

Federal Court



Cour fédérale

Date: 20230217

Docket: T-1542-12

Citation: 2023 FC 237

Ottawa, Ontario, February 17, 2023

PRESENT: Madam Justice McDonald

CLASS PROCEEDING

BETWEEN:

**CHIEF SHANE GOTTFRIEDSON, on behalf of the
TK'EMLUPS TE SECWÉPEMC INDIAN BAND and the
TK'EMLUPS TE SECWÉPEMC INDIAN BAND, and
CHIEF GARRY FESCHUK, on behalf of the SEHELTL INDIAN BAND
and the SEHELTL INDIAN BAND**

Plaintiffs

and

**HIS MAJESTY THE KING IN RIGHT OF CANADA
as represented by THE ATTORNEY GENERAL OF CANADA**

Defendant

and

SALT RIVER FIRST NATION #195

Proposed Intervener

ORDER AND REASONS

UPON MOTION by Salt River First Nation #195, the proposed intervener, for an Order granting it leave to intervene in this Class Proceeding and the Settlement Approval Hearing scheduled to commence on February 27, 2023;

AND UPON READING the Notice of Motion, the Affidavit of Brad Laviolette, affirmed on February 13, 2023, the Affidavit of Kendra Schaefer-Bourke, affirmed on February 13, 2023, the Affidavit of Elizabeth Westwell, affirmed on February 11, 2023, and the Affidavit of Caroline Douma, affirmed on February 13, 2023;

AND UPON READING the written submissions of Salt River First Nation # 195;

AND UPON BEING ADVISED by legal counsel that the Plaintiffs and the Defendant oppose this Motion;

AND UPON determining that this Motion is dismissed for the following reasons:

[1] This matter was certified as a class proceeding in 2015 (*Gottfriedson v Canada*, 2015 FC 706 [Certification Order]).

[2] The Certification Order confirms at paragraph 3 that the Band Class claims were proceeding on an opt-in basis as follows:

Although [Federal Court] class action proceedings are on an opt-out basis, rather than on an opt-in basis, [the Plaintiffs] further

propose that those Indian Bands upon which the residential schools were located may opt-in.

[3] The Band Class is defined as:

the Tk'emlúps te Secwépemc Indian Band and the shíshálh band and any other Indian Band(s) that:

- (i) has or had some members who are or were Survivors, or in whose community a Residential School is or was located; and
- (ii) is specifically added to this claim in relation to one or more specifically identified Residential Schools.

[4] Although this Class Proceeding has been ongoing since 2015 and therefore there were many years for Bands to choose to opt-in, two recent Orders of this Court specifically addressed the ability of Indian Bands to opt-in and participate in this Class Proceeding prior to the opt-in window closing.

[5] First, in the Order of February 8, 2022, the opt-in period for the Band Class was extended until May 31, 2022.

[6] Second, in the Order of June 15, 2022, at paragraph 1, the deadline to opt-in for the Band Class was again extended until June 30, 2022.

[7] Both of these Orders confirm steps would be taken by Class counsel to provide notice of the additional opt-in period to Indian Bands who were not already Class Members. This included posting the extended deadline on the dedicated class action websites and emailing all Indian Bands known to Canada and Class counsel who had not opted-in to the class action.

[8] I am satisfied that Class counsel took steps to communicate the extended deadlines to opt-in to potential Band Class Members across Canada.

[9] In its Notice of Motion, Salt River First Nation #195 states it is requesting intervener status in this Class Proceeding pursuant to Rule 109 of the *Federal Courts Rules*, SOR/98-106. However, a review of the Motion materials demonstrates that in fact, Salt River First Nation #195 is asking to be granted the right to opt-in to the Band Class. This is clear from paragraphs 2(a), (b), (c) and (d) of the Notice of Motion which state that Salt River First Nation #195 seeks to be added as a Band Class Member.

[10] However, Salt River First Nation #195 is out of time to opt-in to this Class Proceeding.

[11] At the time of Certification of the Band Class claim in 2015, it was clear the claim was proceeding on an opt-in basis rather than an opt-out basis.

[12] Having not opted-in to this Class Proceeding by the extended deadline of June 30, 2022, Salt River First Nation #195 is now out of time to do so.

[13] I will briefly address the request for intervener status.

[14] In *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 at paragraph 6 [*Canadian Council*], the Federal Court of Appeal articulated the test for intervention under Rule 109:

I. The proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:

- (a) What issues have the parties raised?
- (b) What does the proposed intervener intend to submit concerning those issues?
- (c) Are the proposed intervener's submissions doomed to fail?
- (d) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

II. The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

III. It is in the interests of justice that intervention be permitted.

[15] As Salt River First Nation #195 is not a member of the Band Class, they are not directly affected by the outcome of this Class Proceeding. In any event, I am satisfied that any of the private and public interests raised by Salt River First Nation #195 will be adequately represented at the Settlement Approval Hearing by the 325 Band Class Members who have opted-in.

[16] Further, Salt River First Nation #195 proposes to challenge the validity of the opt-in regime. This issue has not been raised by the parties in the context of the Settlement Approval Hearing. The only issue before the Court in that Hearing is whether the proposed settlement agreement is in the best interests of the Band Class Members.

[17] Finally, considering the delay of Salt River First Nation #195 in seeking intervener status, it is not in the interests of justice to permit an intervention. This Class Proceeding has been ongoing since 2015 and the Settlement Approval Hearing is scheduled for February 27, 28, and March 1, 2023. Late interventions can disrupt the orderly progress of a matter and can cause significant prejudice to the parties (*Canadian Council* at para 21). If admitted as an intervener, Salt River First Nation #195 would have to make submissions and the parties would need to file a response in addition to their other preparations for the Settlement Approval Hearing.

[18] By contrast, an intervention motion brought early in the proceedings demonstrates “that the proposed intervener monitors the area closely, has a keen interest in the area and is dedicated to it” (*Canadian Council* at para 21). As the Federal Court of Appeal held in *Canadian Council* at paragraph 22:

Intervention is a privilege bestowed to the skilled and committed who will truly assist the determination of a real-life, concrete proceeding that is up and running. Interveners have no right to disrupt the interests of those with a direct stake in the proceeding who have lived it from the beginning, often at great cost. No intervener is so grand and important that the Court will admit it late into the proceedings, whatever may be the prejudice to others or to itself.

[19] To grant the intervention sought by Salt River First Nation #195 at this time would disrupt the proceedings and potentially prejudice the interests of Band Class Members, some of who have been involved in this Class Proceeding from the beginning.

[20] In any event, I am not satisfied that Salt River First Nation #195 has provided a reasonable explanation for their delay in taking steps in this matter. As noted, there has been

extensive outreach by Class counsel to all Indian Bands known to Canada and Class counsel. Furthermore, there has been extensive media coverage of this Class Proceeding.

[21] I am not satisfied that Salt River First Nation #195 has a justifiable explanation for their request to participate in this Class Proceeding on the eve of the Settlement Approval Hearing.

[22] The request of Salt River First Nation #195 to be granted intervener status is denied.

ORDER IN T-1542-12

THIS COURT ORDERS that this Motion is dismissed.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1542-12

STYLE OF CAUSE: CHIEF SHANE GOTTFRIEDSON, on behalf of the TK'EMLUPS TE SECWÉPEMC INDIAN BAND and the TK'EMLUPS TE SECWÉPEMC INDIAN BAND, and CHIEF GARRY FESCHUK, on behalf of the SECHELT INDIAN BAND and the SECHELT INDIAN BAND v HIS MAJESTY THE KING IN RIGHT OF CANADA as represented by THE ATTORNEY GENERAL OF CANADA

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS: MCDONALD J.

DATED: FEBRUARY 17, 2023

WRITTEN REPRESENTATIONS BY:

K. Colleen Verville, K.C.
Dale C. Lysak

FOR THE PROPOSED INTERVENER

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