

2011 CarswellMan 89, 2011 MBQB 44

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**Bighetty v. Manitoba**

Chief Pascall Bighetty and Councillors, Mathias Sinclair, Ken Bighetty, Frank Dumas, Verna Colomb, Barbara Sinclair, Shirley Castel, Joyce Bear, Gordon Bear, Walter Sinclair and Brian Bighetty, in Their Representative Capacities as Chief and Council of Mathias Colomb Cree Nation and on Behalf of the Members of the Mathias Colomb Cree Nation and the Said Mathias Colomb Cree Nation, plaintiffs and Government of Manitoba, Manitoba Hydro and Her Majesty the Queen in in Right of Canada, defendants

Manitoba Court of Queen's Bench

Martin J.

Judgment: March 2, 2011

Docket: Winnipeg Centre CI 97-01-00726

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Counsel: Grant Stefanson, for Mathias Colomb Cree Nation No. 311

Paul Edwards, William Gardner, for Shirley Castel

Elizabeth Tutiah, for Her Majesty the Queen in Right of Canada

Subject: Public; Civil Practice and Procedure; Environmental

Aboriginal law.

Civil practice and procedure.

Environmental law.

***Martin J.:***

**Introduction**

1 Between 1976 and 1985, diesel fuel used to generate electric power leached into the ground under the Indian community of Pukatawagan, known as Mathias Colomb Cree Nation No. 311 (the "MC Cree Nation"). In 1997 the then Chief and Councillors, as representative plaintiffs, sued several parties. In 2011 a settlement agreement was reached, but to execute the settlement the MC Cree Nation, as a legal entity, alone must be the plaintiff. All the representative plaintiffs agree to withdraw except one. The MC Cree Nation wants that former

Councillor to be removed as a plaintiff in the action.

### Issues

2 The issue is relatively straightforward: should the court amend the Statement of Claim to remove the individually named plaintiffs, leaving the MC Cree Nation as sole plaintiff and legal entity entitled to pursue, and resolve, this litigation?

### Background

3 In January 1997, the Chief and Councillors of the MC Cree Nation sued the Government of Manitoba ("Manitoba"), Manitoba Hydro ("Hydro") and Her Majesty the Queen in Right of Canada ("Canada") over 10,000 liters of spilled diesel fuel that contaminated the land, soil, water and air in the vicinity, in a claim for nuisance.

4 The style of cause in the Statement of Claim set out the plaintiffs as Chief Pascall Bighetty and Councillors (who are individually named):

... in their representative capacities as Chief and Council of the Mathias Colomb Cree Nation and on behalf of the members of the Mathias Colomb Cree Nation and the said Mathias Colomb Cree Nation.

5 The prayer for relief seeks:

(a) a representation order "*permitting the individual named plaintiffs to continue this action on behalf of the members of the Mathias Colomb Cree Nation, and the said Mathias Colomb Cree Nation*";

(b) damages for nuisance; and

(c) various declarations that the defendants are liable for the nuisance.

6 Paragraph 2 of the Statement of Claim states:

The individually named Plaintiffs sue in their representative capacity as the elected Chief and Councillors respectively of the Mathias Colomb Cree Nation (hereinafter referred to as "MCCN"), an Indian Band within the meaning of the *Indian Act R.S.C. 1985, Chap. I-5* and as legal representatives of the MCCN and its individual members, past, present and future, as well as in their personal capacities.

7 It is common ground that naming individual plaintiffs for a representative action was prudent in 1997 as the law was unclear whether an Indian Band had legal status to sue. Since then, the law has evolved so it is now clear that an Indian Band can sue and is a proper party to be named as plaintiff for this type of nuisance claim.

8 The plaintiffs have never sought the representation order be granted and no such order has been issued.

9 As may be expected, since the claim was filed in 1997, the Chief and Councillors have changed from time to time as voted by Band members in accordance with MC Cree Nation democratic elections. The last election was in 2010. At that time, one of the individually named plaintiffs, Ms. Castel, lost election for Chief to Mr. Du-mas. Ms. Castel has not been a Councillor, Chief or elected representative of the MC Cree Nation since 2008.

10 By early 2011, the MC Cree Nation completed a negotiated settlement agreement of the claim. Canada is

to pay \$17 million to the Band in exchange for a release and consent judgment dismissing the claim against all the defendants. To be effective, the settlement must be ratified by a majority vote of eligible Band members and by a resolution of a majority of the Band Council. The process has a short time frame; it must be complete by March 31, 2011.

11 On January 19, 2011, Chief Dumas presented the settlement concept to the Band Council and the individually named plaintiffs. Chief Dumas deposed two germane matters:

- first, the individually named plaintiffs, including Ms. Castel, orally agreed with the request that they consent to being removed as individually named plaintiffs by amending the Statement of Claim such that MC Cree Nation would be the sole remaining plaintiff. Ms. Castel disputes this; and
- second, Ms. Castel agreed she had brought the claim in a representative capacity on behalf of MC Cree Nation and not in her personal capacity. Ms. Castel does not disagree that she was an individually named plaintiff as a representative of the MC Cree Nation.

12 The Statement of Claim is clearly framed in nuisance. It does not refer to any claim for negligence or personal injury except, arguably, in a peripheral manner at paragraph 29. There, it alleges numerous unidentified members of the Band suffered ill effects from noxious fumes as well as anxiety and related illnesses due to the apprehension of danger from the contamination, which thus constituted an ongoing health hazard.

13 The settlement agreement expressly states, in several parts, that it shall not "in any way affect any claims, rights and recourses which members of the Mathias Colomb Cree Nation may ever have had, may now have or may in future have in respect of" possible health claims or resulting damages from the diesel spill.

14 To be clear, if the MC Cree Nation's motion to amend and substitute itself as the sole proper plaintiff on behalf of the Band is not granted, then the settlement will be void.

### **Positions of the parties**

#### ***The Applicants — MC Cree Nation***

15 MC Cree Nation asserts that the claim was intended to be a representative action and, as a result, because Ms. Castel was then a Band councillor she, and the others, became individually named plaintiffs. There is nothing in the claim to suggest she was asserting her individual rights or generally any individual rights except as they collectively comprise the Band. In law, MC Cree Nation is the proper, and only, party that can resolve the claim on behalf of Band members and ultimately execute the settlement. MC Cree Nation asserts that Ms. Castel no longer has standing because she is no longer an elected representative of the Band. As a result MC Cree Nation asserts, relying on Court of Queen's Bench Rules 5.04(2) and 26.01 (Man. Reg. 553/88), that I should amend the Statement of Claim so MC Cree Nation is the sole plaintiff in place of the individually named plaintiffs.

#### ***The Respondents — The Individually Named Plaintiffs***

16 As noted, all of the individually named plaintiffs consent to MC Cree Nation's request except Ms. Castel. Ms. Castel wants to remain as an individual plaintiff because she says that the settlement fails to protect individual Band members for claims of ill health effects they may have suffered from the diesel fuel spill and she wants to ensure they are compensated, or at the very least, she wants to protect her right to advance such claim

for herself. Her concern, as it evolved during oral argument, is that if the suit is settled then any individual Band member's health claim may be statute barred by *The Limitation of Actions Act*, R.S.M. 1987, c. L150 regardless of the language in the settlement agreement exempting such claims from the scope of the settlement.

### ***The Respondent Defendants — Canada***

17 All respondents consent. Canada was the only respondent to argue a position on the motion. It supports the MC Cree Nation and further asserts that the Statement of Claim does not set out a cause of action by any individual for personal injury or negligence and, thus, there are no rights or claims to be protected by Ms. Castel.

### **Analysis**

18 While all parties relied on the Queen's Bench Rules 5.04(2) and 26.01, none provided any precedents involving the deletion, amendment or substitution of plaintiffs where a plaintiff in the action objected and insisted on remaining a plaintiff. The cases noted, and there were a number, were not helpful in this regard, particularly where, as here, the targeted plaintiff claims to have status in her own right.

19 The analysis and conclusion which follows will consider this general proposition in the limited context of the particulars of this action.

20 Queen's Bench Rule 5.04(2) deals with adding, deleting, or substituting parties. It states:

At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

21 This is a fairly common rule across Canadian jurisdictions. The broadly framed rule is discretionary, subject to there being no prejudice that cannot be overcome as noted, and in this respect is similar to the rules dealing with amending pleadings. Rule 5.04(2) is usually relied on to correct a party's name, identify proper parties, to ensure that the appropriate parties with valid legal capacity or standing, relative to the claim, are included in the proceedings and to remove parties who ceased to be necessary or proper. Normally objections arise between parties adverse in interest, as opposed to here where Ms. Castel says she has the right to represent others or at least herself.

22 As noted in *Holmsted and Watson, Ontario Civil Procedure* Volume 2, (looseleaf, Toronto: Carswell) at page 5-34:

The rule is part and parcel of the court's broad power of amendment. The general power is found in rule 26.01. The relationship between rule 26.01 and rule 5.04(2) and the breadth of the amendment power was dealt with in *Seaway Trust Co. v. Markle* (1988), 25 C.P.C. (2d) 64 (Ont. Master), affirmed (1990), 40 C.P.C. (2d) 4 (Ont. H.C.) (the same threshold test applies to a motion to amend under either rule 26.01 or rule 5.04(2) and the moving party must demonstrate that no prejudice would result from the amendment that could not be compensated for by costs or an adjournment; once this threshold test is met, under rule 26.01 the granting of leave is mandatory; however, where it is sought to add parties under rule 5.04(2) the court has a discretion whether to allow the amendment, notwithstanding that the threshold test is satisfied; the discretion is to ensure procedural fairness and consideration has to be given to such matters as the state of the action, whether the trial is imminent, whether examinations for discovery of all parties have already been

held, whether it would be a proper joinder of a new cause of action, whether the purpose in adding a party defendant was improper (such as simply to obtain discovery of the party added), whether the proposed added party was a necessary or proper party, and whether a variety of special rules were observed such as those respecting class actions, representation orders, trade unions, assignees, insurance, trustees, infants, persons under disability, *amicus curiae*, accrual of the cause of action and limitations).

23 At this point, I note that Ms. Castel does not object to the right of MC Cree Nation to carry the action in the place of the other individually named plaintiffs who consent to being removed. She just wants to stay in the action herself.

24 I am acutely aware of Ms. Castel's position and the theoretical possibility that she may be prejudiced, if removed, by being deprived of a cause of action. This presupposes she has a cause of action:

(a) supported by facts and disclosed in the pleading; or

(b) that the exemption language in the settlement agreement is deficient in allowing her to advance such a fresh claim because of, for example, the general application of a limitation period.

Yet, I cannot help but conclude that there is no air of reality to such a theoretical construct for the reasons that follow, such that I find that there is no real prejudice to her that would result from granting the motion. Further, I find that the MC Cree Nation is the proper party to carry the litigation and Ms. Castel's continued participation as a party is unnecessary.

25 As noted earlier, the style of cause, prayer for relief and identification of the plaintiffs in the Statement of Claim clearly contemplate that the individually named plaintiffs were acting on behalf of the MC Cree Nation as a collective. It is framed as a representative action, which of course is an action not on behalf of a class of individuals, but rather an action on behalf of individuals comprising a collective such as an Indian Band. The evidence before me supports this in that it was only the then Chief and Councillors who were named as plaintiffs because they were then the elected representatives of the Band members, and this was done to safeguard the Band's interests regarding the contaminated land, soil and air as it was questionable whether the Band, per se, was a legal entity capable of doing so. Thus, it is clear that had the state of the law in 1997 been such that there was no question that MC Cree Nation could sue in its own right for the benefit of its members it would have done so.

26 Whether the claim is purely communal, or alternately could be advanced as private or personal rights (see , [2009 MBQA 12](#), 236 Man.R. (2d) 107), is not determinative of the motion, although I note that there is no assertion that any of the contaminated land or water was privately owned but was rather Band land.

27 The Statement of Claim asserts damage and nuisance to the community's land, water and air. No individual claims are set out. Referring specifically to paragraph 29, no particulars of any specific individual claims are articulated. This pleading is arguably in furtherance of the claim for nuisance. The claim was drafted by legal counsel and over the years the plaintiffs have retained at least three different law firms. There is no obvious indication in the pleadings, as might be expected of a lawyer applying due skill and diligence in drafting the pleading, nor is there any evidence that there was ever an intention, to advance individual claims for injury or compensation. Further, Canada takes the position the claim does not disclose a reasonable cause of action for personal injury or negligence suffered by individuals and that, if asserted, it would be struck out. Without expressing a definitive conclusion, considering the test for striking a pleading on that basis, this pleading appears deficient in this respect.

28 More specifically, nowhere in the pleading does Ms. Castel for example state that she personally suffered injury because of the diesel fuel spill nor does she demand damages for herself, or anyone else, individually. While in her evidence on the motion she opines that she has suffered ill health effects from the contamination, she nonetheless offered no details or informed independent evidence of this, such as a medical report or doctor's opinion. In other words, there is no evidence of the reliability or veracity of her claim. Considering her statements of the importance and impact of the motion, I would have expected more.

29 Further, despite asserting she and others suffer(ed) ill effects of the contamination, the absence in Ms. Castel's affidavit of what if anything was done to address such concerns while the litigation has been outstanding is telling regarding the true nature of the pleading. For example, there is no evidence that the names of individuals or their symptoms were particularized at any time or that even generally Ms. Castel, as an elected representative of the MC Cree Nation, set out their claims or demands to Canada or the other defendants. The significance of this must be looked at as well in the context of Canada's defence denying harm and explicitly putting the plaintiffs to the strict proof of it, and Manitoba's pleading that there was no cause of action against it at all. As to Hydro, it has not filed a defence.

30 I make these observations in the two preceding paragraphs not to be critical, but rather to attempt to analyze whether, after about 14 years of litigation, there is any substance to a cry of prejudice. I fully recognize that the moving party carries the legal onus regarding prejudice, but also am mindful that a responding party assumes the risk of not dealing with a potential shift of the evidentiary burden.

31 It is clear that the individually named plaintiffs dealt with the action when and while they were elected representatives of the Band. Ms. Castel deposes that she did not participate in managing the claim when she was not a Councillor or Chief. The settlement reached was negotiated by duly elected representatives of the Band who have the legal, and moral, authority and duty to do so. I am satisfied that is what was contemplated by the Chief, Council and individually named plaintiffs in 1997 when the action was launched. Further, the settlement will not be fulfilled unless it is accepted by MC Cree Nation Band members through a clearly set out ratification vote.

32 Ultimately, the essence of the claim is a representative action in nuisance, not a personal claim for damage.

33 Even so, the settlement agreement clearly exempts any health claims from its scope and expressly states that such rights remain. Having said that, there is no reference to *The Limitation of Actions Act* and it appears open to Canada to argue such a defence depending upon the specifics of an individual claim, if anyone wishes to advance one. While saying this, I note the scope of the exemption language is very broad and arguably it could be inferred that it implies a waiver of any limitation period, at least to the date of settlement, for otherwise the benefit conferred by the language may be empty. The MC Cree Nation negotiated this provision, this exemption, so that individual Band members would not be prejudiced by this settlement if they have, and wanted to advance, individual claims for injury. I am not called upon, nor do I, express any view or opinion as to the merits of these issues which of course must be assessed on a case by case basis.

## Conclusion

34 On balance I find that the MC Cree Nation is the proper plaintiff and that it was always the intention of the individually named plaintiffs that the legally elected representatives of the Band have carriage of the action. Now that the law regarding a capacity of a Band to sue is clear, it would be most efficient and in the interests of

justice and the Band members for the MC Cree Nation to be the sole plaintiff without the complication of an un-elected individual plaintiff effectively having the power to veto the settlement.

35 Further, I am satisfied that removing Ms. Castel as an individually named plaintiff will not prejudice her or other Band members.

36 Accordingly, MC Cree Nation's motion to amend the pleading consistent with the draft Amended Statement of Claim is hereby granted.

37 Further, the oral request to amend the pleading respecting the correct description of Canada is hereby granted on consent of all parties.

38 Finally, as to costs, I consider:

(a) the success of the parties;

(b) the value of the claim, in part as evidenced by the \$17 million settlement;

(c) the urgency of dealing with this matter; and

(d) the procedural tactics employed, and largely ultimately abandoned, by Ms. Castel, including demands for cross-examination of Chief Dumas on his affidavit and the settlement agreement.

MC Cree Nation will have Class IV tariff costs on a party and party basis on all aspects of the motion opposed by Ms. Castel.

39 As to Canada, it requested costs only for preparation and attendance to argue the substantive motion, not the other procedural matters. That is appropriate and they will have Class IV tariff costs.

40 If the parties cannot agree on the bill of costs, they are free to attend before me and I will set it.

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