction to grant an injunction in that circumstance as its jurisdiction is determined by ss 18(1) and (3) of the *Federal Courts Act*, which permits it to grant injunctive relief only where the underlying proceeding is an application for judicial review.

[41] Here, as demonstrated by the Plaintiffs' Amended Statement of Claim, the Plaintiffs allege that Canada committed trespass and the tort of conversion. Accordingly, as their claim is founded on an action, this Court does not have jurisdiction to grant an interlocutory injunction enjoining the Minister from settling the Enoch Specific Claim.

[42] As to the Plaintiffs' reliance on *Hupacasath*, in my view, it is misplaced. *Hupacasath* was an appeal from the decision of this Court (2013 FC 900) which concerned an application for judicial review regarding the pending ratification of the *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* [CCFIPPA]. In the application for judicial review the applicant, Hupacasath First Nation, sought a declaration that Canada was required to engage in a process of consultation and accommodation with First Nations, including Hupacasath First Nation, prior to ratifying or taking other steps that would bind Canada under the CCFIPPA.

[43] There the Federal Court of Appeal found that the Federal Court system "has the jurisdiction to review exercises of federal Crown Prerogative power" (at paras 7, 54). Accordingly, the Federal Courts had jurisdiction over the matter. *Hupacasath* was not an action nor was the remedy sought an injunction. Here, conversely, the Plaintiffs have brought an action, not an application for judicial review of a decision by a Minister. They do not challenge the prerogative power of the Crown, nor is any such authority under review by this Court. When appearing before me the Plaintiffs submitted that *Hupacasath* demonstrated that the powers of this Court to issue injunctive relief have been expanded. Even if that were so, and I make no finding in that regard, it ignores that *Hupacasath* was a judicial review, not an action.

[44] As to *Stagg*, it too was an application for judicial review. It concerned the review of the termination of evacuee benefits provided to members of a First Nation whose community had been flooded. The application for judicial review was denied as the decision was found to be reasonable. However, the Attorney General had made a preliminary objection on the basis that

the decision to terminate benefits was not subject to judicial review. The premise of that argument being that the federal government had no legal obligation to provide the benefits, which were instead an exercise of royal prerogative, and therefore subject to judicial review only on constitutional grounds. The Attorney General argued that the decision to provide such benefits was a discretionary policy decision unsuitable for review by the courts. Justice Grammond concluded that the decision was subject to judicial review.

[45] Again, I fail to see how this case assists the Plaintiffs. There is no decision that is the subject of judicial review in this matter, and the jurisdictional hurdle that they face is not related to the justiciability of a decision under review. It is concerned with the jurisdiction of the Court to grant the requested injunction.

[46] When appearing before me the Plaintiffs referred to *Smoling v Canada (Ministry of Health*), 1992 CanLii 8547 (FC), 8 Admin LR (2d) 285 [*Smoling*]. This too was an application for judicial review. Justice Rothstein, then of this Court, was not persuaded that an interlocutory injunction could not lie simply because the style of cause named the Crown as one of the respondents – the applicable regulations required the Minister of National Health and Welfare to take the action impugned by the judicial review – and found that, pursuant to s 18.2 of the Federal Court Act, on application for judicial review the Court could make such interim orders as it deemed appropriate until the final disposition of the application. Thus, in *Smoling* the *Crown Liability and Proceedings Act* was not squarely engaged and the matter was not an action; it was a judicial review.

[47] As to decision of the Supreme Court of British Columbia in *Snuneymuxw First Nation et al v British Columbia*, 2004 BCSC 205 [*Snuneymuxw*], which the Plaintiffs also raised at the hearing, this states that there is no doubt that an interlocutory injunction will not be issued against the Crown where it is acting within the sphere of its legislative authority, as demonstrated by s 11 of the British Columbia *Crown Proceeding Act*, RSBC 1996, c 89 (at para 52). However, the Court agreed with the plaintiffs in that case that s 11 could have no effect where the Province lacked legislative jurisdiction over the subject matter and that the *Crown Proceeding Act* could not expand the common law immunity of the Crown in cases where the Crown is alleged to be acting beyond its legislative competence. This is not the situation before me.

[48] When appearing before me the Plaintiffs argued that *Snuneymuxw* illustrates an exception to the rule precluding injunctive relief against the Crown in an action. Specifically, where the Crown acts illegally or unlawfully. The Plaintiffs submit that in the Amended Statement of Claim and in their correspondence, they set out what they describe as a "legal rights framework" which, they assert, binds the Crown. Therefore, as I understood the argument, by not responding to their demands that Canada engage directly with the Plaintiffs and by proceeding with the Proposed Settlement Agreement, the Crown would be acting in defiance of Court declarations and the law, thereby acting illegally, unlawfully, beyond its jurisdiction and in an *ultra vires* manner.

[49] It must first be pointed out that the "legal rights framework", as coined by the Plaintiffs, is comprised of the fact that the CP was issued pursuant to the *Indian Act* and by reference, mainly, to four cases pertaining to CP rights: *Joe v Findlay*, 1981 CanLII 401 (BC CA), [1981] 3

CNLR 58; *Boyer v Canada*, [1986] 2 FC 393, 26 DLR (4th) 284 (FCA); *Dale v Paul*, 2000 ABQB 411 at para 4; and, *Louie v Normand*, 1993 CanLII 805 (BC SC), [1994] 3 CNLR 197. In my view, this is not an established "legal rights framework" that necessarily binds the Crown as might, for example, a test set out by the Supreme Court of Canada. It is merely the legal position taken by the Plaintiffs in support of their allegations against Enoch and Canada. Enoch has advised the Plaintiffs that they do not share that view, and why they do not. Canada has made it very clear that it is negotiating the Enoch Specific Claim with Enoch in accordance with the Specific Claims Policy and has encouraged the Plaintiffs to raise their concerns with Enoch for resolution. Given this, I do not agree with the Plaintiffs that because Canada did not engage with its asserted "legal rights framework" that Canada will be acting illegally or unlawfully by proceeding with the Proposed Settlement Agreement. Nor am I persuaded that *Snuneymuxw* establishes an exception to the rule precluding injunctive relief against the Crown in an action as the Plaintiffs submit. Rather, it is concerned with legislative competence.

[50] And, in any event, *Snuneymuxw* ultimately appears to have relied on the Supreme Court of Canada's decision in *RJR – MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) [*RJR – MacDonald*] finding that, as a statutory court, the Supreme Court was required to find a statutory basis to grant an interlocutory injunction suspending legislation. However, even if the availability of that statutory authority that was in doubt, it would still be prepared to find jurisdiction in s 24(1) of the *Canadian Charter of Rights and Freedoms*, as a charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights. From this, the British Columbia Supreme Court stated that it would seem

that it too had the power to stay the effect of legislation in constitutional cases as it is a court of inherent jurisdiction. Therefore, if in constitutional cases it had the power to suspend, on an interlocutory basis, rights and obligations under legislation, then it must have the same power with respect to rights and obligation deriving from contract (*Snuneymuxw* at para 68). And, given that the principles governing stays and injunctions are identical, the British Columbia Supreme Court stated that it would be quite illogical if that Court had the power to suspend rights and obligations under a contract once it was entered into but could not suspend the ability of government to enter into the agreement in the first place.

[51] Leaving aside the logic of this conclusion, the decision has no application to this matter. The Federal Court is not a Court of inherent jurisdiction. It is a statutory court and its authority to issue interlocutory injunctions is prescribed by ss 18(1) and (3) of the *Federal Courts Act*. Nor is this a constitutional matter. Moreover, *Snuneymuxw* does not engage the interplay of s 18 of the *Federal Courts Act* with s 22 of the *Crown Liability and Proceedings Act*.

[52] In conclusion, the lack of jurisdiction of this Court to grant the motion seeking an injunction entirely disposes of the Plaintiffs' motion. It also renders moot the motions of the Attorney General and Enoch seeking to strike out portions of the Plaintiffs' evidence.

[53] Even if that had not been the case, for the reasons that follow I would not have granted the injunction.

Test for an injunction

[54] In *R v Canadian Broadcasting Corp*, 2018 SCC 5, the Supreme Court of Canada restated the well known three part conjunctive test to be met in order for an injunction to be granted:

> [12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd*. and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd*. At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.

[55] As to whether there is a serious issue to be tried, the Attorney General concedes that this branch of the test has been met on the basis that it is an admittedly low threshold, but without conceding or commenting on the merits of the underlying action. Enoch submits that the higher "strong *prima facie* case" threshold applies in this case because the effect of an interlocutory injunction would "amount to a final determination of the action" (*Gadwa v Joly*, 2018 FC 568 at para 26, citing *RJR – MacDonald* at 338). This is because delaying the finalization of the Proposed Settlement Agreement until the end of trial could take years and, depending on intervening events such Enoch being forced to proceed to litigate the matter before the Specific Claims Tribunal, a change in government, changes to the Specific Claims Policy or difficulty appropriating funds from Parliament, could ultimately defeat the settlement. In my view, Enoch's position is speculative. I am satisfied that, while the Plaintiffs' claim faces many hurdles, it is not so fraught as to be frivolous or vexatious.

[56] However, while the Plaintiffs could have met the first branch of the test, they could not succeed on the second and third branches.

[57] The Plaintiffs identify the irreparable harm that they will suffer as that they will be barred from proceeding with the underlying action if the Proposed Settlement Agreement for the Enoch Specific Claim is executed because that agreement anticipates Enoch providing releases to the Crown with respect to the Specific Claim (*Goodswimmer v Canada (Attorney General),* 2017 ABCA 365 at paras 48-49 [*Goodswimmer*]). They submit that their rights will therefore be "unlawfully expropriated" by Enoch with the knowledge and support of Canada.

[58] The Attorney General submits that the onus is on the Plaintiffs to establish, on a balance of probabilities, that irreparable harm will result if an injunction is not granted. The alleged harm cannot be speculative or hypothetical (*Glooscap Heritage Society v Canada*, 2012 FCA 225 at paras 31-32 [*Glooscap*]; *Canada (Attorney General v Canada (Information Commissioner),* 2001 FCA 25 at para 12; *Janssen Inc v Abbvie Corporation*, 2014 FCA 176 at paras 44-46). The Attorney General submits that the Plaintiffs have not provided clear or convincing evidence that they will suffer irreparable harm, nor have they demonstrated that damages would be insufficient to compensate any asserted harm arising out of the settlement of the Specific Claim.

[59] Enoch agrees with the Attorney General and submits that the Plaintiffs' evidence does not met the threshold required to demonstrate irreparable harm (*Ahlul-Bayt Centre, Ottawa v Canada (National Revenue),* 2018 FCA 61 at para 15 [*Ahul-Bayt*]; *Canada (Attorney General) v Oshkosh Defence Canada Inc*, 2018 FCA 102 at para 25 [*Oshkosh*]). Further, that in Enoch's

discussions with Plaintiffs it offered to discuss any steps necessary to remediate the CP lands or, if the family had concerns about the prior use of the land as a bombing range, that a land exchange could be discussed. These proposals were rejected by the Plaintiffs, who indicated that they would only be satisfied with monetary compensation. Thus, they will not experience irreparable harm. Further, Enoch submits that the Plaintiffs misapply *Goodswimmer*.

Analysis

[60] The Plaintiffs argue that by way of the broad wording of the release and other provisions contained in the Proposed Settlement Agreement, they will be precluded from pursuing their action in this Court. When appearing before me, the Plaintiffs suggested that the broad release wording of the Proposed Settlement Agreement was intentionally used for this purpose. I find no evidence in the motion records before me to substantiate that submission.

[61] I also note that the Specific Claims Policy and the SCTA both contemplate releases and indemnities from First Nations whose specific claim is being settled. The Specific Claims Policy states the Canada requires certainty and finality when it settles a claim and that a claim settlement must achieve complete and final redress of the claim. First Nations must, therefore, provide Canada with a release and indemnity with respect to the claim and may be required to provide a surrender, end litigation or take other steps so that the claim cannot be re-opened at some time in the future. Further, settlements of specific claims by Canada will take third party interests into account. Canada will not accept any settlement which will lead to third parties being dispossessed. Section 35 of the SCTA addresses the requirement of releases and indemnities in the event that the Tribunal decides that a specific claim is invalid or awards

compensation for the claims. The O'Neil Affidavit states that once a claim is accepted for negotiation by Canada, the parties aim to negotiate a settlement agreement that includes financial compensation. In exchange, the First Nation will provide releases and indemnities, and, where applicable, surrenders or other instruments to regularize land status that will, typically, ensure full and final settlement of the claim and any associated liability on Canada's part.

[62] The Proposed Settlement Agreement acknowledges that the compensation paid pursuant to the agreement includes an amount that may be used for munitions scrap and UXO clearance activities, as defined, on the Enoch settlement lands, including any settlement lands issued to a CP holder pursuant to a valid CP, and that Enoch will maintain full discretion in determining the nature and extent of those activities. Enoch is required to save Canada harmless from any related proceeding and has and will continue to "make reasonable efforts" to seek releases from CP holders. The Proposed Settlement Agreement also contains provisions whereby Enoch agrees to forever release Canada from and not to assert any liability or proceedings that Enoch, its successors or assigns, or its past of future members may have ever had, may now have or may in the future have against Canada with respect to any aspect of the claim, the adequacy of compensation provided and other matters. Enoch also agrees to indemnify and forever hold Canada harmless from any proceedings brought by any person, including any CP holder. The Proposed Settlement Agreement also includes a provision by which Canada agrees that it will not refuse to defend any proceeding based solely on the indemnity and will use all reasonable efforts to defend itself. Enoch also agrees to abandon or dismiss or discontinue all proceedings related to the claim.

[63] The Plaintiffs acknowledge that Enoch and Canada cannot force them to discontinue their action. They say, however, that the release provisions will render it hollow.

[64] I agree with Enoch that its settling of the Specific Claim addresses the collective claim, on behalf of Enoch as a First Nation, for breach of fiduciary duty by the Crown in relation to Enoch Reserve Land (*Blueberry River Indian Band v Canada (Indian Affairs and Northern Development)*, 2001 FCA 67at paras 19, 21-22; *Behn v Moulton Contracting Ltd*, 2013 SCC 26 at para 33; *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655 at paras 174, 181). To the extent that the Plaintiffs may have, as they claim, certain exclusive and discrete rights held in their individual capacity as CP holders, they can continue to pursue them by way of their action (*Waquan v Canada (Attorney General)*, 2017 ABCA 279 at paras 36-41; *Birch Narrows First Nation and Buffalo River Dene Nation v Her Majesty the Queen in Right of Canada*, 2020 SCTC 2 at paras 18-21; *Goodswimmer* at para 84). When appearing before me, counsel for both Enoch and Canada agreed that the Enoch Specific Claim addresses the collective rights of Enoch and that any separate and discrete rights of individual CP holders will not be extinguished or barred by settlement of the Enoch Specific Claim.

[65] To this I would add that in their action the Plaintiffs assert the tort of conversion. If, as they assert, Canada wrongfully converted their interests, then this is a separate and discrete cause of action not resolved by settlement of the Specific Claim. Nor do I agree with the Plaintiffs' assertion, premised on their view that Canada is bound by the Plaintiffs' described "legal rights framework", that by finalising the Proposed Settlement Agreement the Minister "is declaring that she will not be bound by judgements [*sic*] of the Courts in relation to the rights of CP holders",

or that the Proposed Settlement Agreement is an attempt to "unlawfully expropriate" the Plaintiffs' rights. And, in any event, if the Plaintiffs pursue their claim and are successful, Enoch will be responsible to indemnify Canada for any award of damages as against Canada.

[66] Accordingly, the Plaintiffs could not have established that they would incur the claimed irreparable harm, the extinguishment or rendering hollow of their action, by the finalization the Proposed Settlement Agreement.

[67] The Plaintiffs do not submit any other basis upon which they claim irreparable harm, which is harm that is not compensable in damages or cannot be cured. Affidavit #2 of Deborah Hardy and the Morin Affidavit disclose that there were discussions between the Plaintiffs and Enoch about potential forms of compensation, such as monetary compensation, exchange of the Plaintiffs' CP Land for other Reserve land, and remediation of the CP Land. While the Plaintiffs rejected these offers of compensation, the Plaintiffs are not being dispossessed and I am not persuaded that their evidence could have established that any damages incurred by them as a result of the settlement of the Enoch Specific Claim could not subsequently be compensated by damages (*RJR – MacDonald* at 341; *Stoney First Nation v Shotclose*, 2011 FCA 232 at para 48*; Musqueam* at paras 48-49;*Commodore v Canada (Attorney General)*, 2001 FCA 387 at para 7; *Ahlul- Bayt* at para 15; *Oshkosh* at para 25; *Glooscap* at para 31).

[68] Finally as to the last branch of the test, whether the balance of convenience favours the Plaintiffs, in this matter, this would have been an important factor.

[69] The Plaintiffs submit that the balance of convenience is resolved by a determination of which of the two parties will suffer greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits (*Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 at 129, 1987 CanLII 79 (SCC)). The Plaintiffs also rely on *Ahousaht First Nation v Canada (Fisheries and Oceans)*, 2014 FC 197 at para 31 [*Ahousaht*] to support that reconciliation is in the public interest. The Plaintiffs submit that the balance of convenience favours them because they attempted to engage with the Crown and Enoch over their rights held under the CP with limited responses from the Crown. Further, if the Crown is allowed to disregard their rights, it will erode the public confidence in the rights of CP holders across Canada.

[70] The Attorney General submits that taking into consideration all of the relevant factors – the nature of the relief sought, the harm the Plaintiffs allege that they will suffer, and where the public interest lies – the balance of convenience favours not granting the injunction. When a party seeks to enjoin a public body from exercising statutory authority, the public interest suffers irreparable harm (*Canada (Attorney General) v Fishing Vessel Owners' Association of British Columbia*, [1985] 1 FC 791, 61 NR 128; *Zoocheck Canada Inc v Canada (Parks Canada Agency)*, 2008 FC 540 at paras 63-66; *RJR – MacDonald* at 346). Further, the balance of convenience favours reconciliation and the resolution of past injustices against Indigenous peoples in Canada. In negotiating a resolution of the Enoch Specific Claim, Canada can achieve a measure of reconciliation with Enoch over this long-standing concern. Enjoining Canada from resolving this matter would be an impediment to Canada's attempts to reconcile with Enoch specifically, and Indigenous peoples generally.

[71] Enoch submits settlement of the Enoch Specific Claim will result in a valuable *per capita* monetary gain to each of its members and that the balance of convenience weights in favour of allowing the settlement to conclude.

[72] I agree with the Attorney General. In *RJR –MacDonald*, the Supreme Court of Canada addressed public interest in the context of the balance of convenience in *Charter* cases at 344-346, stating:

> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.
>
> …
>
> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. **The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.**
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate

> the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.
>
> (Emphasis in bold added)

(See also *North of Smokey Fisheries Assn v Canada (Attorney General)*, 2003 FCT 33 at paras 23-26.)

[73] In *Canada (Citizenship and Immigration) v Ishaq*, 2015 FCA 90, the Federal Court of Appeal held that the comments in *RJR –MacDonald* with respect to irreparable harm to public interests also apply if a policy was accepted by a public authority to "promote or protect the public interest" (at paras 13, 15; See also *Professional Institute of the Public Service of Canada v Canada (Attorney general)*, 2015 FC 1101 at paras 196-97).

[74] In *Ahousaht*, this Court held that the public interest is more than the public interest as between the applicants and the minister, or, in that case, the applicants and the commercial fishing sector. Rather, it is the public interest as a whole which flows from whether relief sought is granted or not. Further, that public interest in the reconciliation of s 35 Aboriginal rights clearly favoured the applicants.

[75] Here, by way of the Specific Claims Policy and the SCTA, Canada was authorized to enter into negotiations with Enoch, as a First Nation. The Specific Claims Policy states:

> All Canadians benefit from the resolution of specific claims and the resolution of claims outside of the court process is in the best interests of all Canadians. Negotiated settlements are about justice, respect and reconciliation. They are not only about coming to terms with the past and respect for treaties but also about moving forward together to realize a better, shared future.

[76] The SCTA, in its preamble, recognizes that it is in the interest of all Canadians that the specific claims of First Nations be addressed and that resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations.

[77] Here, as the result of negotiations held over the years between Enoch and Canada, the Enoch Specific Claim is on the path towards resolution and without need to bring the matter before the Tribunal. Resolving Enoch's Specific Claim is one step towards reconciliation. Enoch Chief and Council are satisfied that the proposed settlement terms are in Enoch's best collective interest and the majority of Enoch's members have voted to ratify the Proposed Settlement Agreement. If the Proposed Settlement Agreement receives final approval and is executed, each of Enoch's members will receive an individual monetary benefit from the settlement and Enoch will also benefit overall from the settlement fund.

[78] Conversely, the claim of the six Plaintiffs is concerned with their assertion of individual rights pertaining to a possessory interest afforded to them by way of the CP with respect to the CP Lands. That is, the Plaintiffs are pursuing their own interests rather than those of Enoch. Further, the Plaintiffs' action is specific to their CP possessory rights in the factual matrix comprising the backdrop of the Enoch Specific Claim. In my view, Canada was not disregarding the Plaintiffs' CP rights nor would the completion of the Proposed Settlement Agreement in the absence of resolution of the Plaintiffs concerns, as between the Plaintiffs and Enoch and within the Enoch Specific Claims process, cause the general erosion of public confidence in CP holder rights.

[79] In my view, preventing the settlement – and the step toward reconciliation that it represents – and thereby delaying or precluding the compensation its resolution would afford to Enoch's members collectively and individually, is not in the public interest and tips the balance of convenience in favour of Enoch and the Attorney General. Nor would the Plaintiffs suffer the greater harm in that event.

Conclusion

[80] In conclusion, for the reasons set out above, this Court does not have jurisdiction to grant the Plaintiffs' motion for an injunction. For that reason, the motion is dismissed. However, even if I had not found this to be so, I would not have granted the injunction as the Plaintiffs failed to meet the requirements of the conjunctive three part test.

Costs

[81] At the hearing of these motions it was agreed that the parties would each submit brief submissions as to costs by close of business on July 10. I have now received and reviewed those submissions in light of my findings above. I agree with Enoch and the Attorney General that the Plaintiffs' approach to this litigation has resulted in avoidable costs. For example, this approach includes the Plaintiffs' refusal to withdraw and revise the affidavits filed in support of the injunction motion to address the concerns expressed by the Attorney General that the affidavits included documents and correspondence subject to settlement privilege. Those affidavits contained information that was clearly subject to settlement privilege. This could easily have been resolved between the Plaintiffs and the Attorney General, and to the extent that

disagreement remained with respect to some documents, it could have been quickly addressed as a preliminary matter within the injunction motion. However, the Plaintiffs insisted, rather than addressing this issue within the injunction motion, that a separate motion to strike be brought by the Attorney General. The Plaintiffs took the same approach with Enoch's evidentiary concerns necessitating the Enoch Motion to Strike. Ultimately, the Attorney General Motion to Strike and the Enoch Motion to Strike were rendered moot by the lack of jurisdiction of this Court to grant an injunction in the Plaintiffs' action, which concern was known to the Plaintiffs prior to the hearing of the injunction motion.

[82] The Attorney General and Enoch have been successful in the injunction motion and are entitled to costs.

[83] However, I am also sensitive to the assertion that the Plaintiffs are six elders of limited means, although no evidence was tendered in the motions to support that assertion.

[84] In her May 10, 2019 letter to the Minister, Ms. Hardy states that her mother and two of her mother's sisters suffer from dementia. These are three of the six Plaintiffs in this action. Affidavit #2 of Deborah Hardy states that she was authorized by all six of the Plaintiffs to swear that affidavit. The written responses to the cross-examination of Ms. Scott, pertaining to Affidavit #2 of Fiona Scott, indicate that she has been provided with and reviewed their "enduring powers of attorney" provided to their family members. Further, that she has been informed by counsel for the Plaintiffs, who has spoken to the other three Plaintiffs and to the family members holding "powers of attorney" for the three Plaintiffs with dementia, and that

they have chosen Ms. Hardy as their representative. Accordingly, the Plaintiffs and their representatives appear to have chosen to pursue the injunction motion in a manner that caused it to require a higher degree of effort than was necessary and have been unsuccessful.

[85] Having considered the parties' submissions on costs and the factors relevant to this matter, I am exercising my discretion, pursuant to Rule 400 of the *Federal Courts Rules*, to order that the Plaintiffs shall pay an all-inclusive lump sum in the amount of $9000.00 to each of the Attorney General and to Enoch. While this is less than the amounts sought by the Attorney General and by Enoch, and it is more than proposed by the Plaintiffs as payable if they were successful, I am satisfied that these amounts are reasonable in these circumstances.

JUDGMENT IN T-1929-19

THIS COURT'S JUDGMENT is that

1. The Plaintiffs' motion seeking an interlocutory injunction is dismissed.

2. The Attorney General and Enoch Cree Nation are awarded costs. The Plaintiffs shall pay to the Attorney General the lump sum all-inclusive amount of $9000 in costs. The Plaintiffs shall also pay to Enoch Cree First Nation the lump sum all-inclusive amount of $9000 in costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1929-19
STYLE OF CAUSE:	MARGUERITE MARY (MARGARET) BUCK, DOROTHY ANNE SAVARD, SYLVIA M MCGILLIS, FRANCES JUNE MCGILLIS, FLORENCE JOYCE L'HIRONDELLE, AND MARILYN MCGILLIS v ATTORNEY GENERAL OF CANADA AND ENOCH CREE NATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	JULY 6, 2020, JULY 7, 2020
ORDER AND REASONS:	STRICKLAND J.
DATED:	JULY 17, 2020

APPEARANCES:

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