Canadian Legal Information Institute

Home > Federal > Federal Court of Canada > 2002 FCT 615 (CanLII)

Français | English

Paul v. Canada, 2002 FCT 615 (CanLII)

Date:	2002-05-31
Docket:	T-646-01
Parallel citations:	[2003] 1 C.N.L.R. 107 • 219 F.T.R. 275
URL:	http://www.canlii.org/en/ca/fct/doc/2002/2002fct615/2002fct615.html
Noteup:	Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Date: 20020531

Docket: T-646-01

Neutral citation: 2002 FCT 615

BETWEEN:

CLEM PAUL and NORTH SLAVE METIS ALLIANCE

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,

THE GOVERNMENT OF CANADA as represented by the

ATTORNEY-GENERAL OF CANADA, THE MINISTER

OF INDIAN AND NORTHERN AFFAIRS CANADA, THE

GOVERNMENT OF THE NORTHWEST TERRITORIES,

THE DOGRIB FIRST NATION as represented by THE

DOGRIB TREATY 11 COUNCIL

Defendants

REASONS FOR ORDER

LEMIEUX J.:

A. INTRODUCTION

•

[1] The plaintiffs in this action move the Court for an interlocutory injunction in the following terms:

(a) An interlocutory injunction ordering the Defendants or any of them to refrain from taking further steps toward the completion or implementation of the Final Agreement referred to in the Statement of Claim in this action until:

(i) The trial of this matter is concluded and judgment rendered; or

(ii) The Defendants recognize the NSMA as an independent party negotiating on behalf of the North Slave Metis in the Dogrib Agreement process and the Plaintiffs execute or adhere to the Agreement-in-Principle referred to in the Statement of Claim in this action by the plaintiff, the North Slave Metis Alliance; ("NSMA") or

(iii) Indication in writing by the NSMA that it has consented to such steps being taken. [*emphasis mine*]

-

[2] On January 7, 2000, the defendants signed an Agreement-in-Principle ("AIP"). The AIP will lead to a Final Agreement ("the Final Agreement"), which, if and when ratified, will be a comprehensive land claims and self-government agreement recognized under section 35 of the *Constitution Act, 1982,* for the North Slave Region ("NSR") in the Northwest Territories ("NWT"), which, according to the AIP, has been traditionally used and occupied by the Dogrib First Nation (the "Dogrib Nation") who is represented in the negotiations by the Dogrib Treaty II Council ("the Dogrib Council").

[3] Clem Paul is a Metis living in Yellowknife, NWT. He asserts he is neither a Dogrib nor a descendant of Dogrib ancestry. Rather, he claims to be a descendant of the historic Metis families of French Cree stock, who, it is said, in the late 1770s settled in the NSR, became a community with distinct traditions, language (Michif), culture and way of life, through inter-marriage largely amongst themselves and evolved into a distinct Aboriginal people, the Indigenous Metis of the NSR entitled to exercise existing Aboriginal and Treaty rights.

[4] The North Slave Metis Alliance ("NSMA") was incorporated in November 1996 grouping the three existing Metis organizations in the NSR: the Yellowknife Metis Council (of which Clem Paul was President), Metis Nation Local 64 based in Rae-Edzo and Yellowknife Metis Nation Local 66. The Yellowknife Metis Council is the successor of Yellowknife Metis Local 55 which was involved in the Dene/Metis land claims negotiations in the late 1980s and early 1990s. Amongst the aims and objectives of the NSMA are:

(a) To unite the membership of the Indigenous Metis of the North Slave Region;

. . .

(c) To negotiate, ratify and implement a land and resource agreement for the Indigenous Metis of the North Slave Region founded on principles of Self-government;

. . .

(e) To promote the recognition and entrenchment of the Aboriginal and Treaty rights of the Indigenous Metis of the North Slave Region, Treaty 11 area.

-

[5] Another goal of the NSMA is to promote the self sufficiency of the North Slave Metis through reliance upon the land and resources of the NSR.

[6] On April 12, 2001, Clem Paul and the NSMA launched an action in this Court issuing a statement of claim against the Dogrib Nation and Council, Her Majesty the Queen in Right of Canada, the Government of Canada as represented by the Attorney General of Canada, the Minister of Indian and Northern Affairs (Canada) and the Government of the Northwest Territories ("GNWT"). They also had named the Chief Negotiators of the defendants but this Court struck those defendants from the action.

[7] In their statement of claim, the plaintiffs claim the Indigenous Metis of the NSR, descendants of the historic Red River Manitoba Metis families who settled there, are a distinct and unique Aboriginal people. They have aboriginal rights and title in the NSR. They have used and occupied the same lands as the Dogrib Nation -- they have joint occupation of those lands.

[8] They refer to Treaty 11 which included the NSR. This treaty was signed on June 27, 1921 by the Dogrib, amongst other First Nations. The Dogrib Nation was represented by Chief Monfwi and Headmen, Jermain and Beaulieu.

•

[9] Treaty 11 also applied to the Metis. They had a choice between Treaty or money scrip.

[10] Mr. Paul and the NSMA claim the North Slave Metis qualify as beneficiaries for a land claims settlement designed to put to rest different interpretations and understandings arising out of Treaty 11. They point to the failed Dene/Metis lands claim process launched in the late 1970s covering the entire MacKenzie River Basin. They say the Metis were recognized by Canada as a people in that process.

[11] Yet, they say the Indigenous North Slave Metis have been excluded by the defendants from participating in the regional land claim and self-government negotiations for the NSR where they have aboriginal rights and title. They have no place at the table and will have none while the Final Agreement is being negotiated. Their distinct interests are not recognized. Their aboriginal rights are being negotiated without their participation. The Dogrib Nation has no authority to negotiate settlement claims to aboriginal title or rights in the NSR on behalf of the North Slave Metis.

[12] Amongst the Aboriginal rights claimed by the plaintiffs for the North Slave Metis are:

(1) the right to hunt, trap and fish wildlife for food, furs and skins for their families, their dogs or for commerce and for such purposes, the North Slave Metis would travel great distances in search of large animals, particularly caribou, and to reach fishing lakes;

(2) the right to harvest timber and wood to build their cabins, boats, fishing and hunting camps, smoke houses, dog pens, sleds for themselves or for commerce by selling timber to steamboats;

(3) the right to harvest plants for teas, medicinal and religious purposes;

(4) the right of access to those resources;

(5) the right to preserve and promote their distinct way of life and culture centred on their Michif language and on songs and dances.

[13] In their statement of claim, they seek several declarations and, amongst others, the following:

(a) a declaration that by signing the AIP and continuing negotiations towards a final agreement without recognition or protection of their rights, the defendants have violated the aboriginal rights of the plaintiffs and the North Slave Metis they represent, contrary to section 35 of the *Constitution Act*;

(b) a declaration the defendants have violated the equality rights of the plaintiffs and the North Slave Metis they represent, contrary to section 15 of the Charter;

(c) a declaration the defendants have violated the rights of the plaintiffs and the North Slave Metis they represent contrary to subsections 2(b) and section 7 of the Charter as well as section 1(a) and 1(b) of the *Canadian Bill of Rights*;

(d) declarations Canada and GNWT have breached their duty to negotiate in good faith with the plaintiffs regarding the North Slave Metis' claims for aboriginal rights and title in the NSR as well as their duty to consult and breached the fiduciary duties owed to the plaintiffs and the North Slave Metis they represent.

[14] The defendants have yet to file statements of defence but their basic defence was revealed in the injunction proceedings. They do not recognize the existence of the Indigenous Metis of the NSR as a separate and distinct Aboriginal people or community having aboriginal rights and title in the NSR. North Slave Metis is simply a term that the members of the NSMA use to identify themselves. This term does not describe persons belonging to an aboriginal community.

[15] The defendants acknowledge individual Metis settled in the NSR and participated in Treaty 11. However, the defendants say that for purposes of land claims negotiations, their rights are co-mingled with the rights of other Aboriginal peoples there. Since the defendants are not prepared to grant the plaintiffs voluntary recognition as a distinct Aboriginal people, they say the plaintiffs are compelled to obtain judicial recognition as an Aboriginal people or community and establish the scope of their rights. They point to the recent decision fo the Ontario Court of Appeal in *R v. Powley* 2001 CanLII 24181 (ON C.A.), (2001), 196 D.L.R. (4th) 221, a case where the Metis community in Sault Ste. Marie gained constitutional recognition.

[16] The AIP contemplates the defendants continuing to negotiate towards a Final Agreement and implementation which, in order to be effective, must sequentially pass the following milestones:

(1) When the Final Agreement is in a form satisfactory to the defendants, it will be initialled by their chief negotiators and submitted for ratification.

(2) The first step in the ratification process is by the Dogrib Nation. The Grand Chief and the Executive of the Dogrib Council must be authorized to execute the Final Agreement by a majority ratification vote of eligible voters.

(3) Once the Final Agreement is signed by the Dogrib Grand Chief and Council Executive, it is to be considered, as soon as possible, by the two governments for their ratification.

(4) Ratification by Canada and GNWT is achieved when the Final Agreement is first signed by ministers duly authorized by the Privy Council in Canada's case and the Executive Council in GNWT's case and then legislated by the enactment of federal and territorial settlement legislation which comes into force on a day fixed by order.

[17] It is only after these milestones have been completed that the Final Agreement is in force.

B. BACKGROUND

[18] The plaintiffs' motion for interlocutory injunction can only be appreciated in its historical context.

[19] The current negotiations in which the Dogrib Nation, Canada and GNWT are engaged arises out of the failure of the Dene-Metis comprehensive land claim negotiations which had advanced to an Agreement-in-Principle signed on or about September 5, 1988.

[20] That process was launched in the 1970s when the Indian Brotherhood of the Northwest Territories (later to be known as the Dene Nation) and the Metis Association of the Northwest Territories submitted proposals to Canada for the settlement of claims in the MacKenzie Valley region owing to unresolved differences related to Treaty 11.

[21] The Dene and Metis claims were joined together because Canada was of the view there should not be two separate settlements which it feared would divide the communities in the MacKenzie Valley.

[22] In their later stages, the Dene/Metis claims were negotiated through a single chief negotiator for both groups coordinated by the Dene/Metis Negotiations Secretariat reporting monthly to the joint assembly of Dene Chiefs and Presidents of Metis Locals including the President of Yellowknife Metis Local 55.

[23] A key concept in land claims negotiations is who could elect to participate or be enrolled as a participant to the rights and benefits flowing from a ratified Land Claims Agreement.

[24] In the Dene/Metis AIP, such election could be made by a Dene or by a Metis who were not defined separately, these two terms bearing the following common definition:

"Dene" or "Metis" means a person who:

(i) is a descendant of the Chipewyan, Slavey, Loucheux, Dogrib, Hare or Cree people; and

(ii) resided in, or used and occupied, or is a descendant of a person who resided in or used and occupied, the MacKenzie Basin on or before January 1, 1921... .

-

[25] After the collapse of the Dene-Metis AIP, which was not ratified by some Dene/Metis organizations, Canada and GNWT chose to negotiate outstanding land claims on a regional basis. In the NWT, there are five such regions or proposed settlement areas: the Gwich'in, the Sahtu, the Deh Cho and the North and South Slave.

[26] In the Gwich'in and Sahtu Regions, negotiations resulted in comprehensive land claim agreements in 1992 and 1994 implemented through settlement legislation. Negotiations are currently under way in the other regions.

[27] In the Gwich'in Agreement, an eligible participant as of right (as distinguished from the community acceptance class, where such acceptance is discretionary) to the rights and benefits flowing from that Agreement was restricted to persons of Gwich'in (also referred to as Loucheux) ancestry or descendants of such persons resident there or used or occupied the area before Treaty 11 was signed. The Metis of Gwich'in ancestry qualified to elect to be participants. The Gwich'in Tribal Council, where both the Dene Bands and Metis Locals had representation, spearheaded those negotiations.

[28] The same model was followed in the Sahtu Dene and Metis Agreement concluded in 1994. Eligible participants or beneficiaries as of right had to be of Hare, Slavey or Mountain ancestry or their descendants who resided in or used and occupied the settlement area on or before Treaty 11 was in place. Metis of such ancestry qualified for participation and "Sahtu Dene", "Sahtu Dene and Metis", "Sahtu Dene or Metis" or "Sahtu Metis" had the same meaning.

[29] The Dene of Colville Lake, Déline, Fort Good Hope and Fort Norman and the Metis of Fort Good Hope, Fort Norman and Norman Wells in the Sahtu Region of the MacKenzie Valley were represented by the Sahtu Tribal Council who managed and controlled the negotiation process. The Agreement was signed separately by the Dene Chiefs and by the Presidents of the Metis Locals in the Sahtu Region.

[30] The same eligibility template was proposed to be followed in the Dogrib claim. Eligible beneficiaries, as initially contemplated, had to trace their ancestry to a member of the Dogrib Nation which included a Metis of Dogrib ancestry. As a result, ineligibility would, under this model, befall someone with Cree, Chipewyan, Slavey or Hare ancestry. In all cases, direct descendancy from an Indigenous Metis, on its own, was not an eligibility factor.

[31] In terms of who was at the negotiation table for the Dogribs, it was their Chief Negotiator. The Dogrib Council, made up of the Grand Chief and the Chiefs of the Dogrib Bands, was the coordinator but there was no separate representation there for the Metis of the NSR, whether Indigenous or with Dogrib ancestry, or any other Aboriginal people for that matter.

[32] In November 1992, the Dogrib Council formally requested negotiations of a regional land claims agreement for the North Slave Region on behalf of the four Dogrib communities located there, *i.e.* at Rae-Edzo, Lac La Martre, Rae Lakes and Snare Lake. In December 1992, the federal Minister of Indian and Northern Affairs (the "Minister") informed the Dogrib Council of Canada's willingness to negotiate an agreement. Formal negotiations began in January 1994. The land claims negotiations was expanded in 1995 to include self-government features.

[33] The issue of Metis eligibility and Metis participation in negotiations arose early. The President of the Metis Nation, Mr. Gary Bohnet wrote to the then Minister, Tom Siddon (affidavit of Clem Paul, tab E, volume I) who replied on October 22, 1992, as follows:

Your letter makes the point that the Metis must be included along with the Dene in any regional comprehensive claim settlement based on the April 1990 Dene/Metis Agreement. That is the federal government's position, and I have no hesitation in confirming your view.

Your comment that the Metis must have a seat at the negotiating table and an "equal bargaining position" goes farther in the specifics of negotiations than I am prepared to go. In the Dene/Metis negotiations, as in the subsequent negotiations between the government and the Gwich'in, and the government and the Sahtu Dene and Metis, my negotiators dealt with a chief negotiator who represented a combined Dene and Metis group. I would expect to continue that practice in a Dogrib negotiation. This is therefore an internal matter which the Dene and Metis must resolve amongst themselves. [*emphasis mine*]

-

[34] On July 29, 1993, then Canada's Chief Negotiator for the North Slave Claim, Nancy Kenyon, wrote to John B. Zoe, The Dogrib's Chief Negotiator (affidavit of John B. Zoe, tab 7):

. . .Mr. Siddon stated that "I will need to know that the Metis who are descendants of the Treaty 11 Dogrib will be included in the settlement". You have said that Metis who are eligible will share the benefits of a comprehensive land claim settlement on the same basis as the Dene who are eligible; this entirely meets any concern of Mr. Siddon's about eligibility to participate.

However, the second question that requires an answer is: how are the Metis represented in the negotiations of the comprehensive claim? There are several ways in which the Metis could ensure that any concerns they may have are articulated in the negotiations--participation in the elections of the Dogrib Treaty 11 Council Chiefs is one possibility. Another possibility might be the presence of a

Metis representative on the Dogrib Treaty 11 Council. There are doubtless a number of possibilities.

It is for the Dogrib and Metis together to determine how the Metis are represented in the negotiation of the comprehensive claim, but it is essential that they be represented, and the government must know what method is used. Without certainty that both Dene and Metis are represented by the negotiating group the government would be unable to begin negotiations. [*emphasis mine*]

-

[35] On September 13, 1993, Mr. Zoe replied to Nancy Kenyon in the following terms (affidavit of John B. Zoe, tab 8):

I wish to reiterate, then, that we view the Dogrib regional claim as a unified claim involving all of the Dogribs and their descendants in the four communities of Rae-Edzo, Lac La Martre, Rae Lakes and Snare Lake. It was on this basis that the Dogrib people undertook last fall to enter into comprehensive claim negotiations with the Government of Canada.

Regarding your concerns about participation in this claim, I would like to stress the following points.

To begin with, all persons who can demonstrate that they are descendants of Treaty 11 Dogribs are and will be included in the Dogrib regional claim. As well, all eligible participants will be entitled to the same or equal rights and benefits under the Dogrib claim and will be defined as eligible Dogrib beneficiaries.

Furthermore, all eligible Dogrib beneficiaries, if appointed by the Dogrib Treaty 11 Council, can represent the Dogrib Nation at the claim negotiations table, and in other work related to the settlement of our regional land claim. The sole requirements for being a member of the Dogrib Negotiating Team are a participant's skills and experience.

As for the political rights of participants, membership in the Rae band has always been open to all descendants of Treaty 11 Dogribs. This gives them the right to vote and to run for band council on the same basis as other members. [*emphasis mine*]

-

[36] On August 7, 1996, the Dogrib Framework Agreement was signed. The Framework Agreement outlines the process, subject matters, scope, parameters and time frame for negotiation of the AIP.

[37] On August 9, 1999, the AIP was initialled by the Chief Negotiators and on January 7, 2000, that AIP was signed by the parties.

[38] It is important to observe that in the AIP, the ancestry limitation for eligible participants was not kept as originally framed. Under the AIP, a person of aboriginal ancestry who resided in and used and occupied the settlement area of the North Slave Region on or before August 22, 1921, or a descendant of such person, is defined as a "Dogrib" and is eligible as of right to the rights and benefits of the Final Agreement when concluded and brought into force through settlement legislation. Under this definition, it is acknowledged that all Metis meeting the qualification will have the rights and benefits of the Agreement, if they enrol.

[39] Under the AIP they, and all other Aboriginal people, are Dogrib Citizens if they choose to be. That includes Metis of Dogrib ancestry as well as Metis of other Dene ancestry. It also covers the Indigenous Metis of the NSR who claim to be a separate Aboriginal people descendants of the original Metis families of French-Cree stock.

[40] Certain other facts should be mentioned. First, the Dogrib claim was advanced by the Dogrib Treaty 11 Council on behalf of the Dogrib members of the four Dogrib Indian Bands and other Aboriginal peoples living in four communities (with a current total population of 3,469) residents in the NSR:

(1) The community of Rae-Edzo with a population of approximately 2,400 located on the North Arm of Great Slave Lake, northwest of the City of Yellowknife. This is where Metis Local 64 has its base. According to the NSMA membership lists, 36 of its members live in Rae-Edzo and of those, 24 are on the Rae Band List;

(2) The community of Lac La Martre located on that lake in the northwest part of the NSR with a population of 550;

(3) The community of Rae Lakes north of Lac La Martre located in the upper part of the NSR with a population of 400; and

(4) the community of Snare Lake, with a population of 119, found in the upper eastern part of the NSR.

[41] Second, the vast majority of NSMA members (approximately two thirds of its 292 members) are residents of the City of Yellowknife which is not a Dogrib community, is not located on any Dogrib Lands which will be vested in the Dogrib Nation nor is it located on any Dogrib community lands which will be vested separately in the four Dogrib communities.

[42] Third, in land claims agreements, the territorial concepts of settlement area (the largest area), primary use area, lands vested in the settling peoples, in this case Dogrib lands and Dogrib, and community lands (the smallest area) are delineated. Generally, the scope of the rights and benefits vested in a settling Aboriginal people are in inverse proportion to the size of the land area concerned. Conversely, the authority of government, both Canada and GNWT, is sharply more present where the land area is greater. Their laws generally apply in the settlement area, while the rights and benefits to the Dogrib Nation are more exclusive on Dogrib Lands.

[43] The settlement area comprises the entire area of the North Slave Region which is bounded:

(a) on the north-east by Nunavut;

(b) on the north-west by the Sahtu settlement area;

(c) on the south-west by the Deh Cho Region;

(d) on the south-east, across from Great Slave Lake by the South Slave Region.

[44] The Dogrib primary use area is yet to be defined but Dogrib Lands will consist of 39,000 square kilometres whose exterior territorial boundaries are the four Dogrib communities. The Dogrib community lands consist of those lands within the territorial limits of the four Dogrib communities.

C. FURTHER BACKGROUND

[45] The major developments in the relationship of the parties to this litigation can be identified as follows:

(1) From 1990 to 1996, the Yellowknife Metis Council (formerly Metis Local 55 -- Yellowknife which had been recognized as a designated organization in the Dene/Metis AIP) was pursuing status as an Indian Band for a land base. Many of its members were registered Indians living in Yellowknife. Mr. Paul himself is on the Indian Registry as a member of the Dogrib Rae Band. He lives in Yellowknife. The two other Metis locals in the NSR were not seeking Indian Band status.

(2) Mr. Zoe, in his affidavit filed in these proceedings, said that in 1992, the Dogrib regional claim could have included the Yellowknife Metis and the Yellowknives Dene because the City of Yellowknife is located within the North Slave Region. He adds, in 1993, the Yellowknives Dene refused to enter into the regional claim with the Dogribs. They then were and currently are involved in their own negotiation process to resolve their outstanding claims respecting their Aboriginal and treaty rights. As a result, Mr. Zoe deposes that early in the Dogrib negotiations, the Dogrib Council determined, although the City of Yellowknife is within the settlement area for the Dogrib negotiations, land in the city would not be included in the Dogrib primary use area or in Dogrib Lands.

(3) Mr. Zoe states in his affidavit that in the summer of 1993, as the Dogrib Council was developing the negotiating process for the Dogrib claim, two members of its negotiating team contacted the Metis Locals in the NSR. They met with Yellowknife Metis Local 66, with Gary Bohnet, President of the Metis Nation of the NWT and with the Yellowknife Metis Council. All of these Metis organizations declined inclusion on the grounds they were pursuing their own claim. (It should be remembered eligibility for rights and benefits was limited to Dogrib ancestry at that time.)

(4) David Wilson, Canada's affiant, stated Canada, in accepting the Dogrib regional claim for negotiation, appreciated:

(a) there was no one group in the NSR (unlike in the Gwich'in and Sahtu Regions), that represented both the Indian Bands and the Metis Locals;

(b) many members of Rae-Edzo Metis Local No. 64 were status (registered) Indians and members of the Rae Band, and as such already represented by the Dogrib Council;

(c) most, if not all, members of the Yellowknife Metis Local 66 had ancestral links to the South Slave Region, not the North Slave Region and as such were ineligible (at that time) for the benefits of the NSR claim.

(d) most members of the Yellowknife Metis Council were of Cree and Chipewyan ancestry, and as such, were ineligible (at that time); and

(e) other members of the Yellowknife Metis Council such as Clem Paul were members of a Dogrib Band, and as such, were already represented by the Dogrib Council.

(5) On July 28, 1995, Clem Paul, as President of the Yellowknife Metis Council, wrote to Warren Johnson, Regional Director General of Indian and Northern Affairs Canada, suggesting to him that he did not understand or appreciate the position of the Yellowknife Metis Council. A copy of that letter was widely circulated and included copies to the Chief Federal Negotiator of the Dogrib claim, Gary Bohnet, President of the Metis Nation and Joe Rabesca, Grand Chief of the Dogrib Nation. In that letter, Clem Paul confirmed the members of the Yellowknife Metis Council were actively pursuing the issue of Band formation. He expressed the Yellowknife Metis Council's concern about the eligibility of claimant groups in the NSR. He stated (affidavit of David Wilson, Tab Q):

. . . Namely, Dogrib Treaty 11 Council which will likely exclude many of our members because of the Dogrib descent clause. Secondly, the Treaty 8 TLE process will not include any person who is not a band member although they will include persons who are presently on the band list whether they are descendent of the area or not. We believe that these groups are entitled to their own eligibility criteria and will pursue their endeavours regardless of our concerns or objections and we really do not wish to be involved in either process . . .

Therefore, we give notice that our organization will only deal directly with the federal government in pursuing a claim in the North Slave region for our membership . . . .

(6) In June and July 1996, the presidents of the three Metis organizations in the NSR wrote to the Minister advising him of their alliance (the NSMA). They indicated they had not adequately participated or been involved in the land claims negotiations in the NSR and requested a meeting with him to explore financial options which would enable them to develop a land claims process in the NSR. They requested this meeting be convened as soon as possible "so we can expedite the North Slave Region claim".

(7) On August 15, 1996, in response, the Minister wrote to Mr. Paul stating that Metis who are eligible for a comprehensive claim or treaty land entitlement in the NWT should consider joining that process. He added it was not an option to chose the Metis Process over another claim or claim-like process.

(8) In November 1996, the solicitor to the NSMA wrote to the Minister requesting the Federal Government commence negotiations with the Metis of the NSR for a fair settlement of their land claim. In particular, he asked the Federal Government recognize the NSMA as the party which it will negotiate with for the settlement of the North Slave Metis claim.

(9) Legal counsel to the NSMA anchored his request on the basis the North Slave Metis were an Aboriginal people who identify with their Metis heritage. As of October 20, 1996, the NSMA had individually signed declarations choosing it to be their representative in land claims negotiations and not any other organization including the Metis Nation. The declarations were said to be made up of:

§ 202 members who are descended from Indigenous North Slave Metis (the historic Bouvier and Lafferty families);

§ 40 who are descended from the Mercredi family;

§ 29 who are descended from Metis residents in the NWT prior to 1921 and long-term residents of the NSR;

§ 9 who are Metis, long time residents of the NWT and associated with the Metis of the NSR, since 1921.

(10) On December 10, 1996, in his answer to the NSMA's solicitor, the Minister, advised him a comprehensive land claim for the Metis alone was not possible reiterating the Metis in the North West Territories eligible to participate in a comprehensive claim or land entitlement process should follow either of these courses of action.

The Minister added a process (known as the Metis Process) in the NWT will be available to Metis who were eligible to participate in the Dene/Metis Comprehensive Land Claim but who are now left out of any other process.

The Minister then referred to his letter to Mr. Robert Douglas, President of the Metis Local at Rae-Edzo in which he stated the interests of the Metis of Dogrib descent living there should properly be addressed within the Dogrib Comprehensive Land Claim and

self-government negotiations and Canada would be prepared to include such people in the Dogrib process as a fifth community provided there were sufficient numbers to warrant doing so.

Finally, the Minister addressed the issue of the Metis in the Yellowknife area. Those who were Indigenous to the South Slave Region should participate in the South Slave Metis Tribal Council process. Other options would remain open.

(11) The same message was reiterated by the new Minister on September 5, 1997, to Mr. Paul. The Minister invited him to contact the Chief Federal Negotiators of the three processes in place (the Dogrib process, the South Slave process and the LTE process) to discuss how eligible members of the NSMA might be represented in those negotiations. The NSMA met with the federal negotiators and with representatives of the Dogrib Nation, thereafter.

(12) On January 19, 1998, Mr. Paul, as President of the NSMA sent the Minister a comprehensive land claim. In his covering letter, he referred to the meetings with the three federal negotiators, meetings which he said had enabled the NSMA to determine the appropriate process to be followed for the resolution of the North Slave Metis land claim. He added (affidavit of David Wilson, tab MM):

As a result of the above discussions and talks with the Dogrib representatives, the North Slave Metis Alliance has formally approved a Statement of Claim which it has provided to the Chief Federal Negotiator, Yves Assiniwi. We will follow with further discussions about funding requirements and options as indicated in your letter.

We look forward to productive discussions and a positive outcome of our negotiations.

(13) On March 24, 1998, the Minister wrote to Mr. Paul stating by providing the statement of claim to the Chief Federal Negotiator for the Dogrib claim, Mr. Paul and the NSMA had demonstrated their intent of being involved in the Dogrib claim negotiations. The Minister continued (affidavit of David Wilson, tab NN):

I understand that you are planning to hold a joint workshop with the Dogrib to discuss how the eligible North Slave Metis will participate in the Dogrib claim negotiations and that you have been in touch with officials from the Department of Indian Affairs and Northern Development's Northwest Territories Regional Office for funding. I would encourage you to hold the workshop with the Dogrib to gain a full understanding of their process. In this regard, and if you wish, federal officials are available to facilitate any such workshop. [*emphasis mine*]

(14) On May 15 and 16, 1998, the NSMA met with representatives of Canada and the Dogrib Council in Ottawa. Through the affidavit of David Wilson filed on behalf of Canada, it is Canada's position the Chief Federal Negotiator stated that how the members of the NSMA were to be integrated into the Dogrib process was to be resolved between the Dogrib Council and the NSMA, a position said to be consistent with that taken by the Minister in 1992 in a letter to the Metis Nation which has already been referred to in these reasons. On July 23, 1998, the Chief Federal Negotiator met again with the NSMA.

(15) On November 23, 1998, Mr. Paul wrote to the new Minister who he met at the opening of the BHP Diamond Mine. He asked for assistance to "kick start our land claim discussions once again" because the NSMA was still being left out of the process in the North Slave Region. He added the NSMA must be at the table as full partners to represent the North Slave Metis appropriately adding the North Slave claims mandate may have to be expanded to expressly include the Metis.

(16) On June 11, 1999, Mr. Paul wrote to Mr. Robert Overvold, Regional Director General, Indian and Northern Affairs in Yellowknife under the heading "Land Claims Progress". He had not yet received a response to his November 23, 1998 letter to the Minister. His understanding was the Dogrib claim was close to an Agreement-in-Principle and he had not been afforded an opportunity to review this claim in any detail. He added (affidavit of Clem Paul, vol. 1, tab 2):

As such, it is our intention to develop a team to prepare our people for the pending debate on the claim. At the same time, we need to continue to develop our own aspirations for a land and self-government agreement. [*emphasis mine*]

(17) On August 5, 1999, the then solicitors to the NSMA wrote to the Chief Federal Claims Negotiator for the Dogrib claim indicating the NSMA wished to proceed with negotiation of a claim on behalf of the Metis. On August 9, 1999, as noted, the Dogrib AIP was initialled by the negotiators.

(18) Mr. Assiniwi, the Federal Negotiator, replied on August 27, 1999, stating he did not have the authority to meet with the NSMA in order to negotiate a "Metis claim" but would be very willing to work with the NSMA in order to try to resolve their concerns with the Dogrib AIP or their relationship with the Dogrib Council. Canada says this offer was not followed up by the NSMA.

(19) The previous day, Mr. Paul had written to another new Minister, the Honourable Robert Nault. Of the Dogrib AIP, he said the Dogrib, for reasons unknown to him, failed to acknowledge the rights and existence of the Indigenous Metis in the NSR. He said the North Slave Metis differ most fundamentally from local Dogrib groups as a result of their French-Cree roots and distinctive, social, cultural and economic adaptations to the area historically centred at Old Fort Rae in the early 1800s the hub of commerce and social activity in the NSR. He wanted a meeting to clarify a number of issues and points raised in the Dogrib AIP and "to lay the groundwork for the negotiation of a North Slave Metis AIP".

(20) On August 28, 1999, Clem Paul wrote to the Premier of the GNWT suggesting changes to the AIP before the NWT Cabinet approved it. He argued for the insertion of clauses for the Metis of the NSR similar to those contained in the AIP for the Yellowknives Dene recognizing their use and occupation of overlapping territories. Clause 2.8.8 of the AIP which Mr. Paul wanted for the North Slave Metis reads (affidavit of David Wilson, vol. 3, tab PP):

Before the date of the initialling of the Agreement, the Dogrib Treaty 11 Council will conduct discussions with the Yellowknives Dene to explore the concept of primary use areas and shall attempt to agree with the Yellowknives Dene on the geographic extent of those areas, how those areas will be managed and how rights will be exercised within those areas, provided that no such agreement shall adversely affect the rights of persons who are not party to that agreement. These discussions should address the following:

(a) exclusive and priority harvesting rights for the Dogrib First Nation, other rights of the Dogrib First Nation respecting commercial wildlife activities and access to land for harvesting by the Dogrib First Nation;

(b) priority rights of the Dogrib First Nation for employment;

(c) establishment of and membership on

(i) the North Slave Renewal Resources Board,

(ii) the North Slave Land and Water Board; and

(iii) any national park advisory management committee;

(d) establishment of any land use plan for an area of the settlement area outside Dogrib lands;

(e) Aboriginal burial sites;

(f) eligibility for the Dogrib ratification vote and enrolment as a Dogrib Citizen; and

(g) any other relevant matter. [*emphasis mine*]

(21) In November 1999, the Premier of the GNWT responded to Mr. Paul advising GNWT's Cabinet had given formal approval to sign the Dogrib AIP. He said GNWT was familiar with the NSMA's claim filed in February of 1997 asking for a separate process to negotiate claims and self-government for the North Slave Metis. He added (affidavit of Clem Paul, vol. 2, tab II:

We are also aware of the response from Canada rejecting the claim, based primarily on the argument that the indigenous Metis represented by the Alliance appear to be eligible to participate in either settled claims or claims that are currently or may be soon under negotiation.

It is important to remember that a signed Dogrib AIP does not have any legal standing. It does not recognize or confer any rights on the Dogrib, and it does not undermine or affect any rights or another party.

We support the Alliance's position that the rights and interests of indigenous Metis in the North Slave Region must be addressed and we know the Alliance is continuing to explore options. We also appreciate the spirit of your comment in the letter that the Alliance does not want to hold up the Dogrib process. [*emphasis mine*]

(22) The record indicates further correspondence between Mr. Paul and DIAND and, in particular, with Caroline Davis, Executive Advisor, Comprehensive Claims Branch, concerning her letter to him in which she indicated the Department believed the NSMA had chosen to pursue their interest in the Dogrib claim, a decision which made sense to the Department due to the large number of Metis of Dogrib descent who were included in the NSMA's membership list.

(23) On March 23, 2000, Mr. Paul wrote back to Miss Davis. He said the NSMA had yet to receive any justifiable explanation there would not be separate lands claims process for the Metis without which he said could result in their cultural genocide as a distinct people. He described the NSMA's attempts "in spades" but without success to be involved in the Dogrib comprehensive land claims process. He referred to several meetings with the Dogrib and the Chief Federal Negotiator. He stated a workshop between the North Slave Metis and the Dogrib was subsequently planned but never held because of Dogrib reluctance and non commitment. He said it was a full year later (July 16, 1999) that the NSMA met with Dogrib negotiators where they informed the NSMA that the "deal was done" and there was no opportunity to become meaningful participants in the Dogrib process.

According to Mr. Paul, the Federal Government must take a leadership role in establishing a North Slave Metis seat at the NSR's land claim table before their rights are infringed and added, despite ongoing Dogrib and federal resistance at the officials' level, it was not too late to work out an agreement which would be satisfactory to everyone. He suggested most of the NSMA's members were not descendants from the Dogrib nor were they eligible for the Yellowknives LTE process. He said they refused to be part of a process of assimilation which the Dogrib process had become.

(24) On July 31, 2000, the Minister announced the withdrawal from Crown lands of approximately 40,000 square kilometres of land adjacent to the four Dogrib communities of Rae-Edzo, Lac La Martre, Rae Lakes and Snare Lake. The purpose of this withdrawal was to set aside a block of land that would become Dogrib Lands if and when the Final Agreement came into effect.

(25) On September 5, 2000, current counsel to the NSMA wrote to the Chief Federal Negotiator asserting Aboriginal title and rights over significant portions of the NSR, areas covered by the AIP and within the lands which had been withdrawn to become Dogrib Lands. The NSMA had been excluded from the negotiations process concerning these lands. He put Canada on notice no further steps affecting the aboriginal rights and title of the members of the NSMA should be taken and the implementation of the Dogrib AIP should be postponed until negotiations have started and finally concluded with the NSMA.

(26) On October 30, 2000, counsel to the NSMA advised Justice Canada NSMA had instructed its legal counsel to launch legal proceedings to halt the implementation of the Dogrib AIP until negotiations on behalf of the Indigenous Metis produce an agreement that would address their interests and concerns. On April 21, 2001, the plaintiffs issued their statement of claim and on April 30, 2001, they filed their motion for interlocutory injunction.

D. THE DRAFT FINAL AGREEMENT

-

[46] The legal arguments on this interlocutory injunction are inextricably linked to the shape of the Final Agreement which is currently being negotiated. The Final Agreement will be both a land claims agreement and a self-government agreement. The record contains the current draft of the Final Agreement dated October 9, 2001.

[47] Counsel for the plaintiffs said I should not take into account that draft because it was only a draft and could change. Rather, counsel for the plaintiffs said I should look to the signed AIP only.

[48] The signed AIP is the basis for the Final Agreement. I compared the AIP and the current draft of the Final Agreement. Both texts are substantially the same but, as could be expected, the current draft of the Final Agreement brings more precision and expansion to the text of the AIP. I accept the representations made to the Court by counsel for the defendants the current draft will not change in substance and captures best how Canada, GNWT and the Dogrib Nation will structure their relationship. In particular, the clauses related to the protection of the rights of other Aboriginal peoples, will not be diminished in the Final Agreement.

[49] In its written memorandum to the Court Canada says this:

Canada submits that the wording of any final agreement will be no less strong on this point than the wording of the Draft Final Agreement.

This Court considers this statement by Canada as analogous to an undertaking.

-

[50] Argument largely proceeded from the defendants' side on this understanding as it did from the plaintiffs' side. In the balance of these reasons, I refer to the current draft of the Final Agreement as the Agreement.

[51] The Agreement confers on the "Dogrib Nation", defined to mean the Aboriginal people of Canada comprised of all Dogrib Citizens, certain rights and benefits to land and self-government in the NSR. "Dogrib Citizen" means "a person whose name is on the Register" and the definition of "Dogrib" is not tied, as noted, to Dogrib ancestry but defined to mean a person:

(a) of Aboriginal ancestry who resided in and used and occupied the settlement area on or before the twenty second day of August, 1921 or a descendant of such person;

(b) who is a registered band member, or a descendant of such person; or

(c) who was adopted as a child, under the laws of any jurisdiction or under any Dogrib custom, by a Dogrib within the meaning of (a) or (b) or by a Dogrib Citizen, a descendant of any such adoptee.

-

[52] In terms of land (whether in the larger settlement area which is the entire NSR, the more restricted Dogrib primary use area, the smaller Dogrib Lands and yet considerably smaller Dogrib community lands with variable access and exclusivity of harvesting rights in those areas), the Agreement confers upon a Dogrib citizen rights to:

(1) harvest wildlife which is defined to include mammals, fish and birds;

(2) harvest trees for firewood, construction of camps and boats and the making of handicraft;

(3) harvest plants;

(4) use and pass over water.

-

[53] The Agreement creates public institutions of GNWT such as:

(1) the North Slave Renewable Resource Board whose mandate is wildlife, forest and plant management;

(2) the North Slave Land and Water Board with a mandate to deal with land and water uses;

(3) the Review Board concerned with environmental matters; and

(4) the Surface Rights Board dealing with access rights and compensation.

[54] The Agreement ensures significant representation to the Dogrib Nation on the first two Boards.

[55] The Agreement also provides Canada will make substantial capital transfer payments to the Dogrib First Nation Government, the sharing with the Dogrib Nation of mineral royalties received by Canada and, in the case of mineral or oil & gas projects on Crown land in the settlement area or Dogrib Lands, mandatory consultation between developers and the Dogrib First Nation Government with a view of reaching agreements on matters of Dogrib Nation interest including environmental and wildlife impacts as well as employment of Dogrib citizens and business opportunities and contracts.

[56] The self-government side of the Agreement leads to the establishment of the Dogrib First Nation Government on the effective date (after the settlement legislation is in force) whose constitution, however, shall be established before the date the ratification process commences.

[57] The governing body of the Dogrib First Nation Government that exercises its law-making powers and its primary executive functions will include at least:

(a) a Grand Chief elected at large by eligible Dogrib citizens;

(b) the Chief of each Dogrib community government; and

(c) one representative of each Dogrib community elected by the residents of that community.

[58] The Dogrib First Nation Government has law making and executive powers related to Dogrib Citizens as to how they will exercise their harvesting rights in the settlement area and on Dogrib Lands, the management of benefits, the structure and internal organization of its administration and the management and protection of Dogrib Lands.

[59] The Dogrib First Nation Government also has the power to enact laws of varying territorial scope covering such matters as the protection of heritage resources, the use of Dogrib language, social assistance, child and family services, guardianship and trusteeship of adult Dogrib citizens, adoption, education except post-secondary education, pre-schooling, wills, intestacy and administration of estates of Dogrib citizens, solemnization of marriage and powers in relation to direct taxation.

[60] The other institution of public governance provided for in the Agreement to be created by territorial law of GNWT are the Dogrib Community Governments in the four existing Dogrib communities which I emphasize does not cover the center of NWT population situated in Yellowknife. These community governments consisting of a Chief and not less than four councillors, are elected by eligible voters who must be Canadian citizens or permanent residents of Canada and resident in the community for at least six months immediately preceding the vote, be 18 years of age and have been resident in the NSR for at least two years. A Dogrib community government has the power to enact laws within the territorial boundaries of its community relating to its operation and internal management, the borrowing of money, the administration and granting of interest in Dogrib community land and in matters such as land use planning, public order, peace and safety, housing of residents, by-law enforcement, intoxicants, local transportation, business licencing and regulation, gaming and recreational contests and other matters of a local or private nature including taxation.

[61] A central feature of the Agreement is the creation of Dogrib Lands by the vesting of Dogrib title to lands totalling approximately 39,000 square kilometres including the mines and minerals that may be found to exist within, upon or under such lands. In respect of some harvesting rights Dogrib citizens will enjoy exclusivity on such lands subject to some harvesting exceptions.

[62] In argument, particular focus was centred on the establishment of the voters' lists for the ratification process of the Agreement by eligible participants and on the non derogation clauses for other Aboriginal peoples.

[63] Eligibility to participate in the Dogrib ratification vote (a condition precedent to Canada's and GNWT's ratification obligations) is determined by the Agreement. An eligible voter for this purpose is a person who:

(a) consents to having his/her name placed on the list;

(b) is eligible to be enrolled as a Dogrib citizen, (that is, a Dogrib as defined); and

(c) is 19 years of age at the time of the vote.

[64] There are several clauses in the Agreement which are designed to circumscribe the scope of the Agreement by protecting the rights of other Aboriginal peoples. These provisions are covered under section 2.7 of the Agreement headed "Other Aboriginal Peoples" and are also contained in other parts of the Agreement.

[65] Subsection 2.7.1 of the current draft of the Final Agreement reads (affidavit of David Wilson, vol. 3, tab SS):

No provision in the Agreement shall be construed to

(a) recognize or provide any rights under section 35 of the *Constitution Act, 1982*, of any Aboriginal peoples other than the Dogrib First Nation; or

(b) affect

(i) any treaty right under section 35 of the *Constitution Act, 1982,* of any Aboriginal peoples other than the Dogrib First Nation, where the right existed before the provision of the Agreement was in effect; or

(ii) any Aboriginal rights under section 35 of the *Constitution Act, 1982*, for any Aboriginal peoples other than the Dogrib First Nation. [*emphasis mine*]

•

[66] Subsection 2.7.2 of the current draft was heavily relied upon by the defendants to show the plaintiffs had not established

irreparable harm. That subsection reads as follows (affidavit of David Wilson, vol. 3, tab SS) :

If a superior court of a province or territory, the Federal Court of Canada or the Supreme Court of Canada finally determines that 2.7.1 has the effect of rendering a provision of the Agreement wholly or partially inoperative or ineffective because that provision of the Agreement would otherwise affect rights under section 35 of the *Constitution Act, 1982,* of an Aboriginal people other than the Dogrib First Nation,

(a) upon notice by a Party, the Parties shall enter into negotiations for the amendment of the Agreement in order to resolve any problems caused by that provision being inoperative or ineffective and to provide new or replacement rights for the Dogrib First Nation that are equivalent to or compensate for any rights of the Dogrib First Nation that would have been enjoyed under the provision; and

(b) if the Parties fail to reach agreement on an amendment under (a) within 90 days of the notice, a Party may refer the matter for resolution in accordance with chapter 6. [*emphasis mine*]

•

[67] Counsel for the parties also pointed to other provisions where the rights of other Aboriginal peoples are referred to. For example, what are known as overlap agreements are contemplated with the Gwich'in, the Sahtu Dene and Metis, the Inuit of Nunavut, the Yellowknives Dene and the Deh Cho and NWT Treaty 8 First Nations but none with the Indigenous North Slave Metis. Such a possible overlap agreement with the Metis of the NSR was identified by Mr. Paul to the Premier of the GNWT. The proposed overlap agreement with the Yellowknives Dene is of particular interest. It reads (affidavit of David Wilson, vol. 3, tab SS):

2.7.8 The Dogrib First Nation and the Yellowknives Dene First Nation have for generations used and occupied and continue to use and occupy their traditional territories. It is recognized that their traditional territories overlap and that there is an area that is used primarily by the Dogrib First Nation and an area used primarily by the Yellowknives Dene First Nation.

Counsel for the Dogrib Nation says the reason the Indigenous Metis of the NSR are not mentioned is that none of the parties (Canada, GNWT or the Dogrib) based on their experience, recognize them as a people having aboriginal rights in the NSR.

•

[68] Also, subsection 2.9.3 provides if any provision of the Agreement is found by a court of competent jurisdiction to be invalid, the parties are to make best efforts to amend the Agreement to remedy the invalidity or replace the invalid provision.

[69] Subsection 2.2.2 states that nothing in the Agreement affects the ability of the Dogrib First Nation Government and Dogrib citizens to participate in and benefit from government programs for status Indians, non status Indians or Metis as the case may be, while paragraph 2.2.4 provides that enrolment as a Dogrib Citizen does not affect a person's identity as an Indian, Inuk or Metis.

[70] The self-government features of the Agreement provide for a certain amount of devolution of law-making and executive authority to the Dogrib Nation, the Dogrib Government and the Dogrib communities. The Agreement sets up a hierarchy and paramountcy of laws and powers which must be understood to appreciate the nature and scope of that devolution. The principal provisions are:

(1) paragraph 2.8.2 deals with laws made by Canada and GNWT of general application and states "unless otherwise provided in the Agreement, legislation of general application shall apply to the Dogrib Nation Government, Dogrib citizens and Dogrib lands, waters in, on or upon Dogrib lands and resources on or in such lands and waters";

(2) paragraph 2.8.3 which provides "where there is any inconsistency or conflict between the provisions of the settlement legislation or the Agreement and the provisions of any other legislation (defined to mean federal or territorial legislation and, for greater certainty, not to include Dogrib laws) or Dogrib laws, the provisions of the settlement legislation or the Agreement, as the case may be, shall prevail to the extent of the inconsistency or conflict";

(3) paragraph 2.8.4 where it is stated "where there is any inconsistency or conflict between the settlement legislation (both territorial and federal) and the Agreement, the Agreement shall prevail to the extent of the inconsistency or conflict;

(4) paragraph 2.15.1 which provides that "the *Canadian Charter of Rights and Freedoms* applies to the Dogrib First Nation Government in all matters within its authority".

[71] Some specific chapters of the Agreement will also touch upon the hierarchy of laws. For example:

(1) chapter 7 deals with the Dogrib First Nation Government and in paragraph 7.1.4 it is provided "that to the extent of any conflict between the Dogrib First Nation Government Constitution and the Agreement, the Agreement prevails";

(2) section 7.7 of that chapter deals with conflict of laws and generally provides in the case of conflict between federal legislation of general application and a Dogrib law, the federal legislation prevails to the extent of the conflict.

(3) It is also stated in paragraph 7.7.3 that except where provided otherwise in the Agreement, in the case of conflict between territorial legislation of general application and a Dogrib law, the Dogrib law prevails to the extent of the conflict;

(4) chapter 8 deals with Dogrib community governments and provides that those governments must be established by territorial legislation consistent with the Agreement. Again, federal legislation prevails to the extent of any inconsistency or conflict with laws enacted by a Dogrib community government (paragraph 8.5.1). Except where otherwise provided in the Agreement, in the case of any inconsistency or conflict between laws enacted by a Dogrib community government and other territorial legislation, the other territorial legislation prevails to the extent of the inconsistency or conflict (paragraph 8.5.3). Also, a Dogrib law has superior status to a law enacted by a Dogrib community government (paragraph 8.5.4) but a territorial law establishing a Dogrib community government prevails over Dogrib laws (paragraph 8.5.2).

E. ANALYSIS

[72] To succeed, the plaintiffs have the onus of satisfying all of the elements of the tripartite test for the grant of an interlocutory injunction. The plaintiffs must show (1) there is a serious issue to be tried in their action; (2) they will suffer irreparable harm if an injunction is not granted and (3) the balance of inconvenience favours them. Justices Sopinka and Cory, for the Supreme of Canada, set out in *RJR-MacDonald Inc. v. Attorney General for Canada et al.,* 1994 CanLII 117 (S.C.C.), [1994] 1 S.C.R. 311, the considerations governing each of these three elements.

(1) Preliminary Issues

(a) Crown immunity and jurisdictional impediment to injunctive relief

[73] Canada and the GNWT raised preliminary points of jurisdiction. Both governments say interlocutory injunctive relief is not available against them.

[74] Canada's submission is based both on the common law relating to Crown immunity from injunctive relief (*Centre d'information et d'animation communautaire* (*C.I.C.A.) et al. v. The Queen et al.,* [1984] 2 F.C. 866 (F.C.A.) and *Saugeen Band of Indians v. Canada (Minister of Fisheries and Oceans),* reflex, [1992] 3 F.C. 576 (F.C.T.D.), an immunity now contained in section 22 of the *Crown Liability and Proceedings Act ("CLPA")* which reads:

22. (1) Where in proceedings against the Crown any relief is sought that might, in proceedings between persons, be granted by way of injunction or specific performance, a court shall not, as against the Crown, grant an injunction or make an order for specific performance, but in lieu thereof may make an order declaratory of the rights of the parties.	22. (1) Le tribunal ne peut, lorsqu'il connaît d'une demande visant l'État, assujettir celui-ci à une injonction ou à une ordonnance d'exécution en nature mais, dans les cas où ces recours pourraient être exercés entre personnes, il peut, pour en tenir lieu, déclarer les droits des parties.
22(2) Servants of Crown	22(2) Préposés de l'État
(2) A court shall not in any proceedings grant relief or make an order against a servant of the Crown that it is not competent to grant or make against the Crown.	(2) Le tribunal ne peut, dans aucune poursuite, rendre contre un préposé de l'État de décision qu'il n'a pas compétence pour rendre contre l'État.

-

[75] Canada further advances the argument by pointing to jurisprudence and subsection 22(2) of the *CLPA* for the proposition an injunction is not available against a Minister or other official unless he or she has acted beyond the scope of his/her statutory authority citing *Hughes Canada v. Canada* reflex, (1994), 80 F.T.R. 300 (F.C.T.D.), and *Mundle v. Canada,* [1994] F.C.J. No. 1342 (F.C.T.D.).

-

[76] Counsel for the plaintiffs argues there is an exception to the rule the Crown is immune from interlocutory injunctive relief. He says such immunity cannot be used to shield an unconstitutional act, that is, cannot be used to protect Crown conduct that is or alleged to be unconstitutional.

[77] In oral argument, he referred to the Quebec Court of Appeal's judgment in *Société Asbestos Limitée c. Société nationale de l'amiante et Procureur général de la province de Québec,* [1979] R.J.Q. 342, the Supreme Court of Canada's judgment in *British Columbia (Attorney General) v. Air Canada,* 1986 CanLII 2 (S.C.C.), [1986] 2 S.C.R. 539, the Saskatchewan Court of Queen's Bench decision in *Van Mulligen v. Saskatchewan Housing Corporation et al.* (1982), 23 Sask. R. 67 and *Lévesque v. Attorney General of Canada et al.* reflex, (1985), 25 D.L.R. (4th) 184 (F.C.T.D.).

[78] Counsel for the plaintiffs' proposition is supported by Hogg & Monahan, *Liability of the Crown*, 3rd ed. issued in 2000 where, at page 36 it is said:

There is one exception to the Crown's immunity from injunction. Where an injunction is sought to prevent a violation of the Constitution, then the Courts will issue an injunction even against the Crown [citing *Société Asbestos* and then *Mulligen, supra*]. The Crown cannot use its remedial immunity to shield an unconstitutional act.

-

[79] I am not satisfied the cases relied upon by the plaintiffs blunt the federal Crown's immunity from interlocutory (versus final) injunctive relief in this case. Justice Beetz in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.,* 1987 CanLII 79 (S.C.C.), [1987] 1 S.C.R. 110, said this of *Société Asbestos, supra*, at page 148, a case which he characterized as an instance where interlocutory relief was granted to suspend the operation of legislation where the Quebec Court of Appeal had issued an interlocutory injunction restraining the Attorney General and any other person from enforcing any right conferred upon them by Bill-70 and Bill-121 relating to *La Société Nationale de l'amiante:*

The two statutes in question had been enacted in the French language only, in violation of s. 133 of the Constitution Act, 1867, and the Court of Appeal immediately came to the firm conclusion that, on that account, they were invalid. This is one of those exceptional cases where the merits were in fact decided at the interlocutory stage.

-

[80] A review of the other three cases relied upon by counsel for the plaintiffs in oral argument exhibit the same characteristic. In *Van Mulligen, supra,* the motions judge granted an interlocutory injunction prohibiting a Crown agent, the Saskatchewan Housing Corporation, from transferring an employee who was an elected alderman in the city of Regina because it was a violation of his Charter right to freedom of expression. *Air Canada, supra*, was a mandamus case requiring the A.G. of B.C. to issue a fiat for an action for recovery of monies collected under an invalid statute. *Lévesque, supra,* is similar to *Air Canada, supra*. It was not an interlocutory injunction case but a case where Justice Rouleau of this Court, on a judicial review application decided on its merits, issued a mandamus as an appropriate remedy for a Charter breach.

[81] As I see it from the jurisprudence, the Court will not issue an interlocutory injunction against the Crown or a Minister of the Crown in constitutional cases unless, in an exceptional circumstance, the motions judge can decide the merits of the action at the interlocutory stage, which is certainly not the case before me. As a result, I find that an interlocutory injunction is not available against Canada.

[82] The preliminary jurisdictional point raised by GNWT is of a different order in that its shield from injunctive relief is on the basis the Court has no jurisdiction over it in this action because this action is under section 17 of the *Federal Court Act* which provides for Federal Court Trial Division jurisdiction where relief is claimed against the Crown and "Crown" is defined in section 2 of that Act to mean "Her Majesty the Queen in right of Canada". It is argued GNWT is not part of the federal Crown.

[83] GNWT relies very heavily on the Federal Court of Appeal's decision in *Fédération Franco-ténoise v. Canada,* 2001 FCA 220 (CanLII), [2001] 3 F.C. 641, a case involving a motion to strike, where Justice Décary observed the action there was not brought against GNWT in a strict sense and stated GNWT was held to have standing in the Federal Court in *Government of Northwest Territories v. Public Service Alliance of Canada*, 2001 FCA 162 (CanLII), [2001] 3 F.C. 566.

[84] Counsel for GNWT is of the view *Fédération Franco-ténoise, supra*, holds GNWT is not part of the federal Crown relying on this particular paragraph in the Court of Appeal's decision referring to section 17(1) of the *Federal Court Act:*

The Crown contemplated in this subsection is the federal Crown. The "federal Crown" is an expression used to refer to the executive

power which in practice is exercised by the Prime Minister and his Cabinet. The expression does not cover the legislative power nor does it cover the judicial power:

When the Crown is spoken of in a statute, the term is symbolic of the executive power and means the King acting in his executive capacity. This, in effect, means the government. [Citing, *McArthur v. The King*, [1943] Ex.C.R. 77]

-

[85] Counsel for the GNWT adds this in its written memorandum:

Although this respondent does not wish to raise a formal objection to the jurisdiction of the Court, its consent cannot overcome the jurisdictional problem set out above.

-

[86] The difficulty I have with the preliminary point raised by GNWT is that its success depends upon a ruling from the Court the plaintiffs' action discloses no reasonable cause of action, a ground for a motion to strike not made here and involving the plain and obvious test which is a different standard than the balance of probabilities governing the issuance of interlocutory injunction.

[87] I cannot make a ruling GNWT is *de facto* not a defendant in this case. Rule 221 of the *Federal Court Rules, 1998,* is available to GNWT to strike it from the plaintiffs' claim. In such a motion, GNWT would have the onus of meeting the plain and obvious test in the context of appropriately proven jurisdictional facts related to Aboriginal and self-government rights. Those jurisdictional facts are missing here because of the exclusive reliance by GNWT, without more, upon *Fédération Franco-ténoise, supra*, in which GNWT was not a party.

[88] I add counsel for the Dogrib Nation was at odds with the position taken by counsel for GNWT. He, in argument, asserted Federal Court jurisdiction under subsection 17(4) or (5) of the *Federal Court Act* against GNWT and against the Dogrib Council relying on *Montana Band v. Canada*, reflex, [1991] 2 F.C. 273 (F.C.T.D.).

[89] For the reasons expressed, the manner in which GNWT raised its jurisdictional point and the absence of necessary jurisdictional facts to support that argument lead me to conclude the GNWT has not discharged the onus it has to convince me, on the state of the existing record, this Court has no jurisdiction to issue an interlocutory injunction against it. As a result, I reject GNWT's preliminary objection.

[90] While I have reached the conclusion the Federal Crown enjoys Crown immunity, at this stage, I have two defendants before me who cannot be shielded from the reach of an interlocutory injunction.

(b) <u>Prematurity</u>

[91] Counsel for the Dogrib Nation argues the plaintiffs' action suffers from a different legal problem -- that of prematurity. He points to the Federal Court of Appeal's decision in *Pacific Fishermen's Defence Alliance v. Canada*, reflex, [1988] 1 F.C. 498, a case where a land claims agreement was being negotiated (but no AIP had been signed) with the Nisga'a. It was alleged the agreement being negotiated would adversely affect the rights asserted by commercial fishermen.

[92] He then turns to cases in British Columbia which he says are similar to the case before me in which proceedings were taken in order to thwart the completion of a land claim process. All involved the Nisga'a Agreement and all were at different stages in the ratification process of the Final Agreement to be brought in force by settlement legislation.

[93] First, he refers to *Gitanyow First Nation v. Canada*, [1998] B.C.J. No. 1453 (B.C.S.C.), where Canada and B.C. had signed an AIP with the Nisga'a, occupants of the Nass Valley, and were in a lands claim negotiation with the Gitanyow, occupants near that same valley. The First Nation brought an action essentially claiming that, by signing the AIP with the Nisga'a before completing their negotiations with the Gitanyow, Canada and B.C. failed to negotiate in good faith. The AIP, in that case, contained a provision that the rights of the Nisga'a Nation set forth in the Final Agreement would not be affected by any treaties with other First Nations, a situation converse to the non-derogation clause in the case before me.

[94] In *Gitanyow, supra*, the defendants launched a motion to strike the statement of claim and Williamson J. allowed that application in part. Counsel for the Dogrib First Nation draws support for his argument because Justice Williamson relied on *Pacific Fishermen's Alliance, supra*, and struck out certain declarations since they involved a possible violation of the commercial fishermen's

rights contingent upon yet unascertained rights of the Nisga'a in the settlement legislation as contrasted to declarations for violations of rights flowing from concrete actions already undertaken. I add that counsel for the plaintiffs draws support from this case because Justice Williamson refused to strike out the statement of claim on the basis it was premature.

[95] He cites the case of *Campbell et al. v. British Columbia (Attorney General) et al.*, [1999] B.C.J. No. 233, where the trial judge refused to set down for trial an action challenging the Nisga'a Final Agreement at a time the B.C. Legislature was debating its ratification legislation and when in Parliament no Bill had yet been introduced.

[96] Lastly, he relies upon Justice Williamson's decision in *House of Sga'nisim, Nisibilada v. Canada*, [2000] B.C.J. No. 831, sustained by the B.C. Court of Appeal [2000] B.C.C.A. 260], a case where the motions judge refused to hear an interim injunction at a time when Parliament was considering the Niaga'a settlement legislation. Two weeks later Mr. Justice Williamson dismissed the application for an interlocutory injunction which would have prohibited officials from taking steps to obtain Royal Assent and obtain the Proclamation in force of the Nisga'a settlement legislation.

[97] I am not persuaded by counsel for the Dogrib Nation's argument the plaintiffs' action contains a fatal flaw -- that of prematurity -- constituting a bar to the plaintiffs from obtaining an interlocutory injunction prohibiting further negotiations towards a Final Agreement between the defendants on the Dogrib Nation.

[98] As I see it, the ratio in *Pacific Fishermen Defence Alliance, supra*, is as stated by Justice MacGuigan at page 506 of the reported case in the following terms:

[8] In my view the allegations of violations of rights in the case at bar, whether based on the common law or on the Charter, are just as incapable of proof as those in the Operation Dismantle cases. They are perhaps not inherently incapable of proof, <u>but they are incapable of proof at this time because, even in the presence of firm evidence as to the exact present state of the negotiations, a court could not possibly conclude that the Government would ultimately decide to translate a particular negotiating position</u> at a given moment into a legal agreement, still less that it would introduce legislation to that effect into Parliament, or that Parliament would enact it. Any duty of fairness owed by the Government to the fishermen must be determined in the context of a real decision by the Government affecting their rights, whatever those rights may be. As the Operation Dismantle case suggests, it may be enough that the violation of rights is merely threatened, but the threat must surely always be a real and not merely a hypothetical, surmised or imagined threat. [*emphasis mine*]

-

[99] In my opinion, the plaintiffs' action at bar is framed differently than was the action before the Federal Court of Appeal in *Pacific Fishermen's Defence Alliance, supra*. The plaintiffs here complain of a present violation by the defendants of their rights to participate in the negotiations for the settlement of present claims affecting their existing aboriginal rights. Plaintiffs do not complain of a possible violation of their participatory rights, rights to be consulted or a breach of existing fiduciary duties owed to them based on rights which may be determined in the future dependent upon speculative stances which might be taken by the Governments, Parliament or the territorial legislature.

[100] As I see it, none of the violations alleged by the plaintiffs, which may be characterized as process rights, are speculative or dependent on the rights which may be granted to the Dogrib Nation in the Final Agreement as ratified by settlement legislation. The fact the plaintiffs will have to prove they have aboriginal rights in the NSR does not make the violation of their rights to participate in the negotiations uncertain or conjectural.

[101] As noted, Justice Williamson in *Gitanyow First Nation, supra*, rejected an argument the plaintiff's First Nation case, based on a duty to negotiate, was premature.

[102] While I subscribe to the principle in *Campbell, supra*, and *House of Sga'nisim Nisibilada, supra,* the courts in our democratic system of government cannot impede a legislature's unfettered freedom to pass legislation proposed by the executive branch, with or without amendment. However, those cases have no application here. The violation of the rights claimed by the plaintiffs are not dependent upon legislative action but upon their alleged yet to be proven existing aboriginal rights.

(2) <u>Serious issue</u>

[103] As defined by the Supreme Court of Canada in *RJR MacDonald, supra,* the serious question to be tried test is not a stringent one, especially in Charter cases, principally because of the difficulties involved in deciding complex factual and legal issues based upon limited evidence available on an interlocutory injunction. Except in two cases, the threshold is a low one:

[49] . . .The judge on the application must make a preliminary assessment of the merits of the case... .

[50] Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. [See Justices Sopinka and Cory at pp. 337 and 338]

-

[104] To the general rule, there are two exceptions a judge should not engage in an extensive review of the merits. They are (1) when the result of the interlocutory motion will in effect amount to a final determination of the action; and (2) when the question of constitutionality presents itself as a simple question of law and its answer is self evident. These exceptions find no application here.

[105] Clem Paul and the NSMA argue their action raises many serious issues which can be summarized as follows:

(a) whether the plaintiffs have existing aboriginal rights which are protected by section 35 of the *Constitution Act, 1982*;

(b) whether the plaintiffs' aboriginal rights give rise to a fiduciary duty owed to the plaintiffs by the defendants and, if so, whether the defendants have breached that fiduciary duty;

(c) whether the plaintiffs' aboriginal rights give rise to a duty to consult them and if so, whether the defendants have breached that duty; and

(d) whether the defendants' actions or failures violate the plaintiffs' rights under any or all of sections 2, 7 or 15 of the *Charter of Rights and Freedoms*.

[106] Counsel for Canada argued the plaintiffs did not clear the serious issue threshold because the NSMA is neither an Aboriginal community nor could it be said it represented that community. The same applies to Clem Paul who could not be said to be an Aboriginal community onto himself. Moreover, counsel for Canada argued it is clear from the case law Canada cannot be compelled to negotiate with anyone.

[107] Counsel for the Dogrib Nation also argued the plaintiffs did not make out a case there was a serious issue to be tried. He said their action was clearly frivolous and vexatious. He dovetailed this argument with his prematurity argument and also incorporated it into his irreparable harm argument. The plaintiffs' claims for both declaratory and injunctive relief are bound to fail he says, unless the plaintiffs can make out the assertions in paragraph 45 of the statement of claim that the AIP and the Final Agreement will cause irreparable harm to the plaintiffs by affecting their aboriginal rights and title in the various ways specified.

[108] To the extent the plaintiffs' action is based on the assertion the AIP will itself affect the rights they say they have, the case is bound to fail because the AIP is only an Agreement-in-Principle and section 2.1 of that document provides it does not itself create any legal rights or obligations and only has been agreed to as the basis for concluding the Dogrib Final Agreement. Legally, the AIP has only the status of an agreement to agree and as such does not create enforceable rights and obligations. As a matter of law, the AIP cannot affect the rights asserted by the plaintiffs. He argues the plaintiffs' case depends on the effects of the Final Agreement which has yet to be concluded and it is unknown if it will be.

[109] I cannot accept counsel for Canada's argument the plaintiffs have not shown there are serious issues to be tried in their action because of doubts as to the existence of the Indigenous North Slave Metis as an organized community or that the plaintiffs do not represent the Indigenous North Slave Metis who, Canada says, historically may not have settled in the NSR communities as was the case in the western provinces, in the Red River Settlement (Manitoba), Batoche (Saskatchewan), or St. Albert (Alberta).

[110] The plaintiffs' action is based on the premise that the Indigenous North Slave Metis constitute a distinct people with aboriginal rights and title in the NSR. The plaintiffs' evidence (through the expert affidavits of Drs. Sprague and Stevenson and that of Mr. Thoms) provides a sufficient basis, at this stage, to establish there may well have been or be today such a community (then Old Fort Rae), (today the Flats in Yellowknife and French Point in Rae-Edzo). Counsel for the Dogrib Nation conceded the plaintiffs had raised sufficient evidence on this point.

[111] In my view, it can be said the issues raised by the plaintiffs are serious ones. A brief consideration of recent decisions of the Supreme Court of Canada in matters of Aboriginal rights under section 35 of the *Constitution Act, 1982* to which must be added the recent decision by the Ontario Court of Appeal in *R. v. Powley, supra,* satisfies me the plaintiffs have met the low threshold of the serious issue test.

[112] Chief Justice Lamer in *Delgamuukw v. British Columbia,* 1997 CanLII 302 (S.C.C.), [1997] 3 S.C.R. 1010, stressed the importance of negotiations building on the obligation established in *R. v. Sparrow,* 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075,

to consult Aboriginal peoples when their rights were involved.

[113] Chief Justice Lamer expressed himself as follows at paragraph 186 of his reasons for judgment:

Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at page 1105, section 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other Aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith ... . [*emphasis mine*]

-

[114] At the heart of the plaintiffs' Charter claims is section 15 where a number of points are raised as to the discriminatory treatment said to have been imposed on the Indigenous Metis of the NSR:

(1) the unavailability of a self-standing land claims process for the Metis in the NSR; and

(2) the obligation, not imposed on others, but required of the Indigenous Metis of the NSR, to prove they are an Aboriginal people, despite their recognition in the Dene/Metis negotiations.

[115] I also mention the plaintiffs' section 7 Charter claim involving an allegation of breach of fairness in that their rights are being affected without their involvement or participation. I note the concern in the way the negotiations have evolved. The land claim was initially launched by the Dogrib Nation as a regional land claim where some Metis participation was anticipated based on previous models of the Gwich'in and the Sahtu and Metis agreements but which had restrictive ancestry rules for eligibility. It turned into a Dogrib claim when the Yellowknives Dene and the Metis organizations in the NSR did not participate in those negotiations. However, during the negotiations, eligible participants were broadened to include as eligible beneficiaries and as Dogrib citizens all Aboriginal peoples resident in the NSR in 1921 or their descendants regardless of Dogrib ancestry.

[116] In addition, counsel for Canada says the NSMA does not represent the Indigenous Metis of the NSR. This argument is based on the NSMA's membership list where out of 292 members, 80 are status Indians and members in one of the four Dogrib bands and 51 are status Indians and members of other bands, both inside and outside the Northwest Territories. This argument was also based on answers during cross-examination of Catherine Paul-Drover and Clem Paul himself where it is indicated those eligible for membership in the NSMA could range to a few thousands.

[117] I do not accept the technical argument that, as framed, the plaintiffs' action is not a representative action on behalf of a people said to be a community. As I read the statement of claim as a whole the indicia of a representative action are sufficiently spelled out. (See also rule 114 of the *Federal Court Rules, 1998*.) Also, the facts relied on by counsel for Canada, in my view, are not sufficient to negate the proposition the NSMA represents the Indigenous Metis in the NSR. The NSMA may represent more than the Indigenous Metis or less than that entire group but this does not affect the essence of their action.

[118] As for counsel for the Dogrib Nation's argument that the plaintiffs' action is frivolous and vexatious because they cannot make out harm, it is best considered, in my view, when analysing the irreparable harm issue because it is inextricably linked to that issue and I believe counsel for the Dogrib Nation recognized this.

(3) Irreparable harm

[119] Irreparable harm is the second prong of the three part test. In *RJR-MacDonald, supra,* Justices Sopinka and Cory adopted what Justice Beetz wrote in *Metropolitan Stores, supra:*

[57] . . . consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm. The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage. [*emphasis mine*]

-

[120] Justices Sopinka and Cory in *RJR-MacDonald, supra,* continued at page 341:

[58] At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own

interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

[59] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision...; where one party will suffer permanent market loss or irrevocable damage to its business reputation ...; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined... . The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration. [*emphasis mine*]

-

[121] In their summary of principles, Justices Sopinka and Cory stated the following at page 348:

[79] At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits. [*emphasis mine*]

-

[122] From this last statement, I take it as established the plaintiffs (applicants) have the burden of establishing the irreparable harm that they will suffer unless an injunction is granted (not "may" or "is likely" to suffer) and their evidence must be clear and not speculative. These propositions have been endorsed by the Federal Court of Appeal in many cases. In the context of aboriginal law, I cite Justice MacKay's decision in *Kitkatla Band v. Canada (Minister of Fisheries and Oceans)*, [2000] F.C.J. No. 383.

[123] The plaintiffs, in their notice of motion, presented three options to the Court as to the kind of interlocutory injunction which might issue:

(1) until the trial of their action and judgment rendered;

(2) until the defendants recognize the North Slave Metis Alliance as an independent party negotiating on behalf of the North Slave Metis and the plaintiffs execute or adhere to the Agreement-in-Principle; or

(3) until the NSMA indicates in writing it has consented to such steps being taken.

[124] I will limit my observations to the possibility of an order enjoining the defendants from taking further steps to the completion or implementation of the Final Agreement until trial. I reject the two other options offered by the plaintiffs as inappropriate in that, if issued, such an injunction would grant them before trial the remedy they are seeking in their action in which they must establish, on the balance of probabilities, their rights as an Aboriginal people and the scope of those rights because it is on those substantive aboriginal rights the participatory rights claimed in this action depend. I make mine the observations of Justice Williamson in *Gitanyow, supra,* that "plainly s. 35(1) of the *Constitution Act* cannot be said to bestow upon one Aboriginal nation a right to a veto over agreements between the Crown and other first nations" (see paragraph 33 of Justice Williamson's reasons for order).

[125] Argument before me proceeded on the basis this land claims agreement would be effective before the trial of this action although I do not have reliable evidence as to the time gap.

[126] The plaintiffs must show they will suffer irreparable harm between now and the date of trial, harm which could not be remedied by the Court should the plaintiffs succeed in their action in which I observe no declaration of their aboriginal rights is being sought although it is the underpinning to their claim for participation in the negotiations.

[127] Counsel for the plaintiffs made two overarching submissions in respect of irreparable harm.

[128] First, they framed their need for an interlocutory injunction so that there may be an effective remedy after trial. They argue, if ratified and legislated, the Final Agreement will become a land claims agreement thus gaining constitutional recognition under section 35 of the *Constitution Act* with the result there will be no remedy for a violation of their Charter claims because a Charter right cannot be used to invalidate another recognized constitutional right. For this proposition, they invoke section 25 of the *Constitution*

Act, 1982, and the Supreme Court of Canada's decision in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (S.C.C.), [1993] 1 S.C.R. 319.

[129] This argument is advanced to counter the defendants' argument that, even though the plaintiffs might be excluded from the negotiations, the non derogation clause provided for in the agreement ensures they will suffer no irreparable harm if they establish the Indigenous North Slave Metis are a distinct Aboriginal people enjoying constitutionally recognized rights under section 35 of the *Constitution Act, 1982* because such rights are carved out of the Agreement and protected by it. I add that Justice Rouleau of this Court in *Benoanie v. Canada (Minister of Indian and Northern Affairs),* 1992 CanLII 2404 (F.C.), [1993] 2 C.N.L.R. 97, relied on the existence of a non-derogation clause to make a finding of no irreparable harm in a case where the plaintiff Indian Bands in an action claiming treaty or aboriginal rights to a portion of land covered in an initialled Final Agreement, sought an interlocutory injunction restraining Canada, the GNWT and the Inuit of Nunavut from taking any further steps towards ratification of a land claims settlement agreement.

[130] I am not prepared to accept the plaintiffs' argument that, if successful on their Charter claims, the non-derogation clause contemplated in the Agreement (which I recognize applies only to a violation of section 35 rights) would not operate because that Agreement and its provisions relating to the infrastructure of self-government and aboriginal rights and title accorded to the Dogrib Nation would obtain constitutional status under section 35 of the *Constitution Act, 1982*.

[131] First, by its very terms, a constitutionalized Final Agreement between the defendants will give constitutional recognition to the non-derogation clause and its mechanism whereby the rights of the Dogrib Nation will be adjusted if they clash with the rights of another Aboriginal people which the plaintiffs say the Indigenous Metis of the NSR have. The reason is self-evident. The non-derogation clause is contained in the very agreement to be constitutionalized under section 35.

[132] Second, as I understood and appreciated their argument, the plaintiffs' Charter claims are inextricably woven with their section 35 claimed rights as an Aboriginal people. Both the section 35 claims and the Charter claims are being advanced together and, in my view, the plaintiffs' Charter claims are dependent upon the plaintiffs establishing substantive (as distinct from procedural) section 35 aboriginal rights.

[133] Third, the plaintiffs' reading of the *Speaker's* case, *supra*, is too broad. McLaughlin J., now C.J.C., ruled the Charter did not apply in that case, not because a legislative body is never subject to the Charter, but because the action in issue (the exclusion by the Nova Scotia House of Assembly of the media from its chambers), was an action taken pursuant to a right which enjoys constitutional status and, having constitutional status, this right was not one which could be breached by the Charter. The right recognized by Justice McLaughlin was the right of a legislative body to control who attends in its chambers. She recognized the right claimed as a constitutional power and not merely an act in the exercise of that constitutional power. She analogized that the important question was whether the Court here was treating the fruit of the legislative tree, or the tree itself. The test is whether to accede to the Charter argument would amount to negating or removing a constitutional power. If so, the Charter does not apply.

[134] Counsel for the plaintiffs have failed to persuade me the result of a successful Charter claim by the plaintiffs will negate or destroy a constitutionalized Dogrib Agreement. Rather, a successful Charter breach, based on ascertained section 35 rights, may result in an adjustment to the rights and benefits granted by the Agreement to the Dogrib Nation, a remedy already contemplated by the Agreement itself. In other words, a successful Charter challenge would not negate the provision in section 35 enabling the constitutionalization of land claims agreements but would merely affect the content of such agreement.

[135] The second fundamental submission made by the plaintiffs on irreparable harm is again made in the context of their Charter argument. The plaintiffs argue irreparable harm is presumed to have been made out and rely upon the following extract from *RJR-MacDonald, supra*:

[61] . . . However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm. [*emphasis mine*]

-

[136] In order for this principle to apply, there are two pre-conditions: first, there must be evidence of financial damage and second, evidence the plaintiffs will suffer that financial damage. The plaintiffs' evidence on the point (mainly aimed at loss of revenue from existing or future agreements from resource companies) is speculative and, in any event, is not sufficiently strong.

[137] The plaintiffs then urged upon the Court several instances arising out of the AIP, upon which the Final Agreement will be based, how the rights of the Indigenous Metis of the NSR would be irreparably harmed between now and the trial of their action unless an injunction is issued, the purpose of which is to enjoin the defendants from taking any further steps in their negotiation towards a Final Agreement and its implementation. Simply put, the effect of such an injunction would be to freeze the current negotiations between the defendants until trial.

-

[138] Before I consider that point, I should say I have no quarrel with many of the cases cited by counsel for the plaintiffs where irreparable harm in aboriginal rights cases was found to have been made out. I summarize the main ones relied upon:

(1) *MacMillan Bloedel Ltd. v. Mullin*, 1985 CanLII 154 (BC C.A.), [1985] 3 W.W.R. 577 (B.C.C.A.) where an interlocutory injunction was issued prohibiting MacMillan Bloedel from clear-cutting an area of Meares Island claimed by the Clayoquot Island Band. Justice Seaton wrote the reasons for the majority of the Court of Appeal overturning a trial judge's refusal to grant the Band the injunction. His reasons for doing so were based on findings that the area to be clear-cutted would be wholly logged and permanently destroyed with the result, if the Band was successful, the Courts would not be able to give them the area with standing trees. Justice Seaton also considered the symbolic and cultural importance of the island to the Band and also took into account as a separate consideration the need to preserve evidence of their use and occupation of the island, evidence which would be destroyed.

(2) *Touchwood File Hiles Qu'Appelle District Chief Council Inc. v. Davis,* [1985] S.J. No. 514 (Sask. Q.B.) where Justice Hrabinsky issued an interlocutory injunction to prevent the defendants from excavating a building site which, as it turned out, was an Aboriginal burial site. Justice Hrabinsky relied upon the fact the Minister of Culture and Recreation for Saskatchewan had previously issued a temporary stop order under the *Heritage Property Act* but limited to other nearby lots and not the lot at issue before him.

(3) *Hunt v. Halcan Log Services Ltd.* 1986 CanLII 863 (BC S.C.), (1987), 34 D.L.R. (4th) 504 (B.C.S.C.) where Justice Trainor issued an injunction prohibiting logging on Deer Island off the East Coast of Vancouver Island across from Prince Rupert in Beaver Harbour on which the Kwakiult Island Band claimed aboriginal rights. Justice Trainor was satisfied, on the evidence before him, the Band had used and occupied the Island as a burial place considered spiritual and sacred, was a major source of year-round fish, meat, harvest roots and berries and used for its timber, the losses of which he characterized as irreparable damage.

[139] The evidence before me is largely different than the evidence brought forward in those cases.

[140] In his affidavit in support of the application for interlocutory injunction, Mr. Paul deposed an affidavit in which he described the historical and current traditional activities of hunting, trapping, fishing for food and the harvesting of timber for housing, building sleds and for commercial use, all carried out in the settlement area. He wants to ensure the preservation of these traditional activities that today are still carried on by the North Slave Metis to provide for their needs in food or otherwise. He stressed dependency on fishing and the need to obtain meat from the caribou herd.

[141] He is concerned that if the AIP culminates in a legislated Final Agreement:

(1) the Dogrib Nation will obtain title to areas which the North Slave Metis have traditionally used (18.1 of the AIP);

(2) the Dogrib Nation will obtain exclusive control over water in the settlement area (21.2.1 of the AIP);

(3) their property and aboriginal rights would be extinguished and the loss of a land base for the North Slave Metis will be lost as well as access to the natural resources within the settlement area;

(4) they will lose many of the benefits currently enjoyed such as hunting, etc., in the settlement area;

(5) they will lose the benefits of existing or future agreements with resource companies which he claims will have a dramatic economic and social impact on the community;

(6) the cultural identity of the North Slave Metis will seriously be damaged because a "Dogrib" includes the Indigenous North Slave Metis thereby wiping out their unique and separate identity. Moreover, in order to obtain the benefits of the finalized AIP, an Indigenous North Slave Metis must enroll as a "Dogrib citizen" which requires them to abandon their Metis identity and Metis rights, a choice which Mr. Paul describes as having to choose between their identity and culture as a unique and separate Aboriginal people and the chance to access the benefits under the Agreement, a choice that will damage their community and their culture. This is compounded by the fact that unless an Indigenous North Slave Metis enrolls as a Dogrib citizen, he or she cannot vote on the ratification of the Dogrib Agreement, an agreement which radically affects their rights, he claims;

(7) the NSMA will lose the recognition it now enjoys from other Aboriginal groups and governments in the NSR. One example is that GNWT currently involves it in decisions regarding the Bathurst caribou herd but now, if finalized, the AIP will grant the Dogrib Nation sole authority to make decisions on the use of wild life in the area;

(8) the Dogrib will have complete control over Aboriginal burial sites and heritage resources within the settlement area pointing to article 17.2 of the AIP said to make the Dogrib exclusive custodian over heritage resources and 17.4 of the AIP granting the Dogrib exclusive control over all Aboriginal burial sites in the settlement area;

(9) the AIP contemplates implementing self-government in the settlement area, a government to be called the "Dogrib First Nation" with no provision for Metis representation or participation nor is there provision for Metis self-government in the NSR. Moreover, by article 7.5.9 of the AIP, the Indigenous North Slave Metis will be subject to Dogrib laws but no ability to participate in the process approving the Dogrib Agreement or selecting the Dogrib First Nation Government; and

(10) the Dogrib Nation will be able to pass laws regarding harvesting in the settlement area and that pursuant to article 7.5.9, these laws will be applicable to the Indigenous North Slave Metis. The Dogrib will have exclusive rights to harvest fur bearing animals on Dogrib lands. They will also have exclusive commercial fishing rights in the Dogrib primary use area. Articles 19.1 and 21.2.1 give the Dogrib the right to control access to the use of the settlement area, including access to lakes and he concludes an Indigenous North Slave Metis will require permission from the Dogrib to continue to use and occupy such lands.

[142] In argument, counsel for the plaintiff stressed:

(1) interference with business activities arising out of the land withdrawal process, the effect of which is to freeze mining developments until ratification such that no new business can be conducted;

(2) loss of natural resources;

(3) every decision made in the interim period impacting on Metis rights in the NSR will be made by the Dogrib Nation or Dogrib First Nation Government who deny the Indigenous Metis' existence;

(4) impact on their participation in decision-making on the Bathurst caribou herd;

(5) eligibility in the AIP purports to settle the rights of others;

(6) if a Metis person enrolls as a Dogrib citizen, families may be fragmented;

(7) the need to preserve evidence of the existence of Metis aboriginal rights as well as damage to Metis culture.

-

[143] I observe that much of the irreparable harm evidence deposed by Mr. Paul aims at the long-term and not at the short-term -- the period of time between now and the trial of the action. To the extent the harm feared by Mr. Paul arises from the coming into force of the legislated Final Agreement, I am in agreement with counsel for Canada and the Dogrib Nation that the non-derogation clause in the Agreement will generally ensure an adjustment will take place to make the space for any rights which the Court will have found the Indigenous Metis of the NSR had.

[144] I think counsel for the plaintiffs recognized the force of the non-derogation clause when she stated at page 738 of volume III of the transcript the following:

We are not talking . . I think we have acknowledged to you, my Lord, that at such time our client litigates their section 35 rights and is successful, the non-derogation clause would provide a remedy.

However, in the interim, there is no protection. That's our concern about the non-derogation clause.

-

[145] I accept without hesitation Justice Rouleau's conclusion to the same effect in *Benoanie, supra*, where he stated as follows:

I am not convinced that the plaintiffs will suffer irreparable harm if I refuse to grant them the relief sought. It appears to me that the

Final Agreement provides protection for whatever treaty and/or Aboriginal rights the plaintiffs may be found to have, and in fact may give them legally recognized rights which they presently don't have.

-

[146] I am not persuaded by the individualized assertions of irreparable harm advanced by the plaintiffs in the short term principally because they are founded on the misreading of the purpose and scope of the Final Agreement and are based on erroneous assumptions. In many cases, the fear of harm is speculative.

[147] The plaintiffs' argument is premised on the assumption the Final Agreement will create an all powerful Dogrib Government operating unchecked on Dogrib lands in the settlement area. This assumption is incorrect because the senior levels of government, Canada and GNWT, have not abdicated from the NSR and their laws of general application have priority. The Agreement and the Charter prevail over Dogrib laws and the courts are available to ensure justice.

[148] The plaintiffs misread the purpose of the Final Agreement. The Final Agreement is not about the settlement of the rights of the Indigenous Metis in the NSR but rather the settlement of the rights of the Dogrib Nation living primarily in the four Dogrib communities in the NSR. This is the proper perspective of the Final Agreement which permeates all of its provisions. This is evident from the structure of the Dogrib Nation Government and Dogrib community governments. These structures are based on the four Dogrib communities. This is also why the future Dogrib First Nation Government is confined to Dogrib lands and in respect of Dogrib citizens exercising harvesting rights in the settlement area where, as noted, the powers of the senior levels of government prevail.

[149] While it is true, as the plaintiffs assert, persons who claim to be Indigenous Metis of the NSR with aboriginal rights are eligible participants to the benefits of the Final Agreement, this does not mean, as the plaintiffs argue, that the Dogrib Nation is negotiating their aboriginal rights.

[150] Persons whom the plaintiffs represent are not forced to participate in the Final Agreement. They have a real and substantial choice which will be rationally exercised taking into account all of the provisions of the Agreement and their personal situation including where they live and how integrated they are with the Dogrib communities. In these circumstances, to participate does not mean a person is forced to abandon being a Metis in the same way that electing to take Treaty in 1921 did not. In any event, the plaintiffs and the persons they represent are at liberty to pursue their action for recognition of their aboriginal rights and, if they succeed, their rights will be recognized and the Final Agreement will be adjusted.

[151] My reading of the current draft of the Final Agreement is, on many points, different than the interpretation urged upon me by counsel for the plaintiffs. As a result, I am not satisfied the plaintiffs have demonstrated irreparable harm justifying the need for an interlocutory injunction during the narrow time frame between now and the trial of the plaintiffs' action. A few examples suffice.

[152] First, the plaintiffs' argument that the individual harvesting rights of the Indigenous North Slave Metis will be impacted does not take into account several factors: the harvesting rights accorded to the Dogrib Nation in the settlement area is not exclusive and that exclusivity on Dogrib Lands is restricted to fur bearers but even that is subject to exemption. Overall, there is a right of access to Dogrib lands including the right to harvest wildlife, trees and plants subject to non-discriminatory Dogrib laws.

[153] Furthermore, such argument does not account for the establishment and authority of the North Slave Renewable Resource Board in the settlement area who must give priority to non-commercial harvesting and within that category to Dogrib citizens and other Aboriginal peoples over other persons in the NWT.

[154] Second, the plaintiffs' argument about losing their rights of consultation in respect of the caribou herd does not take into account the management provisions of that herd in paragraph 12.9.2 and the mandatory consultation provisions with representatives of any Aboriginal group.

[155] Third, the plaintiffs argued eloquently that the mandatory obligation imposed on resource companies to consult with the Dogrib First Nation Government would impede the NSMA's ability to negotiate resource agreements as they had in the past. The AIP has been in existence for two years now and the plaintiffs do not bring any evidence of any effects on their relations with resource companies. This argument ignores the protection granted to existing arrangements and, in terms of future agreements, is speculative as nothing in the Final Agreement precludes the NSMA from entering into such agreements which are predicated on their aboriginal rights which they assert. Moreover, I do not accept the existence of a development freeze on Dogrib lands to constitute irreparable harm to the plaintiffs and the people they represent. The plaintiffs are protected by the non-derogation clause and, in any event, any infringement of their rights would be compensable in damages.

[156] Fourth, I reject the plaintiffs' argument about the impact of the powers granted to the Dogrib First Nation Government in

respect of heritage resources. My reading of the Final Agreement indicates there are provisions for notice of discovery of burial and archeological sites to GNWT which would be able to act in the circumstances. Otherwise, the courts are available to afford appropriate protection in compelling circumstances.

[157] Fifth, the plaintiffs' argument about water provisions are overstated to the extent they encompass the entire settlement area and, in terms of Dogrib lands, do not account for the rights of navigation and passage.

(4) <u>Balance of inconvenience and public interest considerations</u>

[158] In *RJR-MacDonald, supra,* Justices Sopinka and Cory adopted Justice Beetz' formulation in *Metropolitan Stores, supra*, for the third test to be applied in an application for interlocutory relief. This test is:

[62] . . ."a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits".

-

[159] The two justices added the following:

(1) In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage;

(2) The factors which must be considered in assessing the balance of inconvenience are numerous and will vary in each individual case and there may be special factors;

(3) One of those special factors is that in all constitutional cases the public interest must be considered in assessing the balance of convenience.

-

[160] I have no hesitation in concluding the defendants would be harmed more if the injunction were granted than the plaintiffs would be if it was refused and this for several reasons.

[161] First, the Dogrib Nation has recognized aboriginal rights accepted for negotiation by Canada which is not the case for the Indigenous North Slave Metis whose rights have been asserted but not recognized nor established nor accepted for settlement.

[162] Second, the Dogrib Nation has been negotiating since 1992 and can legitimately expect closure. The plaintiffs and the people they represent are not in the same position having sought other solutions since 1992 and only shown serious interest in the Dogrib process in 1998.

[163] Third, John Zoe's affidavit speaks to the impact of delay in completing the negotiations and I accept that evidence. Justice Rouleau in *Benoanie, supra,* made a similar finding of balance of convenience in continuing land claims negotiations partly on similar considerations. On the other hand, no irreparable harm will be suffered by the plaintiffs and the people they represent. They can continue their action and have the acknowledgement by all concerned including the Dogrib Nation that if they prove who they are and have the rights which they assert they have, an effective remedy for the infringement of those rights is available. In the interim, I have found the plaintiffs need no injunctive protection.

[164] Additionally, the public interest largely favours the defendants. The plaintiffs seek to enjoin the continuation of a land claims process which itself is in the public interest because it is a process -- a mechanism for the reconciliation of Aboriginal peoples into Canadian society.

[165] Finally, there is another important reason militating in favour of the defendants and that arises from the plaintiffs' delay.

[166] The purpose of the plaintiffs' action is to obtain a seat at the Dogrib table from which they say they have been excluded. This has been known by them for several years and yet they only launched legal proceedings in the spring of 2001 and this injunction application on April 30, 2001.

[167] Delay was one the bases Justice Williamson invoked for refusing the interlocutory injunction in *House of Sga'nisim, Nisibilada, supra,* as did Goldie J.A. in *Barton et al. v. Nisga'a Tribal Council,* [1998] B.C.J. No. 2395, (October 1, 1998). Similar considerations were taken into account by Justice Sigurdson in *Siska Indian Band v. British Columbia (Minister of Forests),* [1999] B.C.J. No. 2354 (October 25, 1999, B.C.S.C.) who took into account the failure of the Siska Band to proceed expeditiously with its challenge on the grounds of its claimed aboriginal titles and rights and delay in seeking injunctive relief.

[168] I conclude by adopting Justice Goldie's words in *Barton, supra*, at paragraph 18:

[18] So, this motion, in light of all that had gone before, inevitably reminds one that equity aids the vigilant and not those who slumber on their rights. The origin of the maxim lies in the inference of assent to a course of conduct by one who infringes the rights of another without the latter's objection. What in fact is sought here is an order that would interrupt a process, the purpose of which has been well known to every member of the Nisga'a Nation and of the Tribal Council, including the appellants, and which has been ongoing for many, many years.

-

[169] For all of these reasons, the plaintiffs' injunction application is dismissed with costs payable in the cause.

"François Lemieux"

J U D G E

OTTAWA, ONTARIO

MAY 31, 2002

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

STYLE OF CAUSE:

CLEM PAUL and NORTH SLAVE METIS ALLIANCE

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE GOVERNMENT OF CANADA as represented by the ATTORNEY-GENERAL OF CAN INDIAN AND NORTHERN AFFAIRS CANADA, THEGOVERNMENT OF THE NORTHWEST TERRITORIES, THE DOGRIB FIRST NATION as represented by THE DOGRIB TREATY 11 COUNCIL

Defendants

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: December 4, 2001

REASONS FOR Order : Lemieux J.

DATED: May 31, 2002

APPEARANCES:

Janet Hutchison

Katherine Hurlburt

Dale Gibson FOR THE PLAINTIFFS

Pat Hodgkinson

Shaun Mellen

Kevin Kimmis FOR THE DEFENDANTS Her Majesty The Queen, Attorney General of Canada, Minister of Indian and Northern Affairs

Arthur Pape

Jean Teillet FOR THE DEFENDANTS Dogrib First Nation and John B. Zoe

Brad Patzer FOR THE DEFENDANT Government of Northwest Territories

SOLICITORS OF RECORD:

Chamberlain Hutchison

Edmonton, Alberta FOR THE PLAINTIFF

Mr. Morris Rosenberg FOR THE DEFENDANTS Her Majesty the Queen,

Deputy Attorney General Attorney General of Canada, Minister of Indian and

for Canada Northern Affairs

Pape & Slater FOR THE DEFENDANTS Dogrib First Nation and John

Vancouver, B.C. Zoe

Mr. Brad Patzer

Yellowknife, N.T. FOR THE DEFENDANT Government of Northwest Territories, Department of Justice

Scope of Databases | RSS Feeds | Terms of Use | Privacy | Help | Contact Us | About

by LexUM for the Federation of Law Societies of Canada