Date: 20061012

Docket: T-66-86

Citation: 2006 FC 1218

Ottawa, Ontario, this 12th day of October, 2006

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAWRIDGE BAND

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN=S ASSOCIATION OF CANADA

Interveners

Docket: T-66-86-B

BETWEEN:

TSUU T=INA FIRST NATION

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

**CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN=S ASSOCIATION OF CANADA**

Interveners

REASONS FOR ORDER AND ORDER

THE MOTION

[1] The Plaintiffs are seeking an adjournment of the trial date in these proceedings (presently set at January 24, 2007) to March 12, 2007.

[2] The sole ground for this request is that the Plaintiffs have filed an application for leave to appeal the decision of the Federal Court of Appeal dated June 19, 2006, to the Supreme Court of Canada and they want the Court to await the outcome of that leave application. They say that, if leave is granted and the Supreme Court of Canada hears their appeal, the outcome could substantially re-define the issues before the Court in these actions.

[3] The Federal Court of Appeal decision of June 19, 2006 dismissed the Plaintiffs' appeal from my decisions of November 7, 2005 and November 8, 2005.

BACKGROUND

[4] The full background to this motion is contentious and convoluted and I have recited it several times in previous pre-trial motions. The root of the problem is a fundamental difference of opinion between the Plaintiffs and the other participants as to what these actions involve concerning self-government. That difference of opinion came to light in 2004 on the eve of the trial which was originally due to commence on January 10, 2005.

[5] The Crown and the Interveners say that the only issue in the actions as pleaded is whether *Bill C-31* infringes the Plaintiffs' aboriginal rights to determine membership. They agree that, if such a right is established, it may be an incident of the Plaintiffs' right of self-government.

[6] The Plaintiffs, on the other hand, take the view that in their pleadings they have asserted a right to control membership that can be proved not only directly (i.e. on the basis of evidence pertaining to the Plaintiffs' laws, traditions, customs and practices) but also by establishing a broad right to self-government that is inherent, aboriginal, recognized by treaties, and protected by section 35(1) of the *Constitution Act, 1982*. The Plaintiffs also say that they have pleaded in the alternative that their right to control membership is parasitic upon their broad right to self-government.

[7] This turbulent disagreement over the extent to which self-government appears in the Plaintiffs' pleadings as presently drafted came to a head before me when I was asked to make decisions in motions brought by the Crown in 2004 and 2005 concerning the adequacy and relevance of witness will-say statements and an expert report produced by the Plaintiffs in

accordance with a pre-trial order made by Justice Hugessen of March 26, 2004. Justice Hugessen was the case management judge between 1997 (the year in which these actions were returned for re-trial by the Federal Court of Appeal) and 2004 (the year in which I was appointed trial judge). Notwithstanding his considerable experience in such matters, Justice Hugessen encountered significant resistance to his attempts to move these actions towards trial. The record reveals repeated warnings and castigations over needless delays and lack of cooperation, not all of which were directed at the Plaintiffs alone. All in all, as the passage of approximately nine years since the Federal Court of Appeal decision directing re-trial suggests, this has been a very difficult dispute to bring to trial. And notwithstanding that Justice Hugessen ordered a trial date of January 10, 2005, the wrangling and the resistance continued even after my appointment as trial judge in 2004 so that, for one reason or another, the trial commencement date had to be re-set at January 24, 2007.

[8] Since my appointment as trial judge, the principal focus of the dispute has been the scope of the pleadings and the extent to which the Plaintiffs have incorporated into their claims a broad right of self-government. In other words, after seven years of case management, discovery and trial preparation, the parties suddenly discovered that an enormous divide existed between them as to what they were actually litigating. And that issue came to the fore when I was asked to review and exclude some of the witnesses that the Plaintiffs revealed they intended to call at trial.

[9] As part of the exercise of examining the proposed will-says and the expert report of Dr. Martinez produced by the Plaintiffs, the participants asked me to examine the scope of the

pleadings to see if the Plaintiffs had indeed asserted a broad claim to self-government that would justify the voluminous evidence they were proposing to call on that issue.

[10] My decisions of November 7, 2005 and November 8, 2005 dealt with these matters. I concluded for several reasons that the Plaintiffs should not be calling Dr. Martinez and certain of the other witnesses they wanted to call, and that some of the proposed evidence in will-say statements was not relevant to my reading of their pleadings. This was because, after reviewing the pleadings, the history of the dispute, representations made to the Court by the Plaintiffs' former counsel, and the relevant jurisprudence, I could not accept that the pleadings contained the broader self-government claims that the Plaintiffs now wish to assert.

[11] The Plaintiffs took my decisions on these issues before the Federal Court of Appeal who concluded that I had made no reversible error in interpreting the pleadings or in excluding witnesses and testimony on the basis of the will-say statements or the expert opinion of Dr. Martinez. The Federal Court of Appeal decision was rendered June 19, 2006.

[12] The Plaintiffs have now applied for leave to the Supreme Court of Canada to appeal the Federal Court of Appeal decision. We do not know when that leave application will be heard but, based upon the experience of counsel, we likely will not have a leave decision before the trial begins on January 24, 2007. Also, of course, if leave is granted, the Plaintiffs will ask the Court for a further adjournment until the Supreme Court of Canada has heard their appeal and rendered judgment. So this could mean a significant delay of the proceedings in this Court.

[13] Another important factor is that the Plaintiffs have now notified the other participants and the Court that, if they don't get leave to appeal to the Supreme Court of Canada, they are considering several options, one of which is to discontinue the existing actions and commence other actions either in the Federal Court or the Court of Queen's Bench of Alberta.

[14] There have been previous hints that this might occur and, at a trial management conference on August 23, 2006, Plaintiffs' counsel speculated openly on the various options available to the Plaintiffs. It also came up as part of an apprehension of bias motion brought before me by the Plaintiffs in 2005 that raised the possibility of transferring the action to Alberta. But this issue is now beyond speculation. The other participants and the Court, as of the date of the present motion, are now clearly on notice that withdrawal of the actions by the Plaintiffs is a possibility.

[15] In effect, then, the Plaintiffs want the Court to adjourn the trial until the leave application to the Supreme Court of Canada has been determined. If they are successful in being granted leave then they may continue their actions in the Federal Court. If they are not successful, then they may discontinue these actions. There are other options, of course, and the Plaintiffs have now been forthright in placing them before the Court and the other participants. But it is the possible discontinuance of the present actions that appears to me to have the most consequence for the motion to adjourn the trial that is presently before me. Needless to say, it also presents the other participants in these actions, as well as the Court, with enormous problems in preparing for a trial that, after some nine years of expenditure in terms of time and resources, may not take place if the Plaintiffs decide to withdraw.

[16] In their application for leave to the Supreme Court of Canada, the Plaintiffs have raised the following issues with respect to the Federal Court of Appeal decision of June 19, 2006:

1. How Must Pleadings Asserting Aboriginal and Treaty Rights of Self-Government be Interpreted?
2. Does s. 35(1) of the *Constitution Act, 1982*, Recognize and Affirm Aboriginal Rights of Self-Government?
3. Are Claims to Aboriginal Self-Government Justiciable Before the Courts of Canada?
4. Must All Jurisdictional Rights of Aboriginal Self-Government be Individually Proven on the Basis of the *Van der Peet* Criteria?
5. Are Aboriginal Rights of Self-Government "Aboriginal Rights", "Treaty Rights" or Incidents of Aboriginal Title for the purposes of s. 35(1)?
6. How May Aboriginal Rights to Self-Government be Proven?
7. May Specific Rights, Such as the Right to Determine Membership, be Established as "Parasitic" or "Necessarily Incidental" to an Aboriginal Right of Self-Government?
8. Is a First Nation's Right to Determine Their Own Membership an Incident of the Aboriginal Right of Self-Government Recognized and Affirmed by s. 35(1) of the C*onstitution Act, 1982*?

[17] At this stage, of course, we do not know the grounds upon which leave might be granted; and the Plaintiffs' assessment of what the Federal Court of Appeal decided is very much open to debate. Nor do we know how the Supreme Court of Canada will handle the other grounds that I

gave in my decisions, and that were not reversed by the Court of Appeal, for excluding witnesses and evidence because of the Plaintiffs' failure to comply with previous Court orders. So everything remains highly speculative at the time of the present motion for an adjournment.

[18] The Plaintiffs want to keep their options open, and they say they fear some detriment if the trial begins on January 24, 2007. Obviously, the Court can see that the Plaintiffs might gain strategically from an adjournment, but the issue is whether they satisfy the jurisprudence for postponing the commencement of a trial that has taken some nine years to arrange since the Federal Court of Appeal decided to return the actions for re-trial in 1997, and that has taken some twenty years since these actions originally began in 1986.

ANALYSIS

Adjournment or Stay?

[19] The Plaintiffs say they have brought this motion under Rule 36(1) of the *Federal Courts Rules, 1998*:

36(1) A hearing may be adjourned by the Court from time to time on such terms as the Court considers just.	36(1)La Cour peut ajourner une audience selon les modalités qu'elle juge équitables.

[20] This looks straightforward enough but the Crown says that, in truth, the Plaintiffs are asking me to vary my direction setting the trial date at January 24, 2007, so that the motion should be considered under Rule 399(2)(a) of the *Federal Courts Rules, 1998*:

399(2) On motion, the Court may set aside or vary an order	399 (2) La Cour peut, sur requête, annuler ou modifier

	une ordonnance dans l'un ou l'autre des cas suivants :
(a) by reason of a matter that arose or was discovered subsequent to the making of the order; or	*a*) des faits nouveaux sont survenus ou ont été découverts après que l'ordonnance a été rendue;
(b) where the order was obtained by fraud.	*b*) l'ordonnance a été obtenue par fraude.

[21] Even more interesting, NSIAA says that the Plaintiffs and the Crown are both misguided; the reality is that this motion is for a stay pending a leave application to the Supreme Court of Canada and so must be brought before the Federal Court of Appeal pursuant to section 65.1 of the *Supreme Court Act*:

65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.	65.1 (1) La Cour, la juridiction inférieure ou un de leurs juges peut, à la demande de la partie qui a signifié et déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions jugées appropriées, le sursis d'exécution du jugement objet de la demande.

[22] This disagreement is not, of course, merely academic. If the reality is that this is a stay motion, then I may be prevented from considering the merits. The Plaintiffs may have to take the matter up with the Federal Court of Appeal. If I do have jurisdiction to hear it, then I have to decide whether the matter should be considered as a stay, or under Rule 36(1) or Rule 399(2)(*a*), each of which has its own criteria, standards and jurisprudence.

[23] So, first of all, is this really a stay motion that the Plaintiffs should have taken to the Federal Court of Appeal?

[24] In support of the stay characterization, NSIAA in particular relies upon *D & B Companies of Canada Ltd. v. Canada (Director of Investigation and Research*) (1994), 58 C.P.R. (3d) 342 (C.A.), as well as the more recent decisions of Justice Blais in *Re: Zundel*, 2004 FC 198 and Justice Nadon in *Canadian Human Rights Commission v. Malo*, 2003 FCA 466.

[25] In the *D & B* case, the Federal Court of Appeal was asked to consider a stay of proceedings before the Competition Tribunal pending the hearing in the Federal Court of Appeal of an appeal from an order of that tribunal.

[26] Chief Justice Isaac in his reasons addressed the situation as follows at paras. 15-18:

> On September 28, the Appellant filed and served its appeal from that decision of the Tribunal.
>
> The Appellant, not being able to obtain the consent of the Respondent and the Intervenor to its request for an adjournment of the hearing of the application before the Tribunal, brought an application before the Tribunal seeking an adjournment of the hearing pending the hearing and disposition of the Appellant's appeal to this Court. The application was heard on October 5, 1994 and was dismissed. The reasons for decision were given by Rothstein J. as a judicial member of the Tribunal. After hearing argument, Rothstein J. concluded that in deciding the application he should apply the principles laid down in *Attorney General for Manitoba v. Metropolitan Stores (MTS) Ltd., [1987]* S.C.R. 110 and re-stated in *RJR – MacDonald Inc. v. Attorney General of Canada*, [1994] 1 S.C.R. 311. Applying those principles, Rothstein, J. concluded first that the Appellant had satisfied him that the application was not frivolous or vexatious. He then concluded that the Appellant had not shown that it would suffer irreparable harm if the application were not granted. In view of that

> conclusion, he found it unnecessary to decide whether the balance of convenience favoured the Appellant.
>
> …
>
> Following the decision the Appellant launched this motion and supported it with affidavits of Randall T. Hughes and Donald G. Easter, both of whom outlined, among other things, the harm and inconvenience that the Appellant would suffer if required to proceed with the hearing before the Tribunal before the hearing and disposition of the appeal in this Court. The Director filed no affidavits in opposition, but did make submissions opposing the motion. The Intervenor supported its opposition with the affidavit of Gian M. Fulgoni, the Chairman of the Board of the Intervenor and by the submissions of counsel.
>
> …
>
> Although based upon fresh materials, the submissions made by the parties were essentially the same as those made before the Tribunal on the motion to adjourn. I have read the reasons of Rothstein J. and am in substantive agreement with his analysis based upon *Metropolitan Stores* and *R.J.R. MacDonald*. I therefore adopt them and append a copy of his reasons herewith. I would only add that having regard to the materials filed and the submissions made, I find that the Appellant has not satisfied me that the balance of convenience is in its favour. In this respect I was influenced to a great extent by the mandatory provision in subsection (2) of the *Competition Tribunal Act* that the hearing of the application should be held informally and expeditiously as circumstances and conditions of fairness would allow.

[27] Chief Justice Isaac then dismissed the appeal. He attached to his reasons the reasons of Justice Rothstein, who was the presiding judicial member on the Competition Tribunal. In his reasons, Justice Rothstein made the following points at pages 4, 5 and 9-10:

> The threshold question is the test to be employed by the Tribunal in considering whether to grant an adjournment of proceedings pending the outcome of an appeal of an interlocutory order made by it. Counsel for the respondent submits that the test is not the same as in the case of a stay of proceedings in which a court is asked to stay the proceedings of a tribunal or a lower court. While he concedes the applicable principles are *similar* to those in the

case of a stay, he argues that the real issue is the power of the Tribunal to control its own proceedings.

…

Counsel for the Director and counsel for the intervenor submit that the test in the case of an adjournment pending appeal is the same as in the case of a stay of proceedings.

…

I agree with counsel for the Director and counsel for the intervenor. While not every request for an adjournment would be decided by application of the principles governing a stay of proceedings, certainly an adjournment pending appeal has exactly the same result as a stay pending appeal. Counsel for the respondent conceded that an alternative open to him is to seek a stay from the Federal Court of Appeal. I do not understand why the Tribunal, in considering this adjournment application, would apply different principles than the Federal Court of Appeal on the stay application, both relating to the same proceedings. I am of the view that the principles applicable to stays of proceedings, which themselves are the same as the principles applicable to interlocutory injunctions, are to be applied in the case of an application for an adjournment pending appeal.

…

In the present case, I indicated to counsel that if an adjournment were to be granted, the Tribunal could well be in a position to hear the merits of the case commencing on January 16, 1995. Such a delay is not lengthy and of itself might not be sufficient to constitute irreparable harm. However, as pointed out by counsel for the intervenor, there is no assurance that the matter could be heard commencing on that date. Perhaps the Federal Court of Appeal will not have rendered its decision by that date. Perhaps the losing party will seek to appeal to the Supreme Court of Canada. These eventualities are, of course, themselves speculative at this time. But they do give rise to the concern that the delay involved may well be longer than three months. If so, the more lengthy delay may result in irreparable harm to the public interest in the manner indicated in *RJR – MacDonald Inc.*

…

[28] The important point here for the jurisdictional issue that I have to decide is Justice Rothstein's conclusion that "while not every request for an adjournment would be decided by application of the principles governing a stay of proceedings, certainly an adjournment pending appeal has exactly the same result as a stay pending appeal."

[29] This would suggest that, if I do consider this motion, then I should keep in mind that "the principles applicable to stays of proceedings, which are themselves applicable to interlocutory injunctions, are to be applied in the case of an application for an adjournment pending appeal." Those principles are well-known and were set out by the Supreme Court of Canada in *A.G. Manitoba v. Metropolitan Stores (MTS) Ltd., Manitoba Food and Commercial Workers, Local 832 and Manitoba Labour Board*. They were restated in *RJR – MacDonald Inc. v. A.G. Canada,* [1994] 1 S.C.R. 311 at 334.

[30] If I apply those principles in the present motion, then the Plaintiffs must fail because they have adduced no evidence on relevant points. In particular, there is no real evidence of irreparable harm or that the balance of convenience favours the Plaintiffs.

[31] The Plaintiffs say in answer to the characterization of this motion as a request for a stay that "there is no merit to this suggestion." But obviously there is. The sole purpose for requesting an adjournment in this motion is to stay both actions until the Plaintiffs' leave application to the Supreme Court of Canada is considered. This is not a request for an adjournment based, for example, upon readiness issues. In fact, the Plaintiffs have been careful to separate readiness

issues from leave issues in their deliberations before the Court, and readiness issues may well form the basis of a future motion to adjourn the trial.

[32] So it looks to me as though the reality here is that the Court is being asked to consider a stay application. And the Plaintiffs, in their materials and in their argument, have not attempted to satisfy the criteria and the jurisprudence regarding a stay of proceedings.

[33] To get around this problem, and so that I can consider this motion as a simple adjournment application under Rule 36(1), the Plaintiffs have directed me to the decisions of Justice Rouleau in *Schreiber v. Canada (Attorney General)*, [1997] F.C.J. No. 1301 (T.D.) at para. 9, aff'd 1998 CarswellNat 440 (C.A.), and Justice MacKay in *Alberta v. Canada (Minister of Environment)*, [1991] F.C.J. No. 450 (T.D.) at para. 35.

[34] In the *Schreiber* case, Justice Rouleau was dealing with an adjournment motion in a situation where the Supreme Court of Canada had already granted leave in related proceedings. That is not the situation before me in this motion. No leave has yet been granted to the Plaintiffs, and leave may never be granted to the Plaintiffs. In *Schreiber*, an earlier motion to adjourn prior to leave being granted was brought, but that earlier motion was denied.

[35] In addition, there is nothing in the report of the *Schreiber* decision to suggest that Justice Rouleau was asked to consider whether he should be treating the motion before him as a stay application. The issue does not appear to have been argued, so I cannot treat the case for any

authority as to what the Court should do when the jurisprudence regarding stay applications is raised and the Court is asked to make a decision on point.

[36] But I think the Plaintiffs are correct when they say that *Schreiber* shows that Justice Rouleau entertained and granted a simple adjournment request in the following situation:

> 10. If one looks to the issues that were determined by the Federal Court of Appeal and the grounds of appeal to the Supreme Court of Canada which will eventually be determined, I am satisfied that they are so related to this application that one could almost characterize this application as sub judice. I am persuaded that not to grant the adjournment would be an unwarranted imposition of the court's resources.

[37] At this point, I am not addressing whether such an adjournment would be justified on the evidence before me in this motion. But Justice Rouleau, in *Schreiber*, granted an adjournment on the grounds that "a decision on the issue presently before the Supreme Court of Canada will render this exercise academic."

[38] The argument before me is not that an issue presently before the Supreme Court of Canada will render the actions in the present case academic. But this does not affect the Plaintiffs' point that Justice Rouleau was willing to grant an adjournment in a situation where, according to the Interveners in the present motion, he should have applied the jurisprudence related to stay applications.

[39] This is somewhat perplexing because it was Justice Rouleau who, in *AlliedSignal Inc. v. Du Pont Canada Inc.* (1995), 64 C.P.R. (3d) 362 (Fed. T.D.) declined to hear an application to stay a reference as to damages resulting from a decision of the Federal Court of Appeal until

such time as the Supreme Court of Canada decided whether or not it was prepared to entertain the appeal from the decision of the Federal Court of Appeal. In *AlliedSignal*, Justice Rouleau was clear that, on his review of the authorities, “this matter should have been brought before the Federal Court of Appeal.” (para. 3) Justice Rouleau declined to consider the motion for various reasons. One of them was that section 65.1 of the *Supreme Court Act*, “clearly supports the Respondent/Plaintiffs’ position …” (para. 9). But, perhaps most telling, is that Justice Rouleau, at para. 6, applied the “irreparable damage” language of stay applications to the request before him:

> I accept that, here, the expense and inconvenience of the reference will be substantial and that that, by itself, is not a sufficient ground for the exercise of the Court's discretion to stay it. "Irreparable damage", in its ordinary sense, is damage that cannot be compensated by an award of money.

[40] *AlliedSignal*, as regards the jurisdictional point, is much closer on the facts to the situation before me in this motion in that Justice Rouleau was dealing with a situation where leave had not yet been granted by the Supreme Court of Canada. In that situation, he was clearly of the view that he was dealing with a stay application that should have been before the Federal Court of Appeal and his reasons also show that he felt the relevant jurisprudence was that related to stay applications.

[41] Perhaps the only difference is that, in *AlliedSignal*, the motion was framed as a stay, and the parties argued the matter as a stay, while in *Schreiber* the motion was characterized as an adjournment and the parties appear to have argued the matter in those terms. But this issue cannot be decided upon the language and concepts used by the parties; what is more, in *AlliedSignal*, when Justice Rouleau’s attention was directed to section 65.1 of the *Supreme Court*

Act, he was clearly of the view that the motion should not have been brought before him, but should have been brought before the Federal Court of Appeal.

[42] This suggests to me that, when Justice Rouleau did hear full argument on point in *AlliedSignal*, the position he took clearly supports the arguments of NSIAA in the motion before me. The Plaintiffs' motion is really a request for a stay that should have been brought before the Federal Court of Appeal.

[43] As regards Justice MacKay's decision in the *Alberta* case, the Plaintiffs say this is authority for saying that "the tripartite test is not applicable where an adjournment is sought from the trial court on the basis of ongoing proceedings before the Supreme Court of Canada." They say that *Alberta* shows Justice MacKay granting "an application to adjourn the proceedings before him on the basis of separate but related proceedings before the Supreme Court of Canada. This decision was made in light of all the facts and circumstances of the proceedings then before the Court."

[44] But the *Alberta* case is a very difficult decision to equate with the facts before me in the present motion. The Plaintiffs place particular emphasis upon Justice MacKay's reasons at para. 35:

> Counsel for the Province urged that the *Metropolitan Stores* test was not applicable in this case. In oral reasons for my order at the time of the hearing I indicated I would further consider that submission. Having done so I am persuaded that that test is more apt in circumstances where the court is asked to stay or enjoin the proceedings of another body, for example, of the Panel as was sought by the Province in applying for interlocutory relief including an injunction restraining the work of the Panel, an application dismissed

> by Mr. Justice Rouleau. The same test, of *Metropolitan Stores*, is not so apt in considering a motion to stay or adjourn proceedings which has the effect of postponing access to the relief ordinarily available in this Court. In these latter circumstances the more appropriate test is that applied by the Associate Chief Justice in Association of Parents Support Groups in *Ontario (Using Toughlove) Inc. v. York et al.*, that the applicant for a stay establish that the interest of justice clearly supports a stay and outweighs the respondent's right to proceed with its cause of action. The court is reluctant to interfere with any litigant's right of access.

[45] In *Alberta*, the Federal Minister of the Environment was seeking a stay or an adjournment of the Province of Alberta's application to halt a review of the Oldman River dam project by an Environmental Assessment Review Panel appointed by the Minister. The stay or adjournment of the Province's application was sought on the grounds that there was pending before the Supreme Court of Canada an appeal from the Federal Court of Appeal dealing with proceedings where certain relevant constitutional issues would be dealt with.

[46] So, in *Alberta*, the Minister wanted to stay the Province's application to halt a review of the Project by the Panel until the Supreme Court of Canada had considered relevant issues in related proceedings.

[47] *Alberta* was not a situation where the Plaintiffs in an action wanted to halt that action until their own leave application to the Supreme Court from a decision of the Federal Court of Appeal was heard.

[48] Also, *Alberta* is not a case in which Justice MacKay was asked to consider the effect of section 65.1 of the *Supreme Court Act*. The Minister asked that the Province's application be

stayed, pursuant to subsection 50(1) of the *Federal Court Act* or, alternatively, that it be adjourned pursuant to Court Rule 323, pending a decision by the Supreme Court of Canada on an appeal that had already been heard, and for which a decision was expected within a matter of months.

[49] Justice MacKay rejected the Minister's request for a stay under subsection 50(1) of the *Federal Court Act* on the grounds that the Province's application was not "a claim … being proceeded with in another Court" within the terms of that subsection." (para. 30).

[50] Justice MacKay also made it clear in *Alberta* that, whatever test he was applying, "the serious issue is surely the question raised by the Province concerning the validity of the Panel's terms of reference." He agreed that question was a serious issue and "the question before this Court is whether a stay or adjournment should be granted the effect of which would be to postpone resolution of the issue." (para. 31).

[51] Once again, there is no analogy with the situation before me in this motion. The present actions have been brought by the Plaintiffs who are now asking that the trial of their own actions be adjourned. Leave to appeal to the Supreme Court of Canada has not been granted. The Supreme Court of Canada has not heard the matter and no decision is pending in the near future.

[52] In *Alberta*, both sides alleged that they would suffer "irreparable harm." The Minister and the Panel alleged irreparable harm if the Province's application was granted (para. 32) and the Province also alleged that its interests would suffer irreparable harm if the Panel's review was

allowed to continue. (para. 33). Justice MacKay concluded on this issue that while “either of the parties here is likely to suffer some harm whatever the outcome … I am not persuaded that in either case the harm that is feared would be irreparable.” (para. 34).

[53] Justice MacKay was urged by the Province not to apply the *Metropolitan Stores* test in *Alberta*. He agreed at para. 35, that *Metropolitan Stores* did not provide the appropriate test for the case before him.

[54] There is, of course, no analogous situation before me in this motion. The Court is not being asked to interfere with any litigants’ right of access in a particular application brought by the parties or the interveners. So it is difficult to see why, on the facts before me, I should proceed to use some kind of “interest of justice” test on that basis. In terms of Justice MacKay’s rationale in *Alberta,* there is no reason why I should move away from the *Metropolitan Stores* test in the present case on the grounds that that test is “not so apt in considering a motion to stay or adjourn proceedings which has the effect of postponing access to the relief ordinarily available in this Court,” to use the words of Justice MacKay.

[55] So the only way that *Alberta* appears to support the Plaintiffs position before me in the present case is the general import of Justice MacKay’s words that the *Metropolitan Stores* test is “more apt in circumstances where the Court is asked to stay or enjoin the proceedings of another body … .”

[56] As I understand the Plaintiffs' position before me, they are saying that I should not apply the *Metropolitan Stores* test because I am not dealing with a situation where the Court is being asked to stay or enjoin the proceedings of another body. The Plaintiffs are simply asking the Court to adjourn its own proceedings and so, the Plaintiffs argue, *Alberta* supports their view that I should apply the "interest of justice" test referred to by Justice MacKay in *Alberta*.

[57] When I review the balance of Justice MacKay's decision, it is clear to me that when, in para. 35, he discussed the aptness of the *Metropolitan Stores* test for the case before him, he was merely referring to the "irreparable harm" aspect of that test. I say this because, at para. 39 of his reasons, in deciding to grant the stay application in that case, he did not abandon *Metropolitan Stores* in its entirety:

> While it is unusual to stay or adjourn a matter in circumstances which effectively postpones access to relief which a party otherwise has a right to pursue, I am persuaded that this is a case that warrants that unusual step. The application by the Minister to adjourn further consideration of the Province's application pending the decision anticipated from the Supreme Court of Canada, should here be granted, for the following reasons.
>
> 1) Insofar as the *Metropolitan Stores* test may provide standards in this matter, I agree that there is a serious issue to be tried, that issue being the one raised by the Province concerning constitutional validity of the terms of reference of the Panel, but postponing consideration of that issue at this stage is in the public interest. In my view, on the balance of convenience, there is a likelihood of greater inconvenience to the respondents in proceeding to consider the Province's motion while closely related issues are under consideration in the Supreme Court of Canada than there is to the Province from adjourning that consideration. Proceedings at this stage which question the Panel's process, and any order from this Court which might suspend or interrupt the review process of the Panel would be more disruptive and create greater harm to the process of public environmental review than continuing that process pending the decision of the Supreme Court. I take judicial notice that continuing with the review will involve the Province in

further work and the costs will be at the public expense of the Province the longer the review continues. Yet the decision of the Supreme Court is likely to be released within a few months. We can all hope that the decision will be rendered, as the hearing was conducted, on an expedited basis, probably well before November 1991 when the majority of matters under consideration by the Panel may be ripe for public discussion and final consideration by the Panel.

2. For the general considerations outlined by the Associate Chief Justice in the transcript of proceedings concerning the applications referring to the Daishowa project, it seems to me just and appropriate to adjourn consideration of the Province's application pending the decision of the Supreme Court. Those considerations are more particularly applicable in this case than in the Daishowa applications for the matters now under consideration in the Supreme Court, although different from the issue here raised, are closely related to that issue and they arise from earlier proceedings concerning the project of interest in this matter, the Oldman River dam project. These considerations include the factors outlined below which tip the balance in favour of the general interests of justice when weighed against the Province's right to proceed.

3) In my view the interests of justice, and the efficacy of the judicial system, are best served by adjourning consideration of the Province's application because:

a) the constitutional validity of the Guidelines Order upon which the processes of the Panel depend, may be expected to be commented upon in the near future by the Supreme Court. Virtually any decision on the merits of the application for final relief now before this Court is likely to be affected by the Supreme Court decision, which can be expected to influence the determination here sought by the Province.

b) Even if the Supreme Court's decision does not deal directly with the issue raised here, I have no doubt that issue may be more readily resolved, and perhaps more definitively argued, in light of the decision of the Supreme Court, now awaited. In these circumstances any motions judge would be reluctant to render a decision on

the Province's application in advance of the Supreme Court's ruling, for such a decision might be significantly affected by the ruling and this would create additional problems for the parties. If decision of a motions judge were reserved until after it is clear what effect the Supreme Court's decision may have, then the Province would be in the same position as if an adjournment were granted, no better but clearly no worse. As Associate Chief Justice Jerome indicated in the case of applications relating to the Daishowa project, it would be unreasonable to expect a motions judge to render decision on an issue closely related to questions already under consideration in the Supreme Court.

c) Counsel for the Province frankly acknowledged that, even though the Supreme Court of Canada declined to add a specific constitutional question concerning the terms of reference of the Panel, argument before the Court in February urged that the terms of reference were unconstitutional, that they encompass matters falling within provincial legislative jurisdiction. He expressed the hope that the constitutional validity of the terms of reference of the Panel would be dealt with by the Supreme Court, the very issue raised in this application. In my view, to proceed to consider the application at this stage in these circumstances would be an inappropriate process with closely related questions before courts at different levels in the judicial system. Moreover, it would be presumptuous of this motions judge at this stage to consider and determine an issue which the applicant has urged, and hopes, to have resolved by the Supreme Court.

[58] So Justice MacKay appears to have concluded that, in the unusual situation before him, the Minister's application to adjourn should be granted because there was a serious issue (although it was the Province's issue and not the Minister's) and the balance of convenience favoured the Minister. However, instead of looking at irreparable harm (neither side persuaded him on this point) he felt that the circumstances before him required him to examine the "public interest" and whether suspending or interrupting the review process of the Panel "would be more disruptive and create greater harm to the process of public environmental review than continuing that process pending the decision of the Supreme Court."

[59] After proceeding in this way, he concluded that "the interests of justice, and the efficacy of the judicial system were best served by adjourning consideration of the Province's application."

[60] On a strict application of the *Metropolitan Stores* test, the motion before him would have failed because he was not persuaded that irreparable harm would result to either side. However, he felt that a strict application of *Metropolitan Stores* did not meet the needs of situation before him, where the competing rights and assertions required an examination of the broad public interest in the general process of public environmental review.

[61] If there is any analogy between the rationale behind Justice MacKay's decision in *Alberta* and the competing interests (including the broad public interest) thrown up in the present motion, where the Supreme Court of Canada is months away from considering even the leave application, then the Plaintiffs have not articulated that analogy for the Court. They seek, rather,

to assert that *Alberta* establishes a general principle that *Metropolitan Stores* is not applicable in the present motion and I should proceed to apply a general "interest of justice" test. Can I do this?

[62] To begin with, whatever *Alberta* stands for, it does not address the section 65.1 *Supreme Court Act* issues raised in this case.

[63] Secondly, it is quite clear from *Alberta* that Justice MacKay did not think that the principles to be applied should depend upon whether the motion was called a stay application or an adjournment application. He looked at the complex reality of the case before him and fashioned principles to deal with that reality rather than relying upon mere form or semantics. So the *Alberta* case does not establish that I should consider the present motion as an adjournment rather than a stay application.

[64] And thirdly, Justice MacKay's general remark that the *Metropolitan Stores* test "is more apt in circumstances where the court is asked to stay or enjoin the proceedings of another body" is no longer the jurisprudence of this Court. *Alberta* was decided in 1991. Since that time we have had (to name only the cases brought to my attention in this motion) the decision of Justice Rothstein in his role of judicial member of the Competition Tribunal in *D & B Co.* that "an adjournment pending appeal has exactly the same result as a stay pending appeal" and that "the principles applicable to stays of proceedings, which themselves are the same as the principles applicable to interlocutory injunctions, are to be applied in the case of an application for an adjournment pending appeal." That view was endorsed and applied by Chief Justice Isaac in the

appeal of the same case. The same view of the jurisprudence was adopted by Justice Blais in *Zundel* (2004), and was endorsed by the Federal Court of Appeal in *Malo* (2003).

[65] The Plaintiffs have provided me with no argument or authority that specifically refutes or even questions the notion that, even in a situation where a motion is characterized by an applicant as an adjournment request, the Court is obliged to follow Justice Rothstein's guidance and treat it as a stay application if it is nothing more than "an adjournment pending appeal," which this motion surely is. The Plaintiffs merely rely upon Justice Rouleau's decision to grant an adjournment in *Schreiber* (where the stay issue was not raised or argued) and some very general words of Justice MacKay in *Alberta*, a somewhat anomalous case that provides no real analogies for the issues raised in this motion, or at least no analogies that the Plaintiffs have articulated.

[66] On the basis of this jurisprudence, then, I believe I am obliged to treat this motion as a stay application, with all the consequence that flow from that conclusion. The Plaintiffs have produced no evidence, and have provided no argument, that would lead me to conclude that they can satisfy the irreparable harm or the balance of convenience aspects of the usual tripartite test.

[67] In addition, I may not be at liberty to consider this application as a stay because of section 65.1, of the *Supreme Court Act*.

Section 65.1 of Supreme Court Act and Jurisdiction to Hear this Motion

[68] The Plaintiffs say that "Nothing in s. 65.1 ousts or overrides the jurisdiction of a trial court to grant an adjournment of a trial" and they are merely seeking an adjournment "of the current trial date on the basis of developments which have arisen since the original direction of this Court fixing a trial date in January of 2007."

[69] I have several concerns with this approach. First of all, as I have already discussed, it doesn't seem to matter to me that this motion is characterized and brought by the Plaintiffs as an adjournment request under Rule 36. It is the reality that counts. This is precisely what happened in the *Zundel* case and, notwithstanding that Mr. Zundel asked for an adjournment under Rule 36, Justice Blais dealt with the motion as a request for a stay. In doing this he relied upon the words of Justice Rothstein in the *D & B* case as cited above. So given the fact that I have already concluded that I am really dealing with a stay application, and not a simple adjournment request, the Plaintiffs have provided me with no authority or argument concerning the impact of section 65.1 upon the decision I have to make i.e. does the fact that section 65.1 (and the related jurisprudence dealing with stays) directs such matters to the Federal Court of Appeal prevent me from considering this motion as a stay application? The cases cited by the Interveners (*Imperial Oil Limited v. Eric S. Lloyd et al.*, [2000] S.C.C.A. No. 58, and *Re: Pacific Paper Inc.*, [2001] S.C.C.A. No. 400 merely confirm that the proper forum for a stay application under section 65.1 of the *Supreme Court Act* is the relevant court of appeal. The only case before me directly on point is *AlliedSignal* where Justice Rouleau stated quite clearly that "My review of the authorities would seem to support the proposition that this matter should have been brought before the Federal Court of Appeal," and he dismissed the application in that case. The Plaintiffs have provided me with no authority or argument to suggest that Justice Rouleau was incorrect in

his conclusions in *AlliedSignal*. Hence, I see no reason why I should deviate from those conclusions in this case. What is more, it would seem to me, in a situation such as the present motion, where the reality is that the Plaintiffs are seeking a stay of these actions until the Federal Court of Appeal decision is dealt with (at least the leave aspect) by the Supreme Court of Canada, that it would be unseemly and entirely inappropriate for me to consider such an application in the circumstances before me. Even if I have some kind of concurrent jurisdiction and, notwithstanding s. 65.1 of the *Supreme Court Act*, I could consider this motion, I have to conclude not only that the Plaintiffs have not satisfied the well-known criteria required for a stay but that, in any event, it would not be appropriate for me to hear a stay application involving the kinds of issues raised in this case, and that should have been placed before the Federal Court of Appeal.

[70] There are some very good reasons why the Plaintiffs should have taken this matter up with the Federal Court of Appeal and not with this Court. The principal reason is that the Federal Court of Appeal knows what it has decided and why. The grounds cited by the Plaintiffs in their leave application to the Supreme Court are highly problematic and debatable, they extrapolate from the Federal Court of Appeal decision in a highly contentious way, and they are certainly incomplete as regards the full scope and implications of that decision. This Court is not well situated to review the jurisprudence regarding stay motions against the nuances of the Federal Court of Appeal decision and the interpretations that the Plaintiffs have chosen to place upon that decision in their leave application. I suspect that this is part of the purpose behind s. 65.1 of the *Supreme Court Act*.

[71] So I have to conclude that this motion embodies what is, in reality, a stay application and that it properly belongs before the Federal Court of Appeal. If I have jurisdiction to consider it, then I have to conclude that the Plaintiffs have adduced nothing in the way of argument or evidence to satisfy the irreparable harm and balance of convenience factors in the tri-partite test, even if I were to grant that they have raised a serious issue.

[72] On this basis alone, I have to dismiss this motion. However, just in case I am wrong in this regard, and because I think it would assist these proceedings if I also looked at this motion as a simple request for an adjournment of the trial, I will attempt to look at the motion from the perspective that the Plaintiffs invite the Court to take.

Adjournment Issues

[73] From the perspective of a simple adjournment request, the whole history of these actions comes into play. This is because the Plaintiffs say they were surprised by the conclusions I reached, and which were confirmed by the Federal Court of Appeal, regarding the scope of the pleadings and the exclusion of witnesses and evidence regarding a broad right to self-government, and that the Plaintiffs believe they are being thwarted in their attempts to litigate the broader aspects of self-government. Indeed, in the bias motion which they brought before me in 2005, the Plaintiffs actually alleged a reasonable apprehension of a conspiracy between the Federal Court, the Crown and the Interveners aimed at preventing them from pursuing broad self-government claims, and something of this concern appears to linger. It is obvious that, in the present motion for an adjournment, the principal preoccupation remains the Plaintiffs' concern

that the absence of a broad self-government claim from the pleadings prevents a full determination of all matters presently at issue between the parties respecting the constitutional validity of *Bill C-31*, and a feeling that the Court must give the Plaintiffs more time to perfect and pursue those broad claims, either in the Federal Court or elsewhere.

[74] So, in considering the present motion as a simple request for an adjournment, I believe I need to summarize and take into account a few of the principal findings I have made in previous motions that are relevant to the issues and the arguments raised by the Plaintiffs in this motion:

1. No one has prevented the Plaintiffs from litigating broad self-government claims of the kind that the Plaintiffs now wish to place before the Supreme Court of Canada in their leave application. They have been free to pursue such claims, provided they follow the appropriate rules and jurisprudence, at any time since this litigation was commenced way back in 1986;
2. Neither this Court or the Federal Court of Appeal has held that broad self-government claims are not justiciable. In my reasons of November 7, 2005 I reviewed the Supreme Court of Canada jurisprudence on self-government and concluded that the justiciability of broad, self-government claims was a difficult area. But this was only done by way of understanding what Mr. Henderson, Plaintiffs' former counsel, had meant in 1998 when he said in relation to the pleading amendments sought by the Plaintiffs at that time, "I can't be broad" and that the Plaintiffs were only pleading "a right to this fundamental aspect of our self-government" and not "self-government at large … ." Likewise, when this

issue came before the Federal Court of Appeal, that Court held as follows at paragraphs 43 and 44:

> Nonetheless, Russell J. also acknowledged that the Supreme Court has not yet expressed itself on the question of whether a claim to self-government under subsection 35(1) emanates from specific rights (such as the right to determine membership), or is a more general right from which specific rights may be inferred.
>
> Counsel did not persuade me that Russell J.'s analysis of the Supreme Court's jurisprudence on this issue was legally flawed. In my view, it was not incumbent on Russell J., in the present context, to come to a definitive conclusion on a very difficult issue on which the Supreme Court is yet to pronounce. It would be equally unwise in an interlocutory appeal for this Court to commit itself to the proposition that in no circumstances may a general claim to self-government be justiciable under subsection 35(1). These are questions for another day. …

3. The only reason why broad claims to self-government are not before this Court in these actions, as far as this Court and the Federal Court of Appeal are concerned, is because the Plaintiffs did not put them in their pleadings. The Plaintiffs are responsible for what is in their pleadings;
4. The Plaintiffs in the re-trial of this action have not been confined to the pleadings they drafted for the first trial. In light of Supreme Court of Canada jurisprudence that I referred to in my decision of November 7, 2005, the Plaintiffs brought forward specific amendments to their pleadings before Justice Hugessen in 1998. Amendments were allowed at that time and, in seeking those amendments, counsel for the Plaintiffs told the Court that any self-government rights the Plaintiffs wished to put forward "remain sufficiently connected to the plaintiffs' existing pleadings [so] that an additional second action is not necessary" and that they were alleging "the narrowest possible formulation of a jurisdictional right"

and “we are not saying we have a right to self-government at large. That is not what this case is about.” They also assured the Court and the other participants that “The new pleading is simply an explication on the old one.” The actions then proceeded on their tortuous path in accordance with the amendments granted in 1998 and on the basis of the reassurances that the Plaintiffs had given the Court and the other participants about the limited claim to self-government that the Plaintiffs wanted to assert;

5. In 2004, after a trial date of January 10, 2005 had been fixed and the Plaintiffs had indicated that they were ready to proceed to trial on that date, the Plaintiffs brought further proposed amendments which I considered in my decision of June 29, 2004. I allowed some of the amendments but denied others on various grounds including my view that it was too late for the kind of broad self-government claims that the Plaintiffs were now attempting to raise in 2004, not only for themselves, but for other First Nations peoples who were not even parties to, or participants in, these actions, and that such claims would seriously prejudice the Crown by forcing it to go to trial on the basis of broad claims that had not been made until that time and for which there had been no pre-trial discovery and preparation. That refusal to broaden the self-government claims in their pleadings was accepted by the Plaintiffs. They did not appeal my order of June 29, 2004;
6. So the Plaintiffs have always been well aware that: (a) there were no broad self-government claims in the pleadings as originally drafted; (b) the amendments granted by Justice Hugessen in 1998 only allowed the narrowest possible formulation of a jurisdictional right and did not include “a right to self-

government at large"; and (c) that their attempts to broaden the self-government aspects of their claims after the trial date had been fixed were refused, and that refusal was not appealed;

7. Rather than attempt any further amendments, and rather than appealing my order of June 29, 2004 denying their broader claims, the Plaintiffs indicated that they were ready for trial. They also produced will-says of witnesses that, in some cases, were not compliant with previous Court orders and/or were not relevant to the pleadings as drafted.

[75] The Plaintiffs now express surprise to find themselves in the present position. They have retained new counsel and they say that they should be allowed to litigate broad, self-government claims that two Courts have said are not in their pleadings, and which the Plaintiffs themselves, through their counsel, advised Justice Hugessen were not in the pleadings. They are now applying for leave to the Supreme Court of Canada to see whether the Supreme Court will assist them to litigate those broad claims. Of course, they may be successful but, for purposes of the motion before me now, I cannot but conclude that the only reason that broad self-government claims are not in their pleadings is because the Plaintiffs chose to leave them out and, when they attempted to broaden them in 2004, they accepted my assessment that it was too late in the day for such a radical new departure in a lawsuit that had been going on for 18 years, and in which there had been no pre-trial discovery and preparation to that time as regards such broad claims.

[76] It should also be borne in mind that I specifically asked Plaintiffs' present counsel to explain to me the discrepancy between previous counsel's remarks in 1998 concerning the

narrow approach to a jurisdictional right and the broad approach that the Plaintiffs now say they wish to assert and which, somehow, they say has been incorporated into their pleadings. The only answer I was given was “But when you deal with Mr. Henderson’s comments about the issues, what I say to you is forget about them. Forget about them.” Well, as the record shows, I couldn’t forget about them, and the Federal Court of Appeal thought they were relevant too. Present counsel for the Plaintiffs has enormous experience and ability. If he tells me to forget about comments that are obviously key in interpreting pleadings, then I feel confident that there is no explanation as to why the Plaintiffs said one thing in 1998, but now put forward what I regard as an entirely different position on broad self-government claims in the pleadings. More telling, I think, is that the Plaintiffs have never told the Court that Mr. Henderson got it wrong when he told Justice Hugessen what the Plaintiffs hoped to achieve by their amendments in 1998. The Plaintiffs only began to raise and push broader self-government claims in 2004 after the trial date had been fixed and at a time when the Crown would have suffered enormous prejudice if those broad claims had been allowed.

[77] The Plaintiffs take the position in this motion that they are compelled to ask for an adjournment because they did not expect the decisions that this Court and Federal Court of Appeal made in relation to the scope of the pleadings. I could understand this if the Plaintiffs’ legal team was entirely new. But Ms.Twinn has been involved with these proceedings throughout, and the differences over the scope of the pleadings have been the key point of concern since I became involved with this action as trial judge. They were raised by the Crown at the first trial management conference in September 2004, and, of course, they were very much an aspect of the amendment proposals that came before me in 2004. So I cannot accept that the

position the Plaintiffs now find themselves in was not foreseeable. In fact, given the choices that the Plaintiffs made to leave a broad approach to self-government out of their pleadings, but to try and introduce it anyway by proposing witnesses and evidence that, as I have already found, not only attempted to address broad self-government for the Plaintiffs, but also for other First Nations peoples not parties to these actions, the present situation was pretty well inevitable.

[78] All of this is by way of saying that any problems that the Plaintiffs are now facing in the light of a rapidly approaching trial date and their desire to seek the Supreme Court of Canada's assistance regarding broad self-government claims are entirely of their own making and are a function of the way they have chosen to conduct these actions. If broad self-government claims had been brought before Justice Hugessen in 1998, then they could have been dealt with as part of the Plaintiffs' amendment application at that time. Also, if the Plaintiffs thought I was wrong to resist amendments that sought to introduce broad self-government in 2004, after the trial date had been fixed, they could easily have taken the matter up directly with the Federal Court of Appeal. But they chose to do neither of these things. Instead, they chose to proceed on the basis of the pleadings as drafted which, for reasons I have explained, obviously contained no broad claims to self-government.

[79] I am not ascribing blame to the Plaintiffs in this regard. But they have made their choices and they have been given a fair opportunity to present their case, including any claims they may wish to advance concerning broad rights to self-government and any rights parasitic on a broad right to self-government. The Federal Court of Appeal has referred to the protracted and difficult history of these actions, as well as the fact that challenges to interlocutory rulings have been

legion but none of which has succeeded. All of those appeals have caused delays and consumed the resources of the other participants and the Court. All of this has to be kept in mind and is part of the context within which the present motion must be considered. The adjournment sought by the Plaintiffs could usher in many months of further delay and contentions wrangling in a situation where any adjustments to the scope of the trial that may need to be made following the Supreme Court of Canada's decision on the Plaintiffs' appeal can be made once that decision is known.

[80] The Plaintiffs now ask the Court to exercise its discretion under Rule 36(1) to grant them an adjournment of the trial commencement date until March 12, 2007, and then, if they are successful in their leave application to the Supreme Court of Canada, they will come back and ask for a further adjournment. In support of their adjournment request they cite the decisions of Justice Heneghan in *Tucker v. Canada*, [2004] F.C.J. No. 1939 (T.D.), and Justice Harrington in *Timis v. Canada (MCI)*, [2004] F.C.J. No. 1691 (T.D.), and other related cases.

[81] In *Tucker* at paragraphs 5 to 6, Justice Heneghan reviewed the jurisprudence on adjournments and came to the following conclusions:

> A couple of factors come into consideration when the Court is considering a request for an adjournment. One is the question of prejudice to one or more of the parties; see *Martin v. Minister of Employment and Immigration* (1999), 162 F.T.R. 127 (T.D.). A second factor is the question of prejudice to the Court of losing time that has been assigned for the hearing; see *Ismail v. Canada (Attorney General)* (1999), 177 F.T.R. 156 (Fed. T.D.). A third factor is the public interest in the timely conclusion of litigation and use of the facilities provided for trials; see *Markestyn v. Canada*, [2001] 1 F.C. 345.

> As well, the matter of granting an adjournment for a fixed date hearing was addressed by former Associate Chief Justice Jerome in a practice direction dated February 17, 1993. According to that direction, a fixed date hearing will be adjourned only in exceptional circumstances.

[82] In *Timis*, at paragraph 5, Justice Harrington emphasized the exceptional nature of such relief:

> Adjournments are governed by section 36 of the Federal Court Rules, 1998. Subsection 36(1) states that a hearing may be adjourned by the Court on such terms as the Court considers just. According to the practice directions issued by the Federal Court Trial Division in 1993, parties who have been given hearing dates will only receive an adjournment in exceptional cases (*Martin v. Canada (MEI)* (1999), 162 F.T.R. 127 (F.C.T.D.); *Ismail v. Canada (AG)* (1999), 177 F.T.R. 156 (F.C.T.D.).

[83] If I apply the jurisprudence that the Plaintiffs wish me to apply, and treat this motion as a simple adjournment request, the Plaintiffs raise the following arguments for consideration by the Court:

a) The Plaintiffs submit that a brief adjournment of some six weeks is not unreasonable in light of the circumstances of this case. During this time frame, the Plaintiffs say they will have the opportunity to receive the judgment of the Supreme Court of Canada on the leave application and to consider the alternatives referred to by counsel for the Plaintiffs on August 23, 2006;

b) The Plaintiffs say that neither the Crown nor the Interveners will be prejudiced by this brief delay. This is because the Federal Court of Appeal has granted an interim injunction that remains in force, and the effect of which is that all of the “acquired rights” persons affected by the legislation at issue are members of the Plaintiff First

Nations pending the determination of these actions. Hence, the Plaintiffs say, the only parties who could potentially experience prejudice as a result of a further adjournment are the Plaintiffs;

c) The Plaintiffs also say that an adjournment is warranted by the importance of the leave application now before the Supreme Court of Canada. This is because the issues determined in my orders of November 7 and 8, 2005, are central to the conduct of these actions and define the central legal theories which may be advanced by the Plaintiffs in their opening statements and throughout the trial. Should the trial proceed, and should the Plaintiffs then be successful on their appeal, they say that a waste of judicial resources and the resources of all participants will result;

d) The Plaintiffs also say that the absence of a self-government claim from the pleadings prevents a full determination of all of the matters presently at issue between the parties respecting the constitutional validity of *Bill C-31* in these actions. This means that the Plaintiffs are presently unable to argue or prove that a specific right to determine membership exists as a parasitic right to a broader right of self-government;

e) Another difficulty for the Plaintiffs is that the Crown has taken the position that a determination of the issues raised in the pleadings will render the issues between the Plaintiffs and the Crown respecting the constitutional validity of *Bill C-31 res judicata*. This means that, should the trial proceed to a determination in the absence of a claim based upon aboriginal self-government, the Crown will take the position that the Plaintiffs may not raise this ground as a challenge to *Bill C-31* in any future legal proceedings. The Plaintiffs say that such a result ought not to be imposed upon

them until the outcome of the proceedings before the Supreme Court of Canada has been finally determined;

f) All of this means that the Plaintiffs must assess their circumstances and make an informed decision on the advice of counsel respecting the future conduct of these actions. Such a decision cannot be made until the outcome of the leave application is known;

g) The Plaintiffs are of the view that it is possible that the leave application could be decided prior to the current trial date, or shortly thereafter. Hence, they say that the period of adjournment presently requested, is brief. However, should leave be granted, the Plaintiffs will seek a further adjournment of the trial pending the final outcome of their appeal to the Supreme Court of Canada. In the event that leave is denied, the Plaintiffs say they will then be in a position to determine in discussion with their legal counsel which of the options available to them they wish to pursue.

[84] The short answers to these concerns are fairly obvious given the way these actions have evolved over a long period of time, and the Court must remain consistent with its previous rulings.

[85] First of all, a brief adjournment is not really the issue. There is no need to examine the effects of the Plaintiffs' dealings with the Supreme Court of Canada until we know that leave has been granted and what the terms of that leave are. Only at that point would the Court be in a position to appraise the impact of the leave application upon these actions and any adjustments to the trial schedule and process that might be required to protect the Plaintiffs' rights. And any adjustments would need to take into account the full period of time that it would take the Supreme

Court of Canada to render a decision on the merits of the appeal. So the present motion is, at the very least, premature.

[86] Secondly, the Plaintiffs will suffer no prejudice if the commencement of the trial is not adjourned at this time. The Plaintiffs don't even know whether leave will be granted. The only real prejudice would occur if an adjournment was granted at this time, and this would be a prejudice to the other participants and the Court. After some nine years since these actions were returned for a re-trial, it is now imperative that they now be heard as quickly as possible.

[87] The leave application before the Supreme Court of Canada is, no doubt, important to the Plaintiffs, but all leave applications are important to those who make them, unless they are frivolous. The mere fact of a leave application is not grounds for an adjournment. The issues determined in my decisions of November 7 and 8, 2005 followed inevitably from the 1998 amendments and my June 29, 2004 decision dealing with further amendments. Those amendment decisions were not questioned or appealed by the Plaintiffs. If the issues determined in my November 7 and 8, 2005 decision are central to the conduct of these actions, then they were just as central to the 1998 and 2004 amendment decisions and could have been dealt with as part of, or immediately following, those decisions. No doubt the Plaintiffs had their reasons for not addressing them at that time, but the Plaintiffs' attempts to deal with those issues indirectly now, after the trial date has been set, are not a justification for postponing the commencement of the trial, and any disadvantage suffered by the Plaintiffs as a result of their not having dealt with scope of pleading issues at an earlier time should not now be used to justify further delay of a long-overdue trial.

[88] If the Plaintiffs wanted to litigate broad self-government, and/or argue that a specific right to determine membership exists as a parasitic right to self-government, then they could have made those issues a part of the amendments to the pleadings which they sought in 1998, and they should not have told the Court and the other participants at that time that they were only making a narrow claim and that these actions were not about broad claims to self-government. Alternatively, the Plaintiffs could have questioned my June 29, 2004 decision that denied broad amendments in the face of an imminent trial date. Their decision not to deal with these matters up-front at the time when material decisions were made is the cause of the predicament they now say they face. If the Plaintiffs are correct that they are now unable to argue or prove certain matters, that is their own doing and should not be used as a ground to delay these proceedings even further to the prejudice of the other participants and the Court.

[89] If the Plaintiffs are now confronted by *res judicata* issues, that too is a function of the way the Plaintiffs have chosen to conduct these actions over the last nine years and is also an inevitable consequence of amendment decisions in which the Plaintiffs participated fully and fairly. The Plaintiffs accepted those decisions and did not appeal them. If they now find themselves unable to litigate self-government to the full extent that they would like, then that is a function of choices they made years ago, and it does not justify any further delay of the trial.

[90] The Court's view on these matters is merely an inevitable continuation of previous decisions and previous findings.

[91] In addition, I see nothing in the Plaintiffs' arguments or in the evidence before me in this motion to suggest that anything that might come out of the Plaintiffs' leave application to the Supreme Court of Canada could not be incorporated into these actions at a later date if leave is granted and the Supreme Court of Canada subsequently decides that the Federal Court of Appeal somehow got it wrong. This is particularly the case if it is kept in mind that all but a few of witnesses which I excluded under my November 7, 2005 order were excluded for non-compliance with previous Court orders. Should the Plaintiffs get leave and win their appeal, I see no reason why the witnesses in question could not be accommodated into the trial.

[92] There is no point in speculating at this point as to what the Supreme Court of Canada might say, or eventually direct, if leave to appeal is granted and the appeal is considered. And until leave is granted, there is no reason whatsoever to postpone the commencement of the trial on the basis that leave might be granted. If leave is granted, then the situation can be addressed at that time, and I see no prejudice to the Plaintiffs in continuing with the present trial date, while prejudice to the Court and the public interest are strongly against an adjournment at this point.

[93] My review of the Plaintiffs' proposed witness-list, will-say statements and proposed experts, suggests to me that there is no real disadvantage for either side in proceeding with the trial on the basis of the narrow interpretation of the pleadings and waiting to see what happens before the Supreme Court. The Plaintiffs have not said they are not interested in litigating the pleadings as presently drafted, and the narrow approach to the rights asserted is one of the things upon which the Court will, in any event, have to hear evidence. Unlike the *Scheiber* case, for instance, success for the Plaintiffs before the Supreme Court of Canada will not render the narrow claim that I identified

in the pleadings moot. The Plaintiffs' success will merely require the Court to hear additional evidence.

[94] The real issue for the Plaintiffs, and this is where the withdrawal option comes into play, is that, unless they obtain leave from the Supreme Court, they may want to decide not to continue with the actions as they are presently constituted in this Court. They don't want to begin the trial until the decision on leave is made and they have had the opportunity to consider whether or not they really want to proceed with the actions in their present state.

[95] But the timing of the use of the withdrawal option has always been in the hands of the Plaintiffs. Had they moved faster, they could even have had the leave application decided by the Supreme Court of Canada before the present trial commencement date of January 24, 2007. Once again, however, they chose to do things in a particular way that now makes such an outcome unlikely. But that was their choice. The Court, and the other participants, should not be asked to wait because the Plaintiffs chose not to move in a more timely manner on their leave application.

[96] As regards the Plaintiffs' *res judicata* concerns in particular, I do not see how they arise at this stage if there is an opportunity to accommodate the excluded witnesses in the event that the Supreme Court of Canada grants the Plaintiffs what they seek. And in any event, as I have already pointed out, any *res judicata* issues now faced by the Plaintiffs are purely a function of their own past decisions. For instance, in deciding not to appeal my decision concerning the amendments brought forward by the Plaintiffs in June, 2004, the Plaintiffs, in effect, excluded from these actions, the broader issues of self-government that could have been taken before the Federal Court of Appeal

and the Supreme Court of Canada at that time. One of the more difficult problems to understand for purposes of this motion is why the Plaintiffs, after failing to appeal my June 29, 2004 decision that dealt with their late attempt to bring the broader aspects of self-government into these proceedings, are now attempting to pursue broad-based claims in an indirect way by appealing my November 7 and 8, 2005 decisions on witnesses and will-say statements. There is, of course, no obligation on the Plaintiffs to offer an explanation, but the failure to do so makes it difficult for the Court to take seriously the Plaintiffs' *res judicata* argument in this motion. The time to address those issues was in June, 2004. That time has long passed. Without any real explanation, the Plaintiffs simply assume that they retain a right to litigate broad self-government claims at this point in the proceedings when they declined years ago to question my refusal to allow any significant widening of self-government issues in the pleadings.

[97] The Plaintiffs now say they did not appeal my June 29, 2004 decision on their proposed pleading amendments because they concluded that the pleadings as drafted encompassed the broad self-government issues for which they wish to introduce the evidence I excluded in my November 7 and 8 decisions. This assertion, made for the first time during this motion, is very difficult to understand and accept.

[98] First of all, this does not explain why, if the Plaintiffs felt the broader claims were already captured in the language of their pleadings they would have sought specific amendments clearly intended to broaden claims in relation to self-government.

[99] Secondly, in my November 7, 2005 decision, I specifically excluded as irrelevant evidence pertaining to other First Nations peoples. And that was because, in my June 29, 2004 decision I had specifically disallowed proposed amendments that would have introduced other First Nations peoples into these actions. Paragraphs 26-28 of my June 29, 2004 decision contain particularly important findings:

> …
>
> 26. The contentious aspects of the Band's proposed amendments are objectionable for several reasons:
>
> a) some of the proposed amendments to paragraph 8 conflict with previous rulings made by this Court that the Plaintiff in the action is the Band itself in its own right; and
>
> b) some of the amendments would have the effect of enlarging the nature of the action and would bring in a new claim of self-determination; and
>
> c) some of the amendments would further broaden the claims by raising allegations about first nations other than the Band.
>
> 27. In my view, the objectionable amendments I will later refer to do not clarify and focus issues for the Court. They raise new and contentious issues that will require further discovery and will further delay the trial. The late stage at which these amendments are proposed, their number and importance, the degree to which previously held positions are changed, and the inevitable prejudice that will result to the Crown (see Maurice v. Canada (Minister of Indian Affairs and Northern Development), [2004] F.C.J. No. 670, 2004 FC 528 at para. 10) convinces me that these amendments should not be allowed. In addition, some of them are just not relevant to the issues in dispute. As NSIAA points out, the effect of some of the amendments proposed by the Band would be "to put the Crown on trial for all of its conduct with respect to all First Nations in Canada. A trial that is now anticipated to take months could end up taking years to resolve." In addition, other amendments would "substantially expand the scope of this action and raise issues where there has been no discovery" in a context where "the amendments add nothing substantive to the Plaintiff's claim that it has an aboriginal right to determine its own membership ... ." In fact, it seems to me that the words "First Nation" now mean the plaintiff

> Band and only the plaintiff Band. No purpose is really served by having two different terms ("plaintiff" and "First Nation") to refer to the Band even though I have no real objection to this if the Band wishes to use both terms.
>
> 28. The Court also shares the concerns raised by NSIAA in relation to some of the non-housekeeping amendments proposed by the Band that are improper because they are an attempt to plead irrelevant similar fact evidence without pleading any special nexus between those facts and the central allegation in this case which is that the Crown has infringed the Band's right to determine its own membership. As NSIAA says, the "delay that will inevitably result from these expansive amendments creates prejudice that is not compensable."
>
> …

[100] The Plaintiffs are now telling the Court, in effect, that notwithstanding these highly material exclusions, they did not appeal my June 29, 2004 decision because they felt that the pleadings were already sufficient and that decision would not prevent them from introducing evidence that my June 29, 2004 decision obviously renders irrelevant by its principal findings and conclusions. The Court cannot accept this latest attempt to evade the consequences of the Plaintiffs' own earlier decisions and the positions the Court has taken in previous orders.

[101] Finally, if the broad claims were already in the pleadings then they had to have been incorporated as part of the 1998 amendments when the Plaintiffs told the Court they were pleading the narrowest possible formulation of the right and these actions were not about self-government *per se*. Once again, the Court sees the Plaintiffs' present position as an exercise in expediency that is difficult to reconcile with the clear wording of previous decisions.

[102] But over and above all of this, I do not think it is appropriate for the Court to allow an adjournment at this stage on the grounds put forward by the Plaintiffs, or because they wish to preserve their tactical options, where I am satisfied that, should the Plaintiffs be granted leave by the Supreme Court of Canada and win their appeal, there is nothing to prevent the Court from hearing from those witnesses who may have been excluded as a result of my November 7 and 8, 2005 decisions.

[103] It has to be borne in mind that these actions were scheduled to go to trial in January 2005. The reason they did not proceed to trial at that time has a great deal to do with the actions of the Plaintiffs and additional time that the Court has allowed them to get ready for trial. This has included the following:

a) Granting the Plaintiffs additional time to come up with a reasonable solution to resolve the problems caused by their breach of Justice Hugessen's pre-trial order of March 2004;

b) Giving the Plaintiffs the time they requested to rectify their deficient witness list and will-says;

c) Allowing the Plaintiffs the additional time they requested to bring a bias motion that turned out to be groundless and unwarranted;

d) Allowing the Plaintiffs the additional time they needed for their new legal counsel to prepare for trial in January 2007.

The Plaintiffs have already been granted significant time concessions to ready themselves for trial and to make tactical decisions. Fairness dictates that they now submit themselves to the trial process at the appointed time.

[104] There still remains an enormous amount of work that all parties need to complete before the trial begins in January 2007. And yet, at this stage, all of that work might come to nought if the Plaintiffs decide to withdraw the actions. This is of enormous concern to the Court.

[105] It seems to me that it would only make sense to discuss an adjournment at this stage if the Plaintiffs were to make it clear that, should they not be successful in their leave application, they do not intend to litigate these actions before the Court. In such a situation, it might be reasonable to discuss whether further effort and expenditure should be incurred before the Supreme Court of Canada has considered the leave application. This is, of course, a matter entirely for the Plaintiffs and their counsel, but I strongly urge the Plaintiffs to consider the expenditures required of all participants to prepare for trial and, if a greater degree of certainty can be brought to bear on this situation, to take the matter up with the Crown and alert the Court as soon as possible.

[106] I am not suggesting, of course, that the Plaintiffs are not perfectly entitled to consider their options and make a decision as and when they feel the time is right to exercise them. But I can see no reason to adjourn the trial date at this stage on the basis of a leave application that may not succeed and the outcome of which is entirely speculative. And I urge the Plaintiffs to do anything they can, commensurate with the preservation of their rights, to clarify the situation for the Court and the other participants so that time and resources are not wasted.

[107] The whole history of these actions (the Federal Court of Appeal decision ordering a re-trial was made in 1997), and the extreme difficulty that this Court has had in moving the actions towards trial since that time, suggest to me that justice, cost, efficiency and simple fairness dictate that we proceed to trial on January 24, 2007 as planned and that the Plaintiffs consider their options based upon a knowledge of that fact.

ORDER

THIS COURT ORDERS that

1. The motion is dismissed;

2. The parties and the Interveners are at liberty to address the Court on the issue of costs.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-66-86-A

STYLE OF CAUSE: SAWRIDGE BAND v. HER MAJESTY THE QUEEN ET AL

T-66-86-B

TSUU T'INA FIRST NATION (formerly the Sarcee Indian Band) v. HER MAJESTY THE QUEEN ET AL

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: September 28, 2006

REASONS FOR ORDER: RUSSELL J.

DATED: October XX, 2006

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