Federal Court  Cour fédérale

Date: 20171120

Docket: T-2428-14

Citation: 2017 FC 1049

Ottawa, Ontario, November 20, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ONION LAKE CREE NATION AS REPRESENTED BY ITS DULY ELECTED OKIMAW FOX, AND COUNCIL

Plaintiff

and

THE GOVERNOR GENERAL OF CANADA, HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, AND THE ATTORNEY GENERAL OF CANADA

Defendants

ORDER AND REASONS

I. Overview

[1] This decision relates to a motion brought by the Plaintiff, Onion Lake Cree Nation [OLCN], in its action challenging the constitutionality of the *First Nations Financial*

Transparency Act, SC 2013, c 7 [the FNFTA]. In the course of this action, the Defendants (the Governor General of Canada, Her Majesty the Queen as represented by the Minister of Aboriginal Affairs and Northern Development, and the Attorney General of Canada) brought a motion to have the Governor General removed as a party to the action and the allegations in the Statement of Claim pertaining to him struck. In a decision dated May 9, 2017, Prothonotary Lafrenière granted the Defendants' motion [the Decision]. In the present motion, OLCN appeals the Decision pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106.

[2] As explained in greater detail below, the Plaintiff's appeal is dismissed, because I have found no error by the Prothonotary in concluding that it is plain and obvious that the Plaintiff's claim against the Governor General discloses no reasonable cause of action. After taking into account the Plaintiff's arguments surrounding the roles and responsibilities it argues are borne by the Governor General, I find that the Prothonotary correctly concluded that the Plaintiff's claim against the Governor General is not justiciable.

II. Background

[3] In its Statement of Claim, OLCN asserts that that it was formed in 1914 and that it is comprised of two Treaty Peoples (Makaoo and Seekaskootch) who are the successors to those who made a treaty with the Crown in 1876 at Waskahikanis (now Fort Pitt, Saskatchewan) [the Treaty]. Referred to as Treaty 6, the Treaty is a treaty within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11).

[4] The FNFTA was passed by the House of Commons and the Senate during the 41st Parliament and received royal assent from the Governor General on March 27, 2013. In November 2014, the Plaintiff commenced the within action challenging the constitutionality of the FNFTA and seeking various forms of relief arising from the passage and implementation of that statute. In its Statement of Claim, OLCN asserts that the Defendants owe Treaty members a fiduciary duty to implement the written, oral and implied terms of the Treaty but that the Defendants have implemented their Treaty obligations in a manner which breaches this fiduciary duty and other obligations owed to OLCN. The Statement of Claim alleges that such implementation breaches the Defendants' fiduciary duty to administer lands and dispose of any interest for the "use and benefit of" OLCN; gives rise to a duty to consult which the Defendants failed to do; offends the honour of the Crown; and offends s 15 of the *Canadian Charter of Rights and Freedoms*. In particular, OLCN asserts that the passage and implementation of the FNFTA is a breach of the Defendants' Treaty obligations and a violation of its Treaty rights.

[5] In asserting these claims, OLCN's Statement of Claim includes specific allegations against the Governor General. It asserts that the Governor General, as the representative of the Sovereign, is the protector of the honour of the Crown in its dealings with First Nations and, in particular, OLCN, and that the Governor General has breached his fiduciary duty to consult with them and has offended the honour of the Crown by not upholding the Treaty. The Statement of Claim also alleges that the Defendants passed the FNFTA into law without royal consent from the Governor General, representing either a departure not in accordance with the honour of the Crown or the Governor General fulfilling his duty, in circumstances where the honour of the Crown and its obligations were not met, by declining to give royal consent to the Act.

[6] Relying on Rules 221(1)(a), (b) and (f) of the *Federal Courts Rules*, the Defendants moved to strike the Governor General as a defendant and the following paragraphs of the Statement of Claim:

> 2. The Defendant the Governor General of Canada is the representative of Her Majesty the Queen in Right of Canada, the Crown, and is named in these proceedings as her representative.
>
> […]
>
> 16. The Defendant, the Governor General of Canada, having been appointed by *Royal Proclamation and then Letters Patent* of March 23, 1931, attested to all the powers and authorities lawfully belonging to the then King of England by virtue of the ***British North America Act***, 1967-1946, and thereafter by Letter Patent and in such Commission conferred in by those Letters Patent, and together with such Commission that issued to the Governor General under the Great Seal of Canada, and under such laws that were and are in force in Canada.
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> 17. The Defendant, the Governor General of Canada, has the power to Summons, Prorogue or Dissolve the Parliament of Canada, being the lawful representative of the Queen and, inter alia, to give and does deliver the Throne Speech on behalf of the Queen of England each and every year.
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> 18. The Defendant, Her Majesty The Queen as Represented by The Minister Of Aboriginal Affairs is the Minister responsible for the obligations, duties and liabilities as owed and to be delivered to the Plaintiff by reason of Treaty and Common Law.
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> 19. By ***Royal Proclamation of 1763***, RCS 1985 APP. 11, No. l, reserved lands possessed by the First Nations in North America belonged by Treaty unless ceded to the Crown by lawful surrender in accordance with procedures set out in the said Royal Proclamation.
>
> 20. The said Royal Proclamation set out a policy for the British Crown to treat and deal with all First Nations fairly and

honourably, inter alia, to protect the First Nations people from exploitation and illegalities by anyone for any reason.

21. Aboriginal title, at all material times, was established by the said Royal Proclamation and formed the corner stone for the Treaty with the Government of Canada and the Defendant, Governor General, was and is established as the Protector of the Honour of the Crown in all its dealings and undertakings with First Nations, and in particular, the Plaintiff herein.

22. The Honour of the Crown encompasses a duty by the Federal Government to always act honourably in the performance and implementation of those undertakings and obligations imposed on the Defendants in favour of the Plaintiff by the express and implied words and intent of the Treaty.

23. The Plaintiff has sovereign control over its area of reserved lands by exercising its own system of customs and laws governing the First Nation people of the Plaintiff, Onion Lake, consistent with their Treaty.

24. The Defendant, the Governor General, has breached his fiduciary duty, duty to consult as well offended the Honour of the Crown owed to the Plaintiff by not upholding the terms of the Treaty.

[…]

78. The Defendants passed into law the Act without Royal Consent by the Defendant Governor General and this omission represents a departure not in accordance with the Honour of the Crown.

79. Alternatively, the Defendant, Governor General did not give Royal Consent to the said Act, and therefore fulfilled his duty to the Sovereign Crown and to the Plaintiff in circumstances where the Honour of the Crown and its obligations were in fact not met as hereinbefore stated this Statement of Claim, then the Defendants have acted as hereinbefore set out without the Royal Consent of the Governor General.

[7] The Defendants also moved to strike one of the paragraphs of the prayer for relief in the Statement of Claim, which seeks a declaration that the Governor General has failed to fulfil his duties to protect OLCN and to adhere to and fulfil Treaty rights.

[8] Prothonotary Lafrenière heard the Defendants' motion in a special sitting on November 16, 2016, and on May 9, 2017 he granted the motion, issuing the Decision summarized below.

III. Prothonotary's Decision

[9] The Prothonotary identified the issues before him as: (1) whether the Governor General is properly named as a party to this action; and (2) whether the Statement of Claim articulates a claim against the Governor General that is litigable and justiciable in this Court. He then identified the applicable test on a motion to strike under Rule 221(1)(a) as whether it is "plain and obvious" that the claim discloses no reasonable cause of action and, in relation to striking allegations as an abuse of process, he noted the Court's inherent jurisdiction to prevent abuse where a proceeding is clearly futile or plainly has no chance of success.

[10] In considering the first issue, the Prothonotary rejected the Defendants' argument that s 48(1) of the *Federal Courts Act*, RSC 1985, c F-7, which prescribes a means of instituting a proceeding against the Crown, precluded naming the Governor General as a defendant. While s 48(1) refers to a form that includes a general heading reflecting "Her Majesty the Queen" as defendant in a proceeding against the Crown, the Prothonotary concluded that the language in s 48(1) is permissive, not mandatory.

[11] The Defendants also submitted that the claim against the Governor General should be struck as redundant under Rule 221(1)(b), because Her Majesty the Queen is already named as a defendant. The Defendants contended that there was no basis for naming an individual such as the Governor General in the absence of an allegation of personal liability against the individual. The Prothonotary noted the acknowledgement by OLCN that His Excellency the Right Honourable Governor General David Johnston is not being sued in his personal capacity but also that OLCN maintains that distinct declaratory relief is sought and available as against the Governor General because of his role in upholding treaties as the Sovereign's surrogate in Canada. The Prothonotary referred to OLCN's argument that the power to make and honour treaties is vested in the Sovereign's royal prerogative and observed that OLCN is challenging not only the constitutionality of the legislation but also the exercise of the royal prerogative in a manner that it alleges derogates from its Treaty rights, such prerogative being distinct from Parliament's legislative power.

[12] The Prothonotary described the essence of the claim against the Governor General as asserting that he had a duty to OLCN not to grant royal assent to a law which derogates from treaty rights that he was obliged to protect, this duty being separate and distinct from that owed by Her Majesty the Queen or the constitutionality of the legislation. However, the Prothonotary concluded that it was not necessary for the purpose of the motion to fully develop this issue, because the manifestation of the honour of the Crown may arguably be divisible. As such, the Prothonotary was not prepared to strike the Governor General as a party solely on the basis of s 48 or Rule 221(1)(b).

[13] In connection with the second issue, whether the Statement of Claim articulates a justiciable claim against the Governor General, the Defendants asserted that the only manner in which the Governor General is alleged to have been involved in the matter giving rise to this action was by conferring royal assent on the FNFTA. The Prothonotary expressed agreement with this characterization of the claim against the Governor General. While the Statement of Claim alleges that the Governor General breached his fiduciary duty in a number of ways, the Prothonotary found that the only discernable allegation of such a breach was the Governor General's involvement in the passage of the FNFTA by giving royal assent.

[14] The Prothonotary then reviewed recent case law of this Court and the Federal Court of Appeal (canvassed later in these Reasons) which considered the role of the Governor General in granting royal assent and the jurisdiction of the courts over the legislative process. The Prothonotary concluded that the Governor General's discretion with respect to granting royal assent is entirely controlled by the convention of responsible government; that the Governor General's role forms part of the legislative process over which the courts have no oversight; and that no duty to consult arises during the legislative process. While noting OLCN's argument that the creation and honouring of treaties is vested in the royal prerogative, which is constitutionally distinct from the Canadian Parliament's legislative power, the Prothonotary held that this did not assist the Plaintiff in showing a justiciable claim against the Governor General.

[15] Finding that the claim against the Governor General was not justiciable, the Prothonotary concluded that it was plain and obvious that the allegations in the impugned paragraphs of the Statement of Claim did not disclose a reasonable cause of action. He therefore ordered those

paragraphs struck and the Governor General removed as a defendant in the action, although granting leave for OLCN to amend its Statement of Claim to include some of the allegations contained in those paragraphs, which did not relate directly to the role of the Governor General, elsewhere in its claim.

IV. Issue

[16] OLCN describes the issue in this appeal as whether the Prothonotary erred by limiting his analysis of the justiciability of the claim against the Governor General to the justiciability of the act of royal assent.

V. Standard of Review

[17] The parties are agreed, and I concur, that the standard of correctness applies to the Court's review of the issue raised by OLCN. In *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at para 79, the Federal Court of Appeal confirmed that the standard of review set out in *Housen v Nikolaisen*, 2002 SCC 33 at para 8, applies to appeals from decisions of prothonotaries. The standard of review for findings of fact and findings of mixed fact and law is palpable and overriding error. For questions of law, the standard is correctness. The parties are agreed that the Decision was based on a determination of law and that the applicable standard of review is, therefore, correctness.

VI. Analysis

[18] The parties are also agreed that the Prothonotary employed the correct test in considering the Defendants' motion to strike. Where they diverge is on the question of whether he applied that test correctly.

[19] In support of its position that the Prothonotary erred, OLCN states that it is not asking the Court to set aside the Governor General's act of royal assent. Rather, it is seeking a declaration that the Governor General has a duty to honour the Treaty and that he failed in that duty in the enactment of the FNFTA. OLCN explains that its claim against the Governor General is premised upon the following three issues: (a) whether the Governor General is the proper *situs* of the honour of the Crown to uphold the Treaty; (b) the content of that duty to uphold the honour of the Crown; and (c) whether the Governor General breached that duty through acts or omissions relating to the FNFTA. OLCN takes the position that each of these issues is both novel and justiciable. OLCN argues that the Prothonotary erred in concluding that it was not necessary for the purpose of the motion before him to fully develop these issues.

[20] The Defendants respond that the Governor General's only role in relation to the FNFTA was the granting of royal assent, the act upon which the Prothonotary's analysis focused. They take issue with OLCN's position that the Governor General had, or should have had, any other role, arguing that this would be contrary to the principles underlying Canada's system of responsible government. The Defendants also argue that, even if the Governor General had duties of the sort alleged by OLCN, these would be exercised in the context of the legislative

process and, by extension of the authorities upon which the Prothonotary relied, would be non-justiciable.

[21] As a first point, I note that I find no error arising from the Prothonotary's statement that it was not necessary for the purposes of the motion to fully develop the issue as to the Governor General's duty to OLCN. The Prothonotary made this statement in the course of considering the first issue in his analysis, i.e. whether the Governor General was properly named as a party to the action. The Defendants argued that it was redundant to name the Governor General when Her Majesty the Queen was already named as a defendant. The Prothonotary characterized the essence of the claim against the Governor General as an assertion that he had a duty to OLCN, separate and distinct from that owed by Her Majesty the Queen or the constitutionality of the legislation, not to grant royal assent to a law which derogated Treaty rights that he was obliged to protect. The Prothonotary then noted that the manifestation of the honour of the Crown, such as a duty to consult, may arguably be divisible among various Crown emanations. Therefore, he was not prepared to strike the Governor General as a party solely on the basis of s 48 of the *Federal Courts Act* or Rule 221(1)(b) of the *Federal Court Rules*, which permits the striking of a pleading on the ground that it is immaterial or redundant.

[22] As I read the Prothonotary's analysis, he was not prepared to conclude that it was redundant for OLCN to have named the Governor General, given that the honour of the Crown is arguably divisible. Having decided on that basis to reject the Defendants' argument that the claim should be struck under Rule 221(1)(b), it was unnecessary for purposes of disposing of that argument to further develop the issue surrounding the duty resting with the Governor General.

[23] However, turning to the second issue considered by the Prothonotary, i.e. whether the Statement of Claim articulates a justiciable claim against the Governor General, it is necessary to canvass the argument raised by OLCN in this appeal that its claim asserts justiciable issues independent of the Governor General's role in granting royal assent.

[24] I note that, despite taking that position, OLCN still presents arguments that relate specifically to the Governor General's role in granting royal assent. While OLCN asserts that the *situs* of the honour of the Crown to uphold the Treaty is an issue that can only be developed through discovery in the within litigation, its position is that such *situs* is the office of the Governor General, as the delegate of the Sovereign who entered into the Treaty. In explaining its arguments surrounding the content of the resulting duty of the Governor General to uphold the honour of the Crown, OLCN returns to arguments surrounding the granting of royal assent.

[25] OLCN describes the content of the Governor General's duty not to derogate from the Treaty as being characterized by the Governor General's role in approving or disapproving legislation and thus exercising, as surrogate, the royal prerogative. OLCN notes that the Prothonotary relied on commentary by Professor Peter W. Hogg in concluding that the grant of royal assent is now a constitutional convention over which the Governor General has essentially no discretion. However, in reliance on other commentary by Prof. Hogg, OLCN asserts that this convention is superseded by a constitutional imperative that the Governor General act on constitutional and lawful advice. It takes the position that the office of the Governor General has more than a ceremonial role, that there are circumstances where that office can properly refuse royal assent, and that the present case represents an example of such circumstances. OLCN states

that the essence of its complaint is that the Governor General failed to act on proper advice and thereby derogated its rights under the Treaty.

[26] In contrast, the Defendants take the position that the Governor General has no discretion over the decision to confer royal assent but, in keeping with constitutional conventions governing Canada's system of responsible government, must always a grant assent to a bill which has passed both Houses of Parliament.

[27] In considering the parties' respective positions on the Governor General's role in granting royal assent, it is useful to refer to the particular comments by Prof. Hogg upon which they rely. Both parties refer to the same publication: Peter W. Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Thomson Carswell, 2007). At page 9-22 of his chapter on Responsible Government, the same reference upon which the Prothonotary relied, Prof. Hogg states as follows:

> The Governor General, who must complete the legislative process by conferring the royal assent on a bill enacted by both Houses of Parliament, plays no discretionary role whatsoever. It is true that the Constitution Act, 1867, by s. 55, gives the Governor General the power to withhold the royal assent from a bill, and the power to reserve a bill for the signification of the Queen's pleasure; and by s. 56 gives to the Queen the power to disallow a Canadian statute. But the imperial conference of 1930 resolved that the powers of reservation and disallowance must never be exercised. This conference and the full acceptance of responsible government have established a convention that the Governor General must always give the royal assent to a bill which has passed both Houses of Parliament. There is no circumstance which would justify a refusal of assent, or reservation, or a British disallowance. [Emphasis added.]

[28] OLCN relies on the following passage from the same chapter of Prof. Hogg's publication:

> The Governor General has certain "personal prerogatives" or "reserve powers" which he or she may exercise upon his or her personal discretion. Whereas in the exercise of governmental powers generally the Governor General must act in accordance with the advice of the Prime Minister or cabinet, there are some occasions on which he or she may act without advice, or even contrary to advice.
>
> The definition of those occasions when the Governor General may exercise an independent discretion has caused much constitutional and political debate. But it is submitted that the basic premise of responsible government supplies the answer: so long as the cabinet enjoys the confidence of a majority in the House of Comments, the Governor General is always obliged to follow lawful and constitutional advice which is tendered by the cabinet. But there are occasions, as we have seen, when a government continues in office after it has lost the confidence of the House of Commons, or after the House of Commons has been dissolved. There are also occasions, for example, after a very close election, or after a schism in a political party, where for a period it is difficult to determine whether or not the government does enjoy the confidence of a majority in the House of Commons. In all these situations, it is submitted that the Governor General has a discretion to refuse to follow advice which is tendered by the ministry in office. [Emphasis added.]

[29] OLCN's position is that the reference to "lawful and constitutional advice" in the above passage contemplates not only advice received from a government that enjoys the confidence of the House of Commons but also advice that is otherwise in compliance with the government's constitutional and legal obligations. Applying these principles to the present case, OLCN argues that the Governor General, in granting royal assent to the FNFTA, did not receive advice on the proposed statute's compliance with legal and constitutional requirements and did not assess the bill for such compliance. In other words, OLCN argues that the Governor General was obliged to

assess the constitutionality of the proposed FNFTA, and specifically its consistency with the Crown's obligations under the Treaty, before granting royal assent.

[30] OLCN takes the position that Prof. Hogg is incorrect in asserting, in the first passage above, that the Governor General must always give royal assent to a bill which has passed both Houses of Parliament. OLCN supports its position by reference to Arthur Berriedale Keith, *The Constitutional Law of the British Dominions* (London: MacMillan, 1933), which states that the Governor General could not, with propriety, assent to certain forms of legislation which may be regarded as prohibited by the essential status of the Dominions. Examples include bills which would sever the Dominion from the Crown or alter the succession to the throne. OLCN also refers to the decision of the Supreme Court of Canada in *Reference re the Power of the Governor General in Council to Disallow Provincial Legislation and the Power of Reservation of a Lieutenant Governor of a Province*, [1938] SCR 71, as confirming, in relation to the Lieutenant-Governor of Alberta, the power of reservation for the signification of the pleasure of the Governor General of bills passed by the provincial legislative assembly.

[31] The Defendants argue that the interpretation of the Governor General's role advocated by OLCN would be wholly inconsistent with Canada's system of responsible government. They take the position that requiring the Governor General to independently assess the legality or constitutionality of proposed legislation would effectively thrust that office into a judicial role. The Defendants interpret the reference to lawful and constitutional advice tendered by cabinet in Prof. Hogg's statement as referring to the presentation of a bill that has passed both Houses of Parliament. The Defendants assert that, while the courts are final arbiters of legality and

constitutionality, the government would not knowingly present for royal assent a bill that is either unlawful or unconstitutional. Their position is that a bill that has passed through both Houses represents the will of the Canadian people, as expressed through the House of Commons and sanctioned by the Senate, and that the Governor General is required by constitutional convention to give royal assent to such a bill.

[32] I find the Defendants' position on this question compelling. I have difficulty with the proposition that the Governor General is intended to have a role as arbiter of the legality or constitutionality of proposed legislation. However, it is not necessary for the Court to arrive at a determination on this question. While both parties devoted considerable effort to advancing their respective positions on the discretion, or lack thereof, afforded to the Governor General in the decision to grant royal assent, ultimately I find that this question has little impact on the issue of whether the Prothonotary erred in concluding that OLCN's claim against the Governor General is not justiciable. The Prothonotary's decision did not turn on a conclusion that the Governor General was without any discretion in the conferral of royal consent. I recognize that the Prothonotary stated that there was no allegation in the Statement of Claim that the Governor General failed to act on proper advice and that OLCN asserts in this appeal that it is advancing such an allegation. However, I read the Prothonotary's decision as turning not on that point but rather on the question of whether the act of royal assent was justiciable at all.

[33] The Prothonotary relied on the decision in *Galati v Canada (Governor General)*, 2015 FC 91 [*Galati*], which concluded that granting royal assent is a legislative act and therefore not

justiciable. The Prothonotary analysed *Galati*, and its effect on OLCN's claim against the Governor General, as follows:

> [31] In *Galati v Canada (Governor General)*, 2015 FC 91, Mr. Justice Rennie found that the grant of royal assent is a legislative act and as such it is not justiciable. The central issue in *Galati* was whether the Governor General exceeded the scope of his discretion under the Royal prerogative in granting royal assent to the *Strengthening Canadian Citizenship Act*, SC 2014, c 22. Justice Rennie concluded that the Court could not adjudicate on whether the Governor General exceeded the scope of his authority because the grant of royal assent is a legislative act and is not justiciable. He also stated, at para 46, that the discretion to grant royal assent "is wholly constrained by the constitutional convention of responsible government… the Governor General does not exercise an independent discretion".
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> [32] In reaching his conclusion, Rennie J. expressed concern with the Court's intervention into the legislative process and, in particular, into the Governor General's grant of royal assent. He stated:
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> > [35] The courts exercise a supervisory jurisdiction once a law has been enacted. Until that time, the Court cannot review, enjoin or otherwise engage in the legislative process unless asked by way of a reference framed under the relevant legislation. To conclude otherwise would blur the boundaries that necessarily separate the functions and roles of the legislature and the courts. To review the Governor General's act of granting royal assent, as the applicants request, would conflate the constitutionally discrete roles of the judiciary and the legislature, affecting a radical amendment of the *Constitution Act, 1867* and the conventions which underlie our system of government, notably the right of Parliament to consider and pass legislation.
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> [33] OLCN is asking this Court to adjudicate on whether the Governor General acted according to his obligations under Treaty 6. This is analogous to the issue raised in *Galati*, which was whether the Governor General exceeded the scope of his authority in granting royal assent to legislation that the applicants in that case alleged was beyond the legislative competence of Parliament. The applicants were essentially asking the Court to find that the Governor General ought to act as a check against inappropriate

> parliamentary action. However, intervening in the legislative process to declare that the Governor General has such a duty would be contrary to the separation of powers doctrine and parliamentary supremacy.

[34] It is noteworthy that, at paragraph 46 of *Galati*, Justice Rennie refers to the same passage from Prof. Hogg that is cited by OLCN and concludes that assent must be given by the Governor General to a bill which has passed both Houses of Parliament as withholding assent would be inconsistent with the principles of responsible government. This aligns with the Defendants' position on that question. However, the analysis by Justice Rennie upon which the Prothonotary relies relates not to the extent of the Governor General's discretion in granting royal assent but rather to the fact that granting royal assent is a legislative act and legislative acts are not justiciable.

[35] I can find no error in the Prothonotary's reliance on *Galati* to support his conclusion that the grant of royal assent by the Governor General in the present case is not justiciable. OLCN argues that *Galati* is distinguishable, because it arose in the context of an application for judicial review, not an action, and because it did not involve a challenge to the constitutionality of legislation. I find the distinction as to the type of proceeding irrelevant to the justiciability of this issue and that *Galati* is not distinguishable based on the fact that OLCN's action raises constitutional issues. The application in *Galati*, seeking to set aside the Governor General's assent to the *Strengthening Canadian Citizenship Act*, SC 2014, c 22, was based on an argument that provisions of the statute were beyond the legislative competence of Parliament under the *Constitution Act, 1867*. While that case involved different constitutional arguments than those raised by OLCN, the applicants in *Galati* were also asserting a position based on constitutional

principles, and this did not alter the Court's analysis that the act by the Governor General that was being challenged was of a legislative nature and therefore not justiciable.

[36] In arriving at his decision, the Prothonotary also relied on the recent decision by the Federal Court of Appeal in *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 [*Courtoreille*]. In *Courtoreille*, Justice de Montigny, writing for the majority, quoted from *Galati* with approval in arriving at the following conclusion:

> [60] I am therefore of the view, for all the foregoing reasons, that the legislative process, from its very inception where policy options are discussed and developed to the actual enactment of a bill following its adoption by both Houses and the granting of royal assent by the Governor General, is a matter solely within the purview of Parliament. Imposing a duty to consult at any stage of the process, as a legal requirement, would not only be impractical and cumbersome and potentially grind the legislative process to a halt, but it would fetter ministers and other members of Parliament in their law-making capacity. As Justice Hughes astutely observed, "[…] intervention into the law-making process would constitute undue judicial interference on Parliament's law-making function, thus compromising the sovereignty of Parliament" (Reasons for Judgment at para. 71).

[37] As indicated by the above passage, *Courtoreille* dealt with the question of whether the Crown has an obligation to consult when contemplating changes to legislation that may adversely impact treaty rights. Justice de Montigny summarized the Court's conclusion as follows at paragraph 3 of the decision:

> [3]… I find that legislative action is not a proper subject for an application for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7, and that importing the duty to consult to the legislative process offends the separation of powers doctrine and the principle of parliamentary privilege.

[38] OLCN points out that the Supreme Court of Canada has granted leave to appeal *Courtoreille*. Also, in concurring reasons at paragraph 87 of *Courtoreille*, Justice Pelletier made the following remarks:

> [87] Putting the matter another way, the duty to consult would undoubtedly be triggered by the executive's approval of a project which adversely affected a First Nation's interest in a given territory. Can it be said that the duty to consult would not be triggered if the same project were approved and set in motion in a special law passed for that purpose? While this is not the case we have to decide, it does highlight the point that the argument that the legislative process is indivisible, from policy development to vice-regal approval, may be problematic in other circumstances.

[39] While conscious of the point raised by Justice Pelletier, which may be the subject of consideration by the Supreme Court in the upcoming appeal, I agree with the Defendants' submission that Justice Pelletier's comment is *obiter* and that the law as it presently stands is as expressed by the majority in *Courtoreille*. The Prothonotary relied on *Courtoreille* both because of its endorsement of the finding in *Galati*, that the grant of royal assent by the Governor General is not justiciable, and because of its conclusion that there is no duty to consult prior to the passage of legislation, even where treaty rights will be affected. While the Prothonotary framed his conclusion, that the claim against the Governor General is not justiciable, as flowing from the fact that the only action taken by the Governor General in the present case was to grant assent to the FNFTA, it is clear from the Decision that the Prothonotary was aware that OLCN was also alleging that the Governor General had a duty to consult. The Prothonotary concluded that any such duty was precluded by the binding decision in *Courtoreille*. Again, I find no error in this conclusion.

[40] However, I recognize that OLCN's arguments in this appeal extend beyond alleging that the Governor General had discretion not to grant royal assent to the FNFTA and had a duty to consult prior to the passage of that statute. OLCN relies on a treatise on the British constitution, Walter Bagehot, *The English Constitution* (Oxford: Oxford University Press, 1867, reprinted 2001) at page 64, for the principle that, under a constitutional monarchy, the Sovereign has three rights - the right to be consulted, the right to encourage, and the right to warn. OLCN argues that the Governor General had these rights and was obliged to exercise them in the context of the government's efforts to pass the FNFTA. In essence, OLCN's position is that the Governor General should have warned the government that the proposed legislation would infringe OLCN's rights under the Treaty.

[41] OLCN also relies upon the constitutional convention requiring royal consent prior to Parliament passing bills affecting the prerogatives, hereditary revenues, or personal property or interest of the Sovereign. As an explanation of the convention, OLCN referred the Court to the following extract from Audrey O'Brien and Marc Bosc, eds, *House of Commons Procedure and Practice*, 2nd ed (Ottawa: House of Commons, 2009) at ch 16 "The Legislative Process":

> Royal Consent (which should not be confused with Royal Assent or royal recommendation) is derived from British practice, and is among the unwritten rules and customs of the House of Commons of Canada. Any legislation that affects the prerogatives, hereditary revenues, property or interests of the Crown requires Royal Consent, which in Canada originates with the Governor General in his or her capacity as representative of the Sovereign. Consent is necessary when property rights of the Crown are postponed, compromised or abandoned, or for any waiver of the prerogative of the Crown. It was, for example, required for bills in connection with railways on which the Crown had a lien, with property rights of the Crown (in national parks and Indian reserves), with the garnishment, attachment and diversion of pensions and with amendments to the *Financial Administration Act*.

> The consent of the Crown is not required where the bill relates to property held by the Crown for its subjects. The consent of the Crown does not, however, signify approval of the substance of the measure; it means only that the Crown agrees to remove an obstacle to the progress of the bill so that the latter may be considered by both Houses, and ultimately submitted for Royal Assent.
>
> Although Royal Consent is often signified when a bill is read for the second time, this may take place at any stage prior to final adoption by the House. It may take the form of a special message, but it is normally transmitted by a Minister who rises in the House and states: "His/Her Excellency the Governor General has been informed of the purport of this bill and has given his/her consent, as far as Her Majesty's prerogatives are affected, to the consideration by Parliament of the bill, that Parliament may do therein as it thinks fit". If consent is not given in advance, the Speaker will refuse to put the question for passage at third reading. <u>If, through inadvertence, a bill requiring Royal Consent were to pass all its stages in the House without receiving consent, it would be necessary to declare the proceedings in relation to the bill null and void.</u> [Plaintiff's emphasis.]

[42] The Defendants do not take issue with OLCN's description of this convention, as applying to bills affecting the prerogatives, hereditary revenues, or personal property or interest of the Sovereign, but they deny that it has any application to the present case.

[43] OLCN acknowledges that these arguments, surrounding its position that the Governor General has breached constitutional duties, are novel, but submits that this is not an impediment to their justiciability and that they should not be foreclosed on a motion to strike. The Defendants agree that the novelty of OLCN's claim should not militate against it, but they submit that novel claims must still present a reasonable cause of action to survive challenge under Rule 221. The Defendants take the position that OLCN's arguments surrounding the role of the Governor General are inconsistent with Canada's system of responsible government and that, in any event,

the duties alleged to be borne by the Governor General would all occur within the context of the legislative process, making it clear that a claim based on those duties is not justiciable.

[44] In relation to OLCN's position on the convention of royal consent, the Defendants also submit that OLCN's argument, as to how the FNFTA engages a requirement for royal consent, has not been developed sufficiently to permit consideration and response. I agree that OLCN has provided little elaboration upon this argument, but I will analyze it in the terms in which it has been advanced. This component of OLCN's claim is set out in paragraphs 78 and 79 of the Statement of Claim, reproduced earlier in these Reasons. In its Memorandum of Fact and Law submitted in support of this appeal, OLCN describes this aspect of its claim as follows:

> 43. Further to the constitutional imperative for the Crown to consult, there is another constitutional convention requiring Royal Consent to the discussion of the *FNFTA*. Bills affecting the prerogatives, hereditary revenues, personal property or interest of the Sovereign require Royal Consent. When the *FNFTA* was brought before Parliament as Bill C – 27, in circumstances where Royal Consent was never sought or given, even though the Bill curtailed the Governor General's Prerogative and thus his ability to abide by the letter and spirit of the Treaty. The Governor General's lack of consent on behalf of Her Majesty in respect of the *FNFTA* is another nonfeasance that further demonstrates a constitutionally improper abdication of the Governor General's role to preserve and use the Crown prerogative as necessary to protect the Plaintiff's Treaty rights.

[45] I have difficulty identifying a reasonable cause of action asserted in paragraph 78 and 79 of the Statement of Claim, even with the benefit of the elaboration in OLCN's Memorandum of Fact and Law. Paragraph 79, expressed as an alternative allegation, asserts that the Governor

General did not give royal consent to the FNFTA and thereby fulfilled his duty to OLCN. Certainly this assertion cannot give rise to a claim against the Governor General.

[46] Paragraph 78, in contrast, asserts that the Defendants (which include the Governor General) passed the FNFTA into law without royal consent and that this omission represents a departure not in accordance with the honour of the Crown. OLCN's Memorandum explains its position, that royal consent was required, with an assertion that the legislation curtails the royal prerogative and the Governor General's ability to abide by the Treaty. OLCN asserts that the lack of royal consent is an omission which represents an abdication of the Governor General's responsibility to protect its Treaty rights. However, it is not clear how the Governor General's lack of consent to the proposed legislation can possibly support a cause of action against him. It would presumably be OLCN's position that the Governor General should not have granted consent to the bill. The uncontroverted facts are that no royal consent was sought and none was given. It is therefore plain and obvious to me that these facts cannot support a cause of action against the Governor General based on this convention.

[47] OLCN's arguments surrounding royal consent, as well as its arguments based on a Sovereign's right to be consulted, to encourage, and to warn, also present the same difficulty that was the basis for the Prothonotary's conclusion that the claim against the Governor General was not justiciable. These arguments all relate to roles that OLCN submits the Governor General had, or should have had, in the course of the legislative process. As explained by the Federal Court of Appeal in paragraph 60 of *Courtoreille*, reproduced in full earlier in these Reasons, the legislative process, from a bill's very inception to its receipt of royal assent, is a matter solely

within the purview of Parliament. The responsibilities that OLCN seeks to ascribe to the Governor General's office all clearly fall within the parameters of the legislative process, with which the judicial branch of government should not interfere.

[48] As with OLCN's argument that the Governor General is obliged to independently assess the constitutionality and legality of a bill before granting assent, I find these additional proposed responsibilities to be problematic in the context of Canada's modern constitutional monarchy. However, as acknowledged by OLCN, these are novel propositions on which there is a paucity of authority, and it is unnecessary for me to reach a conclusion on the application of responsibilities that, even if they were applicable to the present case, would clearly not be justiciable. Just as the granting of royal assent and the degree of consultation undertaken in the course of the legislative process are not justiciable, it would not be within the Court's purview to supervise the roles that OLCN's novel arguments would ascribe to the Governor General.

[49] In response to the Defendants' argument that these roles are all part of the legislative process and therefore not justiciable, OLCN points out that the relief it is seeking against the Governor General is limited to a declaration. It asks that the Court declare that the Governor General has failed to fulfill his duties to protect OLCN and to adhere to and fulfill its Treaty rights. I do not consider the fact that OLCN seeks only declaratory relief to be of any assistance to it. I appreciate that, as argued by OLCN, Rule 64 of the *Federal Courts Rules* provides that no proceeding is subject to challenge on the ground that only a declaratory order is sought and that the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed. However, for the Court to issue a declaration, the

subject of that relief must still be an issue which is justiciable by the Court (see, e.g. *Black v Canada (Prime Minister)* (2001), 47 OR (3d) 532 (Ont Sup Ct J), aff'd 54 OR (3d) 215 (Ont CA); *Nickerson v Nickerson* (1991), OJ No 1188 (Ont Gen Div)). The Court's jurisdiction to grant a declaration does not apply to non-justiciable issues any more than its jurisdiction to grant prerogative writs or other more active forms applies to such issues.

[50] It is accordingly my conclusion that the Prothonotary was correct in finding that it is plain and obvious that OLCN's Statement of Claim discloses no reasonable cause of action against the Governor General. I appreciate that the Prothonotary's Decision did not analyze some of the arguments advanced by OLCN in this appeal, surrounding royal consent and a duty to warn; however, those arguments have failed on the same basis as those related to royal assent and a duty to consult. As correctly found by the Prothonotary, the Governor General's role in the legislative process is not justiciable. This appeal must therefore be dismissed and the Prothonotary's Order will remain unaltered. In so concluding, I note that I also share the view expressed by the Prothonotary at the conclusion of the Decision, that striking the claim against the Governor General does not leave OLCN without any recourse. Their challenge to the constitutionality of the FNFTA remains to be adjudicated in this action. For that matter, I read the Statement of Claim as alleging that not only the Governor General, but also the other Defendants, are in breach of obligations arising from the honour of the Crown, fiduciary duties, and a duty to consult. As such, those causes of action, that OLCN sought to advance against the Governor General, also remain to be adjudicated against the other Defendants.

VII. Costs

[51] The Prothonotary awarded costs of the motion before him, fixed in the amount of $1000.00 inclusive of disbursements and taxes, to the Defendants in the cause. Each of the parties sought costs in this appeal but left the amount to the discretion of the Court, although OLCN proposed a figure in the range of $1000.00 to $4000.00. I adopt the same approach as the Prothonotary, awarding all-inclusive costs of $1000.00 to the Defendants in the cause.

ORDER IN T-2428-14

THIS COURT'S JUDGMENT is that the Plaintiff's motion, appealing the Order of Prothonotary Lafrenière dated May 9, 2017, is dismissed, with costs to the Defendants in the cause, fixed in the amount of $1000.00 inclusive of disbursement and taxes.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2428-14
STYLE OF CAUSE:	ONION LAKE CREE NATION AS REPRESENTED BY ITS DULY ELECTED OKIMAW FOX, AND COUNCIL V THE GOVERNOR GENERAL OF CANADA, HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN DEVELOPMENT CANADA, AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	NOVEMBER 8, 2017
ORDER AND REASONS:	SOUTHCOTT J.
DATED:	NOVEMBER 20, 2017

APPEARANCES:

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