

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20090603

Docket: A-365-08

Citation: 2009 FCA 185

**CORAM: DÉCARY J.A.
NOËL J.A.
BLAIS J.A.**

BETWEEN:

**EDOUARD VOLLANT, AGNÈS MCKENZIE, JEAN-YVES PINETTE,
MICHEL PINETTE, JACQUES MCKENZIE, ALPHONSE AMBROISE,
JEAN-GUY PINETTE, ÉRIC ROCK, GEORGE MCKENZIE, PHILOMÈNE MCKENZIE,
GEORGES-ERNEST GRÉGOIRE, RONALD FONTAINE, RAYMOND JOURDAIN,
DANIEL ST-ONGE, ANDRÉ JÉRÔME, FRANÇOIS FONTAINE, LÉO GRÉGOIRE,
ANTOINE JOURDAIN, SYLVIO JOURDAIN, ISRAEL ST-ONGE, MARC ST-ONGE,
ANGÉLINE JOURDAIN AMBROISE**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

and

THE ATTORNEY GENERAL OF QUEBEC

Respondent

and

THE ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR

Respondent

Heard at Montréal, Quebec, on May 25, 2009.

Judgment delivered at Ottawa, Ontario, on June 3, 2009.

REASONS FOR JUDGMENT BY:

DÉCARY J.A.

CONCURRED IN BY:

**NOËL J.A.
BLAIS J.A.**

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REASONS FOR JUDGMENT

DÉCARY J.A.

[1] The appellants filed in Federal Court a claim for relief against the federal Crown. It is undisputed that, under subsection 17(1) of the *Federal Courts Act*, the Federal Court has concurrent jurisdiction in such matters.

[2] The claim for relief seeks a series of declarations which essentially focus on alleged Aboriginal rights, treaty rights and Aboriginal title rights, which the plaintiffs allegedly hold in Labrador. I reproduce below the twenty-five (25) declarations the plaintiffs are seeking:

[TRANSLATION]

1. A declaration that the plaintiffs have Aboriginal rights and treaty rights existing everywhere in Labrador.
2. A declaration that the plaintiffs' aboriginal and treaty rights extend to natural resources and include the right to exercise their way of life, their customs, their traditions and their traditional practices, which are an integral part of the distinctive Innu culture, everywhere in Labrador, individually as members of the Innu families and as members of their Innu community.
3. A declaration that the plaintiffs' Aboriginal rights and treaty rights include (a) the right to hunt, fish and trap (right to harvest) anywhere in Labrador and to carry out activities incidental to that right; (b) the right to sufficient wildlife habitat to be able to enjoy the right to harvest; (c) the right to move freely anywhere in Labrador in order to carry out traditional activities; and (d) the right to access Labrador's natural resources and to use them for subsistence purposes.
4. A declaration that the plaintiffs' Aboriginal rights are independent of the plaintiffs' Aboriginal title in Labrador.
5. A declaration that in addition to the Aboriginal and treaty rights described above, the plaintiffs Édouard Vollant, Agnès McKenzie,

Jean-Yves Pinette, Michel Pinette, Jacques McKenzie, Alphonse Ambroise, Jean-Guy Pinette and Éric Rock and the members of their respective families whom they represent (“Innu families”) have an Aboriginal title and specific Aboriginal and treaty rights on all land of said Innu families (hereinafter “Innu family lands”), namely the land located in Labrador and elsewhere between approximately the 52nd and 56th parallels of north latitude and the 64th and 68th meridians of west longitude, being the tracts described at paragraph 29 and commonly designated as tracts 258, 211, 247, 239, 220, 220A, 221, 235, 238 and 271, including 13 178 square kilometres over which the plaintiffs have complete control and jurisdiction.

6. A declaration that the Aboriginal title related to the Innu family lands and the treaty rights of these plaintiffs include the right to use the natural resources situated on and below the Innu family lands.
7. A declaration that the Aboriginal rights and treaty rights of all plaintiffs and the Aboriginal title claimed by the plaintiffs named at paragraph 5 are protected by the Canadian constitution.
8. A special declaration that the rights of the members of the Innu families take precedence over any other right, authority or jurisdiction relating to the Innu family lands.
9. A declaration that for the Innu family lands, the plaintiffs’ existing Aboriginal and treaty rights, and in particular the Aboriginal title, include (a) the right to the exclusive use and occupation of the Innu family lands; (b) the right to hunt, fish and trap and to carry out incidental activities (right to harvest) on these lands, without interference; (c) the right to use and exclusively benefit from all the natural resources in, on, above and below the Innu family lands, including water resources regardless of their natures; (d) the right to control, manage and exploit these lands and their natural resources according to Innu laws and customs; and (e) the right to build constructions of any kind on those lands.
10. A declaration that the Innu family lands are subject to Innu laws, customs and traditions as practiced and respected by the Innu families.
11. A declaration that the *Royal Proclamation of 1763* applies to Labrador and ensures that the Innu Nation should not be molested or disturbed in its possession of Labrador as its hunting grounds.

12. A declaration that all of Labrador and, more particularly, the Innu family lands are lands reserved for the Indians within the meaning of subsection 91(24) of the *Constitution Act, 1867*, and section 3 of the *Terms of Union of Newfoundland with Canada*, confirmed by the *Newfoundland Act*, and, subject to the plaintiffs' constitutional rights, are of federal jurisdiction.
13. Alternatively, a declaration that if the Province of Newfoundland and Labrador has rights in respect of lands, mines, minerals and royalties belonging to Labrador, the plaintiffs' rights shall be subject to a trust and are an interest other than that of the Province in these lands, mines, minerals and royalties within the meaning of section 37 of the *Terms of Union of Newfoundland with Canada* and the *Newfoundland Act*.
14. A declaration that any legislation of the Province of Newfoundland and Labrador dealing with the lands or natural resources within the Innu family lands is unlawful, unconstitutional and of no force and effect with respect to the plaintiffs and the Innu family lands.
15. A declaration that any development project, including mining, forestry, hydroelectric, railway, tourism and outfitting projects, and all related work affecting the Innu family lands are subject to the consent of the Innu families of these Innu family lands.
16. A declaration that, without that consent, any development project affecting the Innu family lands is unconstitutional, unlawful, void and *ultra vires* and a breach of the Aboriginal rights and treaty rights of the Innu families in these Innu family lands and exceeds the rights of the Crown and the authority of the Parliament of Canada and the Legislature of Newfoundland and Labrador.
17. A declaration that, under the common law, treaties between the French Crown and the British Crown, on the one hand, and the Innu Nation, on the other, and various constitutional instruments, including the *Royal Proclamation of 1763*, the *Terms of Union of Newfoundland with Canada* and the *Newfoundland Act*, the defendant, Her Majesty, has, among Her constitutional and fiduciary obligations, the duty to recognize, protect, respect, preserve and promote the plaintiffs' freedom and right to exercise without interference their Aboriginal and treaty rights in Labrador and, particularly, on the Innu family lands.

18. A declaration that Her Majesty has violated the constitutional and fiduciary obligations described at paragraph 17.
19. A declaration that Her Majesty has, *inter alia*, breached Her constitutional and fiduciary obligations to protect the plaintiffs from breaches of their rights and damage to the Innu family lands resulting from development projects in Labrador.
20. A declaration that, subject to the plaintiffs' rights, all development projects in Labrador and particularly those that affect the Innu family lands are under federal jurisdiction.
21. A declaration that moreover, and in any event, Her Majesty has breached Her constitutional and fiduciary obligations to consult the plaintiffs about development projects in Labrador, particularly those that have affected the Innu family lands.
22. A declaration that Her Majesty has breached Her obligations to apply federal legislation concerning the environment, social impacts, navigable waters and fisheries to development projects in the Innu family lands.
23. A declaration that, with regard to any development project on the Innu family lands, the developers must obtain various permits, licences and authorizations under federal legislation, including the *Fisheries Act*, the *Navigable Waters Protection Act*, the *Canadian Environmental Protection Act* and the *Canadian Environmental Assessment Act*.
24. A permanent injunction against the defendant, Her Majesty, ordering the defendant, her officers, directors, servants, employees and agents and those in active concert and participation with Her to take the necessary measures to prevent or to stop all development projects on the Innu family lands, unless the Innu families concerned have consented to it; to respect, protect and preserve the plaintiffs' Aboriginal and treaty rights, including their way of life; and to fulfill Her Majesty's constitutional and fiduciary obligations relating to the plaintiffs in accordance with the Honour of the Crown and Her Majesty's constitutional jurisdiction under subsection 91(24) of the *Constitution Act, 1982*.
25. An order against the defendant to pay damages or expenses in the total amount of \$525 million for breaches of their Aboriginal and treaty rights and damage to the Innu family lands and for Her

Majesty's breaches of Her constitutional and fiduciary obligations towards the plaintiffs.

[3] The Attorney General of Newfoundland and Labrador (the Attorney General), who has been impleaded in the proceeding, has filed a motion to strike under rule 221(a) of the *Federal Courts Rules*. The Attorney General submits that the lands described in the statement of claim are located in the province of Newfoundland and Labrador, that the notice of constitutional questions challenges the validity of some twenty-seven (27) provincial acts and regulations identified by name and any other Newfoundland legislation concerning natural resources; that the said notice alleges that [TRANSLATION] "all of Labrador and, more particularly, the Innu family lands are lands reserved for the Indians within the meaning of subsection 91(24) of the *Constitution Act, 1867*" and that all Newfoundland legislation and [TRANSLATION] "any development project affecting the Innu family lands" was void. In short, the Attorney General pleads as follows:

10. The Federal Court has no jurisdiction to grant relief as claimed in the Amended Statement of Claim in particular in respect of the plaintiffs claimed aboriginal and treaty rights in relation to lands and resources with the province and the validity of provincial legislation.

11. The relief which is claimed in the Amended Statement of Claim in substance constitutes relief against the Province of Newfoundland and Labrador and is not within the jurisdiction of the Federal Court. The claim in its entirety should be struck out.

[4] Justice Hugessen allowed the motion and struck out the amended statement of claim in its entirety without leave to amend (T-568-07).

[5] The Federal Court has jurisdiction, of course, to hear statements of claims for declarations made against the federal Crown. The Court has no jurisdiction—this too is clear—to make declarations against a provincial Crown, meaning that a provincial Crown cannot be summoned as a defendant in the Federal Court.

[6] It is clear in this case, as Justice Hugessen said, that the province of Newfoundland and Labrador is an essential party to the dispute. If one excludes the declarations sought that focus on or concern the province of Newfoundland and Labrador, virtually nothing remains to justify the continuation of a proceeding in the Federal Court. This is why, I believe, the judge struck out the entire statement of claim without leave to amend. Counsel for the appellants have made no effort, in their memorandum or at the hearing, to convince us that they would be able, without amending the cause of action, to file a new amended statement of claim in which the province of Newfoundland and Labrador would, for all intents and purposes, no longer be an essential party.

[7] The striking out of an entire statement of claim is nonetheless an extreme remedy in a case in which the Court's concurrent jurisdiction over some aspects of the dispute has been established. In the case at bar, the appropriate remedy would be that contemplated by this Court in *Fédération Franco-ténoise v. Canada* (C.A.), 2001 FCA 220, namely to stay the proceedings and to allow the dispute to be pleaded before the Supreme Court of Newfoundland and Labrador. The following remarks, at paragraphs 81 and 82 of that decision, apply to this case, *mutatis mutandis*:

[81] It is clear, from a reading of paragraphs 50(1)(a) and 50(1)(b) [of the *Federal Courts Act*], taken together, that the Court may order the stay of a proceeding even though no other proceeding is pending before another court. As we know, in the case at bar no action has so far been brought in the Supreme Court of the Territories.

[82] I would have no hesitation in ordering the stay of the action if I had to determine the question. There is in the Territories a superior court that would have jurisdiction in relation to all of the defendants and in relation to all of the remedies that are sought. No problem of jurisdiction, standing, procedural vehicle or choice of remedy would be posed in the Supreme Court of the Territories. The action could be carried to completion without the interlocutory proceedings that have already delayed the progress of the proceedings in the Federal Court and that apparently are still not exhausted.

[8] I would therefore allow the appeal, set aside the judgment by the Federal Court, and, rendering the judgment which ought to have been rendered, dismiss the motion to strike and order a stay of proceedings in docket T-568-07. I would grant costs to the Attorney General of Newfoundland and Labrador before the Federal Court. I would not award any costs on appeal.

“Robert Décary

J.A.

“I agree.
Marc Noël J.A.”

“I agree.
Pierre Blais J.A.”

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-365-08

STYLE OF CAUSE: Edouard Volland et al
v. Her Majesty the Queen et al

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: May 25, 2009

REASONS FOR JUDGMENT BY: DÉCARY J.A.

CONCURRED IN BY: NOËL J.A.
BLAIS J.A.

DATED: June 3, 2009

APPEARANCES:

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