

Federal Court



Cour fédérale

Date: 20091015

Docket: T-436-04

Citation: 2009 FC 1043

Ottawa, Ontario, October 15, 2009

**PRESENT:** The Honourable Mr. Justice Phelan

**BETWEEN:**

**TODD SIMPSON, SKONWAKWENINI GABRIEL,  
SYLVIA BONSPILLE LORENTE, ANNIE MICHALA,  
HILDA BONSPILLE, RUBY MARTIN, BELLIE BEAUVAIS,  
SANDRA RICHARDS and STEVEN BONSPILLE, JOHN HARDING,  
PEARL BONSPILLE personally and as duly elected Chiefs of the  
MOHAWK COMMUNITY OF KANESATAKE**

**Plaintiffs**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA,  
the MINISTER OF INDIAN AND NORTHERN AFFAIRS AND  
NORTHERN DEVELOPMENT CANADA, the MINISTER OF PUBLIC  
SAFETY AND EMERGENCY PREPAREDNESS CANADA, JAMES GABRIEL,  
CLARENCE SIMON, MARIE CHÉNÉ, DOREEN CANATONQUIN as duly  
elected Chiefs of the MOHAWK COMMUNITY OF KANESATAKE**

**Defendants**

**REASONS FOR ORDER AND ORDER**

I. INTRODUCTION

[1] The specific matters before the Court were motions by the Defendants to dismiss the action in whole, or alternatively, to strike significant and critical portions of the Plaintiffs' Statement of Claim.

[2] There are significant questions with this action not the least of which are who are the proper Plaintiffs, who are the proper Defendants, who is counsel for the Plaintiffs, what is the true nature of the claim and does this Court have subject matter and/or personal jurisdiction.

[3] It is not the Court's intention to set out anything more than a brief summary of this file; details are contained in the Court record.

II. BACKGROUND

[4] This action was commenced on March 1, 2004. The Statement of Claim was amended on June 3, 2005, at which time additional Plaintiffs were added and the Plaintiffs claimed jointly and severally against the Defendants for general damages of \$90 million plus punitive damages. The Plaintiffs alleged breach of contract, breach of fiduciary duty, breach of the duty to consult, negligence, abuse of power, abuse of process, conspiracy, pain and suffering, psychological and psychiatric trauma, and breach of constitutional rights.

[5] The Plaintiffs also seek various orders and declarations under s. 35 of the *Constitution Act, 1982* and s. 35 of the *Charter of Rights and Freedoms*.

[6] There have been a series of delays in the prosecution of this action, only partially related to the government departments requiring time to prepare a voluminous affidavit of documents in the face of the wide ranging claims made.

[7] By Order dated May 9, 2005, the then Plaintiffs were ordered to pay security for costs in favour of the individual Defendants (who are in this action separately represented) in the amount of \$32,960 and the action was stayed until the security was paid. The security for costs has yet to be paid.

[8] In companion litigation to the original action, the then Plaintiffs commenced an application against virtually the same Defendants. The then Plaintiffs advised the Court that they did not recognize the jurisdiction of the Federal Court. Justice von Finckenstein, who was then case managing both matters, dismissed the application on January 20, 2005 with costs to the individual Defendants in the amount of \$18,900. These costs have not been paid.

[9] This action seems to have hung in limbo thereafter. On April 30, 2008, a Forensic Audit Report was issued by the two federal departments after which the Plaintiffs asked the Minister of Public Safety to hold an inquiry into the events of January 2004 which form part of the facts pleaded in the action. The Minister refused the request on July 15, 2008 but indicated willingness to

explore alternatives to litigation. Despite expressing a willingness to engage in those discussions, the Plaintiffs have done nothing.

[10] The Court issued a direction on September 26, 2008 for the parties to advise the Court of the status of the action and the plans to move the matter forward. The due date for responses was January 15, 2009.

[11] On that due date, counsel for the Plaintiffs (Mr. Reynolds) asked for a 45-day delay in order to obtain instructions and to put their alternative litigation proposal to the Defendants.

[12] By fax dated that same due date, January 15, 2009, a Notice of Change of Solicitors was filed by Mr. Allali, signed only by himself.

[13] The Court granted the delay and imposed an obligation on the Plaintiffs to advise the Court by March 2, 2009 of the status of this matter and absent significant advancements, the matter would be set for a status review.

[14] The Court's directions and orders as to moving this case along have not been acted upon by the Plaintiffs.

[15] There is apparent confusion in the Plaintiffs' camp as to who is counsel. On May 8, 2009, the Court rendered an Order requiring the Defendants to serve and file any motions, to dismiss or to

strike for reasons of delay or any other reasons, within 30 days of the date of that Order. In addition, the Court ordered that a copy of that Order be served on former counsel to the Plaintiffs by fax or by courier.

[16] The Defendants, obviously frustrated with the lack of action and concerned about the serious deficiencies in the pleadings, indicated their intention to move to strike parts of the Statement of Claim or dismiss the action.

[17] On September 8, 2009, the Court ordered that the Defendants' motions be served on both solicitors and indicated that the motions would be heard on September 29, 2009.

[18] On the day of the hearing the Court was advised that Mr. Reynolds had written to the Court the afternoon before indicating that he could not obtain instructions from his clients either as to the motions or as to legal counsel (presumably meaning who counsel to the Plaintiffs was to be).

[19] At the hearing Mr. Allali appeared but indicated that he had no instructions on the motion and that he was unclear who he represented and what status they had. The hearing proceeded absent any materials from or representations by the Plaintiffs.

### III. ANALYSIS

[20] Before dealing with the merits of the motion, the Court must address the issue of legal representation.

[21] The matter of legal representation has been languishing since January 15, 2009 and despite efforts by the Court, there is no greater clarity now than back then.

[22] It is important to note that the Rules of this Court require that a Notice of Change of Solicitor be filed by a “party”. In the usual course the Notice is filed by new counsel as agent for the party. Absent a dispute about representation, such a procedure is sensible and sound in law as a matter of agency. However, here the question of the legitimacy of the change of counsel is in question and there is nothing filed by any of the Plaintiffs themselves indicating which counsel is to represent which Plaintiffs.

[23] This lack of attention as to who represents the Plaintiffs is another factor indicating that there is no genuine intention or ability of the Plaintiffs to proceed with this action.

A. *Motion to Strike*

[24] The Defendants have collectively raised numerous grounds to strike significant portions of the Statement of Claim. The Statement of Claim is fraught with problems, many so serious that it cannot be resurrected by simple amendments and deletions. The Court will touch on but a few.

[25] There is insufficient linkage between the individual Defendants and the Crown as to bring them within this Court’s jurisdiction under s. 17 of the *Federal Courts Act*, R.S., 1985, c. F-7.

[26] The “Mohawk Community of Kanesatake” is not a body known at law. The more appropriate body is the “Mohawks of Kanesatake”; however, it is unclear from the pleadings what status any or all of the individual Plaintiffs have to invoke the legal status of the Band. Some of the Plaintiffs are not members of the Band and one of them is deceased.

[27] The Amended Statement of Claim does not disclose how the Plaintiffs, as a minority of Band Council, can initiate a claim on behalf of the Band, nor how they, not being parties to the contract in issue, can claim breach of contract or have standing to claim collective rights on behalf of the Band.

[28] The Amended Statement of Claim is so deficient in its allegations of material facts that it is impossible for a defendant to properly defend. There are significant deficiencies in the claim for breach of fiduciary duty, duty to consult, violation of s. 35 rights, s. 25 rights, punitive damages and negligence, without even considering whether an action is sustainable for at least some of these claims.

[29] The government Defendants have raised a number of other grounds involving issues of the applicability of various legal principles, both at common law and under the *Civil Code* which are unnecessary to resolve here.

[30] The Plaintiffs' problem is that there are so many clear difficulties with its pleading that cannot be readily solved by amendments or the alternative remedy of striking the claim with leave to file a further and better claim.

B. *Motion to Dismiss*

[31] The government Defendants also moved to dismiss this action on the grounds that it constitutes an abuse of process as is evident from the failure to prosecute the action or to comply with Court order.

[32] I share these Defendants' concern. It is an abuse to file an action with no intent to proceed. The Court is not a parking lot for possible litigation. It does appear that the Plaintiffs have used this litigation to pressure the government (not an unusual tactic for some litigants) but most importantly, with no real intention to proceed.

[33] Consistent with my reasons on the Motion to Strike, the action will be struck. The issue is whether it should be struck "with prejudice" as to the merits of the claim.

[34] There were members of the Plaintiffs in Court at the hearing of these motions, as Mr. Allali advised. The Court indicated that it would defer rendering its decision in this matter for two weeks.

[35] Since then, there have been no steps to clarify the Plaintiffs' position on representation or on how they wished to proceed with the litigation.



[36] Given the past inaction, delays and failures to comply and failure to properly retain and instruct counsel, the government Defendants are entitled to their request that the action be dismissed with costs as an abuse of process.

[37] The Court is not prepared to dismiss the action on its merits so as to create some form of estoppel or *res judicata*. However, if any of the Plaintiffs, individually or collectively, intend to litigate the subject matter of the Amended Statement of Claim, they will require leave of the Court. Such leave may well contain terms.

**ORDER**

**THIS COURT ORDERS that:**

1. The action against the individual Defendants is dismissed with prejudice and with costs to those Defendants.
2. The action against the remaining Defendants is dismissed with costs in their favour but without prejudice to one or more of the Plaintiffs filing a new action in respect of the same subject but only with leave of this Court and within 30 days of this Order.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-436-04

**STYLE OF CAUSE:** TODD SIMPSON, SKONWAKWENINI GABRIEL,  
SYLVIA BONSPILLE LORENTE, ANNIE MICHALA,  
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PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS CANADA, JAMES GABRIEL,  
CLARENCE SIMON, MARIE CHÉNÉ, DOREEN  
CANATONQUIN as duly elected Chiefs of the  
MOHAWK COMMUNITY OF KANESATAKE

**PLACE OF HEARING:** Montreal, Quebec

**DATE OF HEARING:** September 29, 2009

**REASONS FOR ORDER  
AND ORDER:** Phelan J.

**DATED:** October 15, 2009

**APPEARANCES:**

Mr. Frédéric Allali

FOR THE PLAINTIFFS

Mr. Louis-Alexandre Guay  
Ms. Marie-Eve Robillard

FOR THE DEFENDANT,  
ATTORNEY GENERAL OF CANADA

Mr. Ian Houle

FOR THE INDIVIDUAL DEFENDANTS

**SOLICITORS OF RECORD:**

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