Date: 20080702

Docket: T-2172-99

Citation: 2008 FC 823

BETWEEN:

HARRY DANIELS, GABRIEL DANIELS,
LEAH GARDNER, TERRY JOUDREY and
THE CONGRESS OF ABORIGINAL PEOPLES

Plaintiffs

and

HER MAJESTY THE QUEEN, as represented by
THE MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT
and THE ATTORNEY GENERAL OF CANADA

Defendants

REASONS FOR ORDER

(Delivered from the Bench in Toronto, Ontario
on June 25, 2008)

HUGESSEN J.

[1] This is a motion brought by the defendant Crown to strike the statement of claim or to dismiss the action. It is very similar to a motion which was brought a number of years ago by the Crown and pleaded before Prothonotary Hargrave and dismissed by him. That decision was not timely appealed by the Crown (*Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, [2002] 4 F.C. 550).

[2] In particular, the Crown argues today as it did in the previous motion that the case raises a pure question of law and is analogous to a private reference.

[3] The well-known case of the reference *Re Eskimos* in the Supreme Court of Canada is given as an example (*Reference re: British North America Act,* 1867 (U.K.), s. 91, [1939] S.C.R. 104).

[4] I am content with regard to this aspect of the motion to adopt Prothonotary Hargrave's reasons which like so many of the decisions that gentleman rendered (his loss is much felt by all of us) are complete, thorough, and, in my view, entirely correct.

[5] With one exception, which I will come to in a minute, the points taken today by the Crown were taken before Prothonotary Hargrave and dismissed. I would, however, add this. The analogy insisted upon by the Crown to the *Eskimos* case is simply not an argument in favour of the case's dismissal.

[6] The fact that the government has the power to raise the same issues which come up in this case and to raise them by way of a reference does not mean that those issues cannot come before the Court in some other way. In my view, the present action is precisely such another way and is legitimate.

[7] The classic three requirements in this and I think in every other Court for obtaining declaratory relief are:

> 1. That plaintiff has an interest
>
> 2. That there be a serious contradictor for the claim.
>
> 3. That the issue raised and upon which a declaration is sought is a real and serious one and not merely hypothetical or academic. (*Montana Band of Indians v. Canada*, [1991] 2 F.C. 30 (C.A.), leave to appeal to S.C.C. refused (1991), 136 N.R. 421).

[8] In my opinion it is certainly not beyond question that those requirements have not been met in the present case. Indeed, I think that they are all met and satisfied.

[9] The exception which I mentioned a minute ago, that was not perhaps pleaded thoroughly before Prothonotary Hargrave, is the argument concerning the Court's jurisdiction. That point was not directly taken before Prothonotary Hargrave, although it clearly could and, in my view, should have been.

[10] The argument is that this case does not meet the three criteria laid down in the *ITO* case and refined in the *Roberts* case (*ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Roberts v. Canada*, [1989] 1 S.C.R. 322). In my view it fails.

[11] There is a clear statutory grant of jurisdiction to this Court in section 17 and I would add section 18 as well of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[12] The plaintiffs claim rights as “Indians”, as aboriginal peoples, and as beneficiaries of the fiduciary duties owed by the Crown.

[13] The Crown argues that this is a “bare” constitutional question and that the only law required to answer it is subsection 91(24) of the *Constitution Act, 1876* which is not a “law of Canada” within the meaning of the applicable case law which I have just mentioned. The Crown in my respectful view is wrong.

[14] Of course section 91 and particularly subsection 24 of the *Constitution Act, 1876* will be in play. There can be no doubt of that. But that is not all that the Court will have to apply in order to determine the questions before it.

[15] It is settled law now that aboriginal rights, the scope of the Crown's duties to its aboriginal peoples, and the status of non-“Indians” (that is persons not covered by the *Indian Act*, R.S.C. 1985, c. I-5) are matters of federal law and it is a field of law which is in rapid (and I would say with respect almost vertiginous) development.

[16] Its sources go back to the time of first contact but they are still with us today and are being developed daily in judgments of the Supreme Court and us, the lower courts.

[17] It is far from being plain and obvious to me that this Court is without jurisdiction to hear this case. Indeed the contrary is my view of the matter.

[18] The motion will therefore be dismissed with costs.

[19] The case is far developed. Thousands of documents have been produced. Several supplementary affidavits of documents have been filed. Interrogatories have been asked and answered. Discoveries have been held and although there are some refusals and undertakings still outstanding, they have been largely answered.

[20] Plaintiffs have filed their pre-trial memorandum but the Crown has not.

[21] In my view this motion should not have been brought.

[22] The Crown will pay costs to the plaintiffs which are hereby fixed and assessed in the amount of $20,000 all inclusive, forthwith and in any event of the cause.

[23] An order will go to that effect.

"James K. Hugessen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2172-99
STYLE OF CAUSE:	HARRY DANIELS et al v. HER MAJESTY THE QUEEN et al
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 25, 2008
REASONS FOR ORDER:	HUGESSEN J.
DATED:	JULY 2, 2008

APPEARANCES:

Andrew K. Lokan Joseph Magnet	FOR THE PLAINTIFFS
D. Kim McCarthy Cynthia J. Dickins	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Paliare Roland Rosenberg Rothstein LLP Toronto, Ontario	FOR THE PLAINTIFFS
John H. Sims, Q.C. Deputy Attorney General of Canada Edmonton, Alberta	FOR THE DEFENDANTS