

Federal Court of Canada  
Trial Division



Section de première instance de  
la Cour fédérale du Canada

Date: 19980626

Docket: T-66-86

BETWEEN:

**WALTER PATRICK TWINN suing on his own behalf  
and on behalf of all other members  
of the Sawridge Band, and**

**WAYNE ROANE suing on his own behalf and  
on behalf of all other members of the  
Ermineskin Band, and**

**BRUCE STARLIGHT suing on his own behalf and on  
behalf of all other members of the  
Sarcee Band**

Plaintiffs

- and -

**HER MAJESTY THE QUEEN**

Defendant

- and -

**NATIVE COUNCIL OF CANADA, NATIVE  
COUNCIL OF CANADA (ALBERTA) and  
NON-STATUS INDIAN ASSOCIATION OF ALBERTA**

Interveners

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REASONS AND DIRECTION

HUGESSEN J.

[1] On June 3, 1997, the Court of Appeal allowed the plaintiffs' appeal in this matter and ordered a new trial. On June 12, 1997, the Associate Chief Justice appointed me as case-management judge for this file. On June 13, 1997, I addressed a memorandum to all counsel of record in the following terms:

Counsel will now be aware that the Associate Chief Justice has asked me to take over the management of this case. To avoid any possible misunderstanding, counsel should know that I will not, in any circumstances, be the trial judge. A long trial having already been held and judgment rendered, I would assume that little, if anything, is required to make the case ready for re-trial other than to consider how much of the record of the first trial can be put before the new trial judge. This is a matter on which counsel should be able to agree but if I can be of any help to them, I would be happy to make myself available either in Edmonton or here in Ottawa as counsel may wish.

If, contrary to my foregoing assumption there are any matters which need to be dealt with by pre-trial motion, I would be obliged if counsel would let everyone know of that fact as soon as possible. If there are any such motions I would suggest that we arrange to have them all dealt with at a single sitting to be held preferably before Labour day. Again, the hearing can be at either Edmonton or Ottawa or by electronic means, at counsel's option. Simple or consent matters could also be dealt with pursuant to Rule 324.

Finally, in these rather special circumstances, it seems to me that it would be appropriate to file a new joint application for a trial date with new estimates of the numbers of witnesses and times required, revised in the light of past experience and the results of the matters mentioned in the two preceding paragraphs. As a

practical reality, counsel will know that the shorter the time realistically required for trial the sooner the Court is likely to be able to reserve the necessary block of time.

I repeat that I shall be happy to make myself available in any way in which I can be of help to counsel. My judicial assistant, Josée Deschênes, can be reached at (613)995-7660 or by fax at (613)954-7714.

I shall be on vacation during most of July but will be available at virtually any other reasonable time.

[2] No response of any kind, formal or informal, was received to that memorandum. On May 20, 1998, I issued an order herein in the following terms:

Almost one year having elapsed since the undersigned's (unacknowledged and unanswered) memorandum to all counsel dated June 13, 1997 and no step having been taken by any party to bring this matter on for trial or otherwise to move it forward, the parties are required to show cause in writing by 15 June 1998 why this action should not be declared to have been abandoned and be dismissed without costs accordingly.

[3] In response to this order, the plaintiff, the Ermineskin Band, has filed a Notice of Change of Solicitors followed by a Notice of Discontinuance. The defendant Crown has advised that it has no submissions to make. One of the intervenors, the Congress of Aboriginal Peoples, has filed submissions asking that the action not be deemed to have been abandoned but that the Court impose a condition on the plaintiffs to the effect that the plaintiff Bands immediately recognize as

members those persons entitled to Band membership by virtue of paragraphs 11(1)(c) and 11(1)(d) of the *Indian Act*<sup>1</sup>

[4] For their part the remaining plaintiffs have filed two documents. The first is a purely housekeeping application which seeks to substitute Bertha L'Hirodelle for the named individual plaintiff Walter Patrick Twinn who died October 30, 1997 and to substitute Harley Crowchild for the named individual plaintiff Bruce Starlight. While this motion does not appear to raise any problem (other than the fact that notice of it does not seem to have been given to the intervenors so that I am not presently ready to grant it), it does nothing to move the case any closer to trial.

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<sup>1</sup> R.S.C. 1985, c. I-5

11. (1) Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

...

(c) that person is entitled to be registered under paragraph 6(1)(c) and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

(d) that person was born on or after April 17, 1985 and is entitled to be registered under paragraph 6(1)(f) and both parents of that person are entitled to have their names entered in the Band List or, if no longer living, were at the time of death entitled to have their names entered in the Band List.

11. (1) À compter du 17 avril 1985, une personne a droit à ce que son nom soit consigné dans une liste de bande tenue pour cette dernière au ministère si elle remplit une des conditions suivantes :

...

c) elle a le droit d'être inscrite en vertu de l'alinéa 6(1)c) et a cessé d'être un membre de cette bande en raison des circonstances prévues à cet alinéa;

d) elle est née après le 16 avril 1985 et a le droit d'être inscrite en vertu de l'alinéa 6(1)f) et ses parents ont tous deux droit à ce que leur nom soit consigné dans la liste de bande ou, s'ils sont décédés, avaient ce droit à la date de leur décès.

[5] The second document filed by the remaining plaintiffs is a large volume of submissions and supporting material in response to the show cause order. It was only filed on the last day, June 15, 1998. For the most part it consists of attempts to explain or excuse the inordinate delay.

[6] In particular, it is suggested that the plaintiffs have not moved forward with preparation for trial because they have been preoccupied by ongoing proceedings in the Court of Appeal relating to the question of costs; with respect, those proceedings are purely ancillary and should have no bearing on the resumption of the trial.

[7] Next, it is said that there was an application for leave to appeal to the Supreme Court of Canada which kept the plaintiffs from acting. That may be true, but that application was dismissed on December 1, 1997, fully six months ago. Its effects are long since spent.

[8] Then it is said that the plaintiffs, and particularly their solicitor of record, have been greatly affected by the death of the named plaintiff, Walter Patrick Twinn. That is undoubtedly the case and the Court expresses its sympathy for the solicitor of record who is the late Chief Twinn's widow. It remains, however, that the death occurred on October 30, 1997; it did not prevent the plaintiffs from dealing with the application for leave in the

Supreme Court nor with the ongoing costs matter in the Court of Appeal; it is not an excuse for doing absolutely nothing to bring this matter on to trial.

[9] As a further excuse for their delay and inaction, the plaintiffs claim that the recent decision of the Supreme Court in *Delgamuukw* has significant implications for the manner in which their case is to be pleaded and presented. It is said that that decision, and other Supreme Court cases, will necessitate certain amendments to the pleadings. Leaving aside, for the moment, the question as to whether leave should now be given to amend the pleadings where a trial has already been held and the Court of Appeal has ordered a new trial on the existing pleadings, the most significant aspect of this extraordinary submission is that no actual amendment or motion to amend has yet been produced. If plaintiffs are truly interested in pursuing their action as they say, and if they think an amendment is required, why on earth have they waited until they received the show cause order, and even then why have they not done more?

[10] The plaintiffs' action affects the rights of people other than themselves. The submissions of the intervenor, the Congress of Aboriginal Peoples, is eloquent on this point. The plaintiffs simply cannot continue as they have to neglect the case and to take advantage of their own refusal

to comply with the provisions of a law just because they say it is unconstitutional.

[11] While I am not prepared just yet to make an order dismissing this action for delay in accordance with Rule 382(2)(a), the plaintiffs have allowed themselves to come perilously close to that result. The remedy suggested by the intervenors is also one which I might be prepared to consider.

[12] Short of such drastic measures, however, it has become clear to me that the only other way of ensuring that this case moves forward at a reasonable pace is to keep the parties, and particularly the plaintiffs, to an extremely tight timeline. I am accordingly issuing the following direction:

- 1) If plaintiffs wish to amend their statement of claim, they must file a motion for leave to that effect pursuant to Rule 369 on or before July 22, 1998;
- 2) If plaintiffs elect not to move for leave to amend, they shall, by the same date, July 22, 1998, file a detailed proposal for the conduct of the new trial herein. Such a proposal shall include reference to those portions of the transcript and those exhibits from the first trial which plaintiffs propose should be placed before the new trial judge as well as a statement of the names and number of witnesses expected to be called and the number of days that it is anticipated their testimony will take;
- 3) In default of 1) and 2) above, the action may be dismissed without further notice.

- 4) The defendant and the intervenors shall respond in writing to the plaintiffs motion to amend or to the plaintiffs proposal for a new trial, as the case may be, by August 17, 1998;
- 5) A case-management conference and status review will be held by conference telephone on August 24, 1998 at 12h00 noon (Ottawa time). At that conference, the plaintiffs' motion to substitute other named plaintiffs (if notice thereof has been properly given) and any other outstanding matters may be spoken to.

[13] In their written submissions the plaintiffs express some doubt as to my status as case-management judge in this matter. I confirm that I have been the case-management judge since I was appointed to that position by the former Associate Chief Justice and that I have continued as such since the coming into force of the *Federal Court Rules, 1998*. I have also been authorized by the present Associate Chief Justice to indicate that he has confirmed my designation as such

“James K. Hugessen”

judge



FEDERAL COURT OF CANADA  
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

**COURT FILE NO.:** T-66-86

**STYLE OF CAUSE:** WALTER PATRICK TWINN suing on his own behalf and on behalf of all other members of the Sawbridge Band, and  
WAYNE ROANE suing on his own behalf and on behalf of all other members of the Ermineskin Band, and  
BRUCE STARLIGHT suing on his own behalf and on behalf of all other members of the Sarcee Band,  
Plaintiffs

-and-

HER MAJESTY THE QUEEN,  
Defendant

-and-

NATIVE COUNCIL OF CANADA , NATIVE COUNCIL OF CANADA (ALBERTA) and NON-STATUS INDIAN ASSOCIATION OF ALBERTA,

Interveners

**DIRECTION:** May 20, 1998

**REASONS AND DIRECTION OF MR. JUSTICE HUGESSEN**

**DATED:** June 26, 1998

**APPEARANCES:**

Ms. Catherine Twinn  
Mr. Marvin Storrow  
Mr. Martin Henderson

FOR THE PLAINTIFFS

Mr. Patrick Hodgkinson

FOR THE DEFENDANT

Mr. P. Jon Faulds

FOR THE INTERVENER NATIVE  
COUNCIL OF CANADA (ALBERTA)

Mr. Terry Glancy

FOR THE INTERVENER  
NON-STATUS INDIAN ASSOCIATION

Mr. Eugene Meehan

FOR THE INTERVENER  
CONGRESS FOR ABORIGINAL  
PEOPLES

**SOLICITORS OF RECORD:**

Twinn  
Stave Lake, Alberta

Balke, Cassels & Graydon  
Vancouver, B.C

Aird & Berlis  
Toronto, Ontario

FOR PLAINTIFFS

George Thomson  
Deputy Attorney General of Canada

FOR DEFENDANT

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ABORIGINAL PEOPLES

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