Federal Court  Cour fédérale

Date: 20211125

Docket: T-69-20

Citation: 2021 FC 1302

Ottawa, Ontario, November 25, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

GEORGE FRANK QUINN, FLOYD WILLIAM QUINN, FRANCES DOREEN WABASCA, VIOLET ANDRES AND THE PASS-PASS-CHASE (PAHPAHSTAYO) FIRST NATION ASSOCIATION OF ALBERTA BAND 136

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] The plaintiffs claim to represent descendants of the Papaschase First Nation, which was dissolved in the late 19th century. Prior to the dissolution, several members of the Papaschase First Nation, including some who were minors at the time, took scrip. In this action, the plaintiffs allege that at the relevant time, the *Indian Act* did not authorize the taking of scrip by minors. On

behalf of the descendants of those minors who took scrip, they seek damages, an accounting of profits and declarations.

[2] A case management judge, however, struck their statement of claim and denied leave to amend it. She held that the statement of claim constituted an abuse of process, because it was an attempt to relitigate matters that were the subject of a decision the Supreme Court of Canada made thirteen years ago. Despite the fact that the precise issue of scrip taking by children was not raised in the previous action, she found that the underlying issues were the same.

[3] The plaintiffs now appeal the decision of the case management judge. I am dismissing their appeal, because the case management judge properly stated the law regarding abuse of process by relitigation and made no palpable and overriding error in concluding that the present action was essentially an attempt to relitigate matters raised in the previous action.

I. Background

A. *The Dissolution of the Papaschase First Nation*

[4] The facts underlying the present action have been recounted elsewhere and I will only set out what is necessary for the understanding of these reasons.

[5] In 1877, the Papaschase First Nation adhered to Treaty 6. It was granted reserve lands around present-day Edmonton. In 1886, however, Chief Papaschase and several members of the

First Nation took scrip. In other words, they withdrew from treaty and were no longer considered to have Indian status. It appears that children were included among those who took scrip.

[6] In 1889, the federal government obtained the surrender of the Papaschase reserve from the few remaining members. A few years later, an agreement was reached with the last remaining members for them to join Enoch First Nation, and for the proceeds of the sale or lease of Papaschase reserve to be paid to Enoch.

B. *The Lameman Action*

[7] This is not the first time that these facts are brought before the courts. In 2001, a group of plaintiffs led by Ms. Rose Lameman brought an action in the Alberta Court of Queen's Bench on behalf of all the descendants of the Papaschase First Nation. The plaintiffs in that action alleged, among other things, that the federal government should not have allowed Chief Papaschase and his followers to take scrip; that the surrender of the reserve was invalid or in breach of a fiduciary duty and that the proceeds were mismanaged; and that the Papaschase First Nation is still in existence.

[8] This action was met by a motion for summary judgment. Justice Slatter of the Alberta Court of Queen's Bench found that the action did not raise a genuine issue for trial. He therefore granted that motion and dismissed large portions of the claim, with one exception that is not relevant for our purposes: *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655. This decision was overturned by the Alberta Court of Appeal: *Lameman v Canada (Attorney General)*, 2006 ABCA 392. Then, the Supreme Court of Canada

allowed the appeal and reinstated Justice Slatter's decision: *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372 [*Lameman*].

[9] It must be emphasized, however, that the Supreme Court dismissed the action on grounds that were much narrower than those relied upon by Justice Slatter. The Court noted that limitation periods apply to claims made by Indigenous peoples. At paragraph 17, it held that the following facts led inevitably to a finding that the action was time-barred:

> The evidence filed by the government establishes that in the 1970s the causes of action now raised would have been clear to the plaintiffs, exercising due diligence. […] Indeed, in 1979 the Enoch Band provided funding to Kenneth James Tyler to write a Master's thesis on the events surrounding the surrender of the Papaschase Reserve. The Tyler Thesis covers most if not all of the facts that form the basis of the claims in this action. […] The chambers judge, on all the evidence, concluded that any interested party exercising due diligence could have uncovered the same facts Mr. Tyler did.

C. *The Present Action and the Decision Under Appeal*

[10] In 2020, the present plaintiffs, who claim to be descendants of members of the Papaschase First Nation who were minors when they took scrip, brought this action. They initially claimed that the *Indian Act*, in particular its provisions regarding scrip, is unconstitutional, and that "luring Treaty Indians to take scrip" was contrary to the honour of the Crown. They sought a declaration that the *Indian Act* is unconstitutional, that the Papaschase First Nation is entitled to land under Treaty 6 and that it is entitled to be reconstituted under the *Indian Act*.

[11] The defendant moved to strike the statement of claim because it disclosed no reasonable cause of action. The plaintiffs conceded that their statement of claim should be struck, but moved to amend it. Their proposed amended statement of claim included additional allegations pertaining to the fact that certain ancestors of the plaintiffs were minors when they took scrip. They also wanted to add a plaintiff who is a descendant of a member of the Papaschase First Nation who was a minor when he took scrip. They alleged that the taking of scrip by children was against the provisions of the *Indian Act* then in force and constituted a breach of fiduciary duty or a conflict of interest on the part of the Crown. Instead of declarations, the proposed amended statement of claim seeks damages in excess of $1 billion, as well as an accounting of profits resulting from the sale of the reserve.

[12] My colleague Prothonotary Mireille Tabib, in her role as case management judge, heard both the defendant's motion to strike and the plaintiffs' motion to amend. It appears that, in their written and oral submissions, the plaintiffs made further suggestions for amending the statement of claim. In particular, they propose to seek various declarations to the effect that children could not take scrip in 1886 and that their descendants remained entitled to Indian status.

[13] Given the plaintiffs' concession, the case management judge allowed the motion to strike: *Quinn v Canada (Attorney General)*, 2021 FC 342. She also dismissed the plaintiffs' motion to amend, as she was of the view that the proposed amendments raised claims that were substantially determined in *Lameman* and constituted an abuse of process.

II. Analysis

[14] After describing the standard upon which this Court reviews decisions made by case management judges, I will explain why the case management judge correctly stated the relevant legal rules and made no palpable and overriding error in applying them. Thus, I confirm her conclusion that the present claim constitutes an abuse of process. I also explain why the plaintiffs cannot escape limitation periods by seeking certain declarations. Lastly, I dispose of certain other arguments raised by the plaintiffs.

A. *Standard of Review*

[15] In *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331, the Federal Court of Appeal held that the standard of review established by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, applies to appeals from decisions of prothonotaries, including when they act as case management judges. It summarized this standard as follows, at paragraph 66:

> …with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. […] with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness.

[16] It may also be useful to set out explicitly certain legal parameters of the task that the case management judge had before her. Rule 221 of the *Federal Courts Rules*, SOR/98-106, allows the Court to strike a pleading that discloses no reasonable cause of action (subparagraph (1)(a)) or is an abuse of the process of the Court (subparagraph (1)(f)). Under Rule 221(1)(a), no evidence is

admitted, the facts alleged in the pleading must be taken as true and the Court must decide if the claim has no reasonable prospect of success: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 17, [2011] 3 SCR 45. Under Rule 221(1)(f), the Court has a wider discretion to decide whether the claim is an abuse of process and may receive evidence in this regard.

[17] According to Rule 75, a party may seek leave to amend a pleading. The Court's discretion in this regard is exercised according to a number of relevant factors. Most importantly, leave to amend will not be granted if the amended proceeding does not have a reasonable prospect of success: *Teva Canada Limited v Gilead Sciences Inc*, 2016 FCA 176 at paragraph 29; *McCain Foods Limited v JR Simplot Company*, 2021 FCA 4 at paragraph 20 [*McCain Foods*]. In other words, an amendment should not be allowed if it is liable to be struck out: *McCain Foods*, at paragraph 22.

B. *Abuse of Process: The Law*

[18] The plaintiffs do not take issue with the case management judge's statement of the law regarding abuse of process through relitigation. It is nevertheless useful to give a concise overview of the relevant principles. In *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at paragraph 37, [2003] 3 SCR 77, the Supreme Court of Canada described this doctrine as follows:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[19] In this regard, the case management judge noted a previous judgment of this Court, where it is said that "the repeated attempts by the applicant to litigate essentially the same dispute, by naming slightly different parties, or applying in different capacities and relying on slightly different statutory provisions, when earlier attempts have failed, also constitute an abuse of the process of this Court": *Black v Creditors of The Estate Nsc Diesel Power Inc* (2000), 183 FTR 301 at paragraph 11. See also *Vautour v New Brunswick*, 2021 NBCA 4 [*Vautour*].

[20] Thus, whether a claim is sufficiently similar to a previously determined claim to constitute an abuse process is a question of mixed law and fact. I now turn to this issue.

C. *Abuse of Process: Application to This Case*

[21] Two findings of the case management judge are critical to her conclusion that the action constitutes an abuse of process.

[22] First, she found that there is substantial identity of parties in the *Lameman* action and in the present case. At paragraph 16 of her reasons, she wrote:

> It is clear that the lead plaintiff in *Lameman* intended to represent and assert claims on behalf of Quinn, Gladue, and the same group which they and the Association wish to represent in this case. The proposed Plaintiffs in this action, as the proposed plaintiffs in *Lameman*, are clearly not intending to restrict their action to their own personal claims, but to act as representatives of the same group or subgroup of descendants. To the extent the causes of actions or issues proposed to be raised in the amended pleadings were in their essence raised and determined in *Lameman*, it would be an abuse of process to allow them to be raised again by, and on behalf of, the same persons on whose behalf the prior litigation was ostensibly brought.

[23] Second, after a detailed review of the claims in *Lameman* and the present action, she found that the causes of action in both cases are substantially similar. At paragraph 41, she wrote:

> … the broad issue of the legal entitlement to scrip of all members of the Papaschase Band who accepted scrip in the period of 1885-1886, and the validity of their withdrawal from Treaty was very clearly raised as a cause of action in *Lameman*. […] A cause of action, based on a challenge to the validity of all original Band members' taking of scrip, was thus litigated and determined.

[24] These findings are sufficient to justify the conclusion that the present action constitutes an abuse of process. The plaintiffs do not challenge the first finding. Indeed, on the face of the pleadings, both actions seek to include descendants of the initial members of the Papaschase First Nation. It may be that the *Lameman* group is wider, as the present plaintiffs seek to represent only the descendants of "treaty children," namely, those members of Papaschase who were minors when they took scrip or when their parents took scrip on their behalf. Nevertheless, there need not be perfect identity between the plaintiffs in both actions. It is enough that the plaintiff group in the present action is a subset of the plaintiff group in *Lameman*. In my view, the case management judge did not make a palpable and overriding error in comparing the two groups. I would only add that the potential ramifications of this action for persons whose ancestors took scrip elsewhere in Canada has no bearing on the comparison, as the plaintiffs are seeking remedies only in respect of Papaschase First Nation descendants.

[25] However, the plaintiffs forcefully argue that the case management judge erred with respect to the second finding. They reiterate their submissions to the effect that the *Indian Act*

then in force did not allow children to take scrip. They assert that the *Lameman* plaintiffs did not raise this specific issue.

[26] Nevertheless, I am unable to find any palpable and overriding error in the case management judge's decision. In this regard, deciding whether a claim constitutes an abuse of process by relitigation requires a comparison between two claims, to determine whether the second is sufficiently similar to the first. This exercise involves a measure of subjective appreciation, to assess whether the similarities outweigh the differences. It is for the case management judge to make this call, unless she makes a palpable and overriding error.

[27] In the excerpt quoted above, the case management judge noted that the taking of scrip and the withdrawal from treaty were a central component of the *Lameman* case. In light of the description of the claim found in Justice Slatter's judgment, the case management judge did not err. Thus, there was a sound basis for comparing *Lameman* with the present action.

[28] The case management judge was also mindful of the differences between the two actions. She took into account the fact that the argument that children could not take scrip was not put forward in *Lameman*. Yet, she found that the broad issue of the validity of taking scrip was raised in that case, and that the doctrine of abuse of power covers situations where the initial plaintiffs failed to raise a specific argument arising out of the same general factual matrix. Thus, according to her, the issue of the validity of children taking scrip could and should have been raised in *Lameman*.

[29] In so finding, the case management judge made no palpable and overriding error. By way of analogy, in *Vautour*, the New Brunswick Court of Appeal applied the doctrine of abuse of process by relitigation, where the first claim pertained to an aboriginal right to fish, and the second claim also involved aboriginal title. Yet, the Court held that the underlying issue, the existence of a Métis community in that province, was the same in both cases.

[30] These findings were sufficient to justify the conclusion that the plaintiffs' proposed amended statement of claim constituted an abuse of process and to dispose of the plaintiffs' motion to amend accordingly. The case management judge, however, went further. She found that the statement of claim should be struck not only because it constituted an abuse of process, but also because it disclosed no reasonable cause of action. In reaching this conclusion, she relied heavily on Justice Slatter's findings that the claim before him was time-barred and that present-day descendants would lack standing to challenge their ancestors' decision to take scrip. In my view, this was unnecessary and problematic, for two reasons.

[31] First, only a narrow portion of Justice Slatter's judgment was affirmed by the Supreme Court. Contrary to what Justice Slatter found, the Supreme Court assumed that the claim raised triable issues and that the plaintiffs had standing: *Lameman*, at paragraph 12. It nevertheless found that the claim was time-barred because the cause of action could have been discovered in the 1970s, not in the 1880s as Justice Slatter held. Once the Supreme Court decides a case, lower court judgments in that case are no longer binding: *R v Sparrow*, [1990] 1 SCR 1075 at 1084 [*Sparrow*]. Thus, in the end, the only ground for the dismissal of the *Lameman* action was the limitation period.

[32] Second, on a motion to strike, a finding that the statement of claim discloses no reasonable cause of action cannot be based on factual evidence; it has to be grounded in the pleadings themselves. Yet, the Supreme Court's conclusion that the *Lameman* action was time-barred is based on a set of factual findings. An argument that the present claim is time-barred would be more properly considered on a motion for summary judgment. The case management judge noted this difficulty at paragraph 59 of her reasons. In any event, the present action constitutes an abuse of process because it raises the same claims as in *Lameman*, which were dismissed because they were time-barred. It does not add much to say that the present cause of action would be time-barred even if it did not constitute an abuse of process.

[33] For the same reasons, it does not assist the plaintiffs to assert that the case management judge misinterpreted Justice Slatter's judgment with respect to certain of his specific findings. In the end, what is relevant is the nature of the claims put forward in *Lameman*, not the specific reasons for which they were dismissed.

[34] Thus, I conclude that the case management judge did not make any palpable and overriding error with respect to the two main findings underlying her conclusion that the plaintiffs' statement of claim is an abuse of process.

[35] I need to dispose of an additional argument put forward by the plaintiffs. One of the plaintiffs is the Pass-Pass-Chase (Pahpahstayo) First Nation Association of Alberta Band 136. It seeks public interest standing to advance the claims of the descendants of Papaschase's initial members. At paragraph 60 of her decision, the case management judge noted that because these

claims constituted an abuse of process, granting standing to the Association would have no prospect of success. I agree. If the underlying claim constitutes an abuse of process, it serves no purpose to grant standing to the Association to pursue it.

D. *Declaratory Relief and Constitutional Obligation*

[36] The plaintiffs also raise an issue that the case management judge did not address. They assert that they intend to amend their statement of claim to seek declarations. According to *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14, [2013] 1 SCR 623 [*Manitoba Métis*], limitation periods would not apply to proceedings where declaratory relief is sought.

[37] The defendant objects to this, because it would be unfair to allow the plaintiffs to raise a new argument on appeal. It is unclear whether the plaintiffs raised this argument in their oral submissions before the case management judge and, if so, whether it was presented in the same manner before me. In any event, I do not think that it is unfair to allow the plaintiffs to raise this argument now. The unfairness of raising a new argument on appeal usually results from the other party's inability to adduce evidence to counter the new argument: *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19 at paragraphs 32-34, [2002] 1 SCR 678. Thus, "in order to raise a new issue, an appellate court must be satisfied that there is a sufficient basis in the record on which to resolve the issue": *R v Mian*, 2014 SCC 54 at paragraph 51, [2014] 2 SCR 689. Here, we are dealing with a motion to strike that must be decided based on the pleadings only. Thus, a party cannot complain that, had it been made aware of the new argument, it would have brought additional evidence.

[38] Nevertheless, the plaintiff's argument is without merit, because it overstates the scope of *Manitoba Métis.* That case dealt with the implementation of a constitutional obligation to provide land for the children of the Métis inhabitants of the province. That obligation was enshrined in the *Manitoba Act, 1870*, to which the *Constitution Act, 1871* gave constitutional status.

[39] When the Court dealt with the issue of limitation periods, it noted that it had always considered that legislation could be declared unconstitutional irrespective of limitation periods. It extended this rule to executive action. At paragraph 135, it wrote:

> Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct.

[40] The Court in *Manitoba Métis* also dealt extensively with the concept of honour of the Crown. At paragraph 70, it noted that the honour of the Crown is at stake when the Constitution contains an explicit guarantee in favour of Indigenous peoples. However, the Court did not rely on the honour of the Crown to conclude that limitation periods do not foreclose a declaration that the Crown's conduct is unconstitutional. Neither did it suggest that limitation periods would not apply whenever the honour of the Crown is engaged. In truth, at paragraph 135, the Court reiterated its previous holding that limitation periods established by provincial legislation apply to claims made by Indigenous peoples: see *Lameman*, at paragraph 13.

[41] Likewise, at paragraph 141 of *Manitoba Métis*, the Court noted that the policy rationales underlying limitation periods are not always relevant in the context of Indigenous claims. Nevertheless, the Court did not suggest that limitation periods would be abolished in Indigenous

matters, beyond the narrow exception it carved out with respect to the constitutionality of Crown conduct.

[42] In this case, the plaintiffs do not allege that the impugned conduct breached any constitutional provision then in force. They are simply alleging that the *Indian Act* then in force did not allow children to take scrip. While they link this claim to treaty entitlements, they fail to link it to any constitutional enactment. Section 35 of the *Constitution Act, 1982*, which recognizes and affirms treaty rights, cannot be given retroactive effect: *Sparrow*, at 1091.

[43] Thus, the plaintiffs' intention to amend their statement of claim to seek declarations does not set aside limitation periods. It does not affect the validity of the decision of the case management judge.

E. *Leave to File a Fresh Claim*

[44] In the event their appeal is dismissed, the plaintiffs are seeking leave to file a fresh statement of claim seeking an accounting of the proceeds of the sale of Papaschase's reserve. They did not explain the basis for seeking such an order. Nor did they provide me with a draft statement of claim. In any event, the plaintiffs do not need leave of the Court to file an entirely new statement of claim. Whether this hypothetical statement of claim amounts to a relitigation of the *Lameman* action is an issue for another day. I will not make any order in this regard.

F. *Costs*

[45] In their motion for appeal of the case management judge's decision, the plaintiffs assert that the award of costs against them in the amount of $4750 is punitive and unreasonable. In their written and oral submissions, the plaintiffs did not expand on this issue.

[46] According to Rule 400, the case management judge has full discretion regarding costs. In making her award, she took into consideration the "diffuse and changing nature" of the plaintiff's claim. In my view, this was reasonable.

G. *Extension of Time*

[47] Given the decision I have reached on the merits of the appeal, it is not strictly necessary to rule on the plaintiffs' motion for an extension of time.

III. Disposition

[48] As the case management judge correctly stated the applicable law and made no palpable and overriding error in its application, I must dismiss the plaintiffs' appeal.

[49] The defendant is seeking the costs of this motion. There is no reason to depart from the usual rule, whereby the losing party pays the costs of the prevailing party. I am of the view that an amount of $2000 would be reasonable in this regard.

ORDER in T-69-20

THIS COURT ORDERS that:

1. The plaintiffs' motion for appeal of the case management judge's decision dated April 20, 2021, is dismissed.

2. The plaintiffs are condemned to pay costs to the defendant in the amount of $2000, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-69-20
STYLE OF CAUSE:	GEORGE FRANK QUINN, FLOYD WILLIAM QUINN, FRANCES DOREEN WABASCA, VIOLET ANDRES AND THE PASS-PASS-CHASE (PAHPAHSTAYO) FIRST NATION ASSOCIATION OF ALBERTA BAND 136 v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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DATED:	NOVEMBER 25, 2021

APPEARANCES:

Darlene M. Misik	FOR THE PLAINTIFFS
Amy Martin-LeBlanc Tessa la Bastide	FOR THE DEFENDANT

SOLICITORS OF RECORD:

St. Paul Legal Services Barristers and Solicitors St. Paul, Alberta	FOR THE PLAINTIFFS
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT