In the Court of Appeal of Alberta

Citation: Lameman v. Canada (Attorney General), 2006 ABCA 392

Date: 20061219
Docket: 0403-0299-AC
Registry: Edmonton

Between:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on Their Own Behalf and on Behalf of All Descendants of the Papaschase Indian Band No. 136

Appellants
(Plaintiffs)

- and -

Attorney General of Canada

Respondent
(Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Third Party)

- and -

Federation of Saskatchewan Indian Nations

Intervener

Corrected judgment: A corrigendum was issued on May 30, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Doreen Sulyma

Reasons for Judgment Reserved of The Honourable Mr. Justice Côté
Reasons for Judgment Reserved of The Honourable Madam Justice Paperny
Concurring in Part
Reasons for Judgment Reserved of The Honourable Madam Justice Sulyma
Concurring in Part and in the Result

Appeal from the Judgment by
The Honourable Mr. Justice F.F. Slatter
Dated the 13th day of September, 2004
Entered the 14th day of December, 2004
(Docket: 0103-03088)

Reasons for Judgment Reserved of
The Honourable Mr. Justice Côté

A. Introduction

[1] Here there are both factual questions and procedural issues, arising from summary dismissal of most of a civil suit.

[2] Sometimes a plaintiff brings a suit which the defendants think have weak elements in important places, or the defendants plead what they think are strong and apparently factually-grounded defences. Then counsel for the defendants is often in a difficult position. Modern litigation can consume unconscionable amounts of time and money, and leave crippling uncertainty in the meantime. Unnecessary discovery and trial are deplorable.

[3] On the other hand, there are significant risks in moving for summary dismissal (or moving to strike pleadings). The judge or judges hearing the matter are compelled to look carefully to see whether the evidence leaves room for any significant doubt on any relevant issue. Somewhat the same may be true of gaps in the defendant's legal authorities. Mere possibilities sometimes can derail the dismissal motion, so long as they are not too farfetched.

B. Facts

[4] Here a small newly-formed band of Indians got a reserve in the 1880s. Then they quickly abandoned it. Some of them gave up their status as treaty Indians, and took scrip as Métis. Others moved to other reserves and joined other bands. The Dominion government attempted to follow the proper steps to cancel the reserve. It then sold the reserve lands, and used the sale proceeds for another Indian band in the locality. A number of the ex-residents of the former reserve had joined that other band. In 2001, the present appellants sued the Attorney General of Canada, seeking redress for those events. (I sometimes refer to the Attorney-General of Canada as the Crown.) They say that the surrender was not properly authorized. They also say that they are descendants of one or another member of that former band.

[5] When discovery of records was largely complete, but before any examinations for discovery, the defendant Crown moved for summary dismissal of the suit. The appellant plaintiffs cross-moved for an order declaring their suit a representative action. The chambers judge (who was the case management judge) largely dismissed the action, making it unnecessary to rule on the cross-motion. The plaintiffs appeal.

[6] The Crown's position is three-fold. It argues that the surrender and sale were properly conducted, and no one has any ground for complaint. In the alternative, it argues that none of the appellant plaintiffs has any cause of action or standing to sue, and they are not the former band, nor its successors in title. The Crown says that no successors in title exist. Obviously the original members must be long dead. In the further alternative, the Crown argues that all possible limitation periods had long expired before the suit was brought.

[7] In the appeal court, Alberta (the third party) supported the Attorney-General of Canada. The Federation of Saskatchewan Indian Nations intervened to support the appellant plaintiffs.

C. The Issues

[8] Trying to list the possible issues on this appeal is like taking stock of a general store. The parties filed extensive written arguments in the Court of Queen's Bench, raising a host of issues, large and small. The chambers judge dealt with all of them in lengthy careful written Reasons. The appellants' factum is divided into a large number of headings, many of which contain subparts, or contain brief suggestions of yet other issues. The intervener Federation's factum argued a number of those issues, plus a number of other issues, even after it was trimmed of material which contravened an earlier order of this Court. At the opening of oral argument, the appellants handed in a book containing some extracts from the appeal books and books of authorities. At the front was a new factum, three pages single-spaced, raising yet more issues. Counsel for the appellants made a few more oral arguments not clearly made (maybe not made at all) in their factums.

[9] It is almost impossible, even counterproductive, to try to deal with all those issues here. Furthermore, the conclusion which I reach below in Part R makes it unnecessary. Premature comment on some issues could prejudice the trial, or indeed contain error.

[10] On the other hand, this appeal raises some issues about summary judgment which are of practical interest to other litigants. The appeal tries to plant some procedural suggestions which should be dug up before they take root. Finally, it makes some suggestions about the conduct of the chambers judge and of counsel for the Crown, which I believe it is my duty to answer.

[11] I propose to deal with the issues in the following parts of this judgment, under these headings:

D. Standard of Proof for Summary Judgment

E. Expert Evidence

F. What Was in Issue on this Motion?

G. Hearsay

H. Expertise and Interest

I. Incompleteness of Plaintiffs' Evidence

J. Whether Pleadings are Closed

K. Whether Discovery is Needed

L. Pleas of Malice, Fraud etc.

M. Any Misunderstanding of Fundamental Aboriginal Rights?

N. Drawing Inferences

O. Evidence of Consent to Surrender

P. Standing to Sue

Q. Limitation Periods

R. Conclusion on Liability

S. Costs

D. Standard of Proof for Summary Judgment

[12] The order under appeal comes from a motion for summary judgment of dismissal. (There was also a cross-motion to certify a class action.)

[13] The factum of the appellants (plaintiffs) suggests that the test here is whether the suit is "bound to fail". The defendant moving to dismiss the suit must prove that, say the appellants.

[14] It is true that an occasional case on point uses the phrase "bound to fail". But the Supreme Court of Canada and our Court have repeatedly adopted a somewhat different standard of proof for summary judgment (or summary dismissal). It is either "no genuine issue for trial" or "plain and obvious". To put it another way, summary judgment (or dismissal) will be granted unless the party opposing has a real chance of success. See ***Guarantee Co. of N. Amer. v. Gordon Cap. Corp.*** [1999] 3 S.C.R. 423 (para. 27); ***Boudreault v. Barrett***, 1998 ABCA 232, 219 A.R. 67 (paras. 8-9); ***DeShazo v. Nations Ener. Co.***, 2005 ABCA 241 (paras. 17-18); ***Allan (Pioneer Expl.) v. Euro-Am Pac. Ent.***, 2003 ABCA 298, 339 A.R. 165 (paras. 15-19); ***732311 Alta. v. Paradise Bay Spa & Tub Whse.***, 2003 ABCA 362, 339 A.R. 386, 21 Alta. L.R. (4th) 17 (para. 12). Those cases bind.

[15] The appellants' suggested "bound to fail" test is used by courts in a different situation: where the defendant moves to strike out the plaintiff's pleadings as disclosing no reasonable cause of action. That is allowed by R. 129(1)(a). But the motion argued before the Court of Appeal was about facts and evidence, not about pleadings.

[16] It is true that the respondent defendants also moved to strike out the statement of claim as being scandalous, frivolous, or vexatious, under R. 129(1) (b). But that was on the argument that the facts and evidence did not bear out the allegations in the statement of claim. It was not based on any suggestion that the statement of claim did not plead enough, or did not plead the right things. The

respondent defendants relied on evidence, which **is** allowed under that para. of R. 129, but is expressly forbidden under R. 129(1)(a): see subrule (2).

[17] Therefore, even the alternate motion under R. 129 here is much more like a summary judgment (dismissal) motion than a true attack on pleadings. It is a relic of the time before a defendant could move for summary dismissal. Now that the Rules allow a summary dismissal motion by a defendant, our Court has held that summary dismissal is the appropriate procedure. See ***Excelsior Life Ins. Co. v. Zurich Inv.*** (1988) 89 A.R. 14 (C.A.) (para. 11); ***Huet v. Lynch***, 2000 ABCA 97, 255 A.R. 359 (paras. 15-16).

[18] More to the point, the Court of Queen's Bench here dismissed most of the claim summarily, and struck out nothing. So it used R. 159 only, and R. 129 is moot here.

[19] So the appropriate motion, and standard of proof, even for the R. 129(1) (b) motion, is that for summary dismissal, described above at the head of this Part D.

[20] There may be little difference in result on this appeal, but I wish to be careful not to endorse any confusion in the law. Moreover, the chambers judge here had the correct legal test; there was no error of law, despite the appellants' original factum.

[21] Counsel for the appellants several times argued that summary judgment or dismissal is incompatible with decency or constitutional democracy. He cited no authority for that. Rule 159 permits it, and the Rules of Court are confirmed by the ***Judicature Act***, s. 63 (R.S.A. 2000, c. J-2). No one suggests that that Rule or ***Act*** is unconstitutional, and no such notice was given. That argument cannot succeed.

E. Expert Evidence

[22] One of the affidavits filed here by the respondent defendant to dismiss the suit annexed a report by a historian. He was also cross-examined by counsel for the appellant plaintiffs, and the chambers judge read the transcript.

[23] The appellants argue at length that expert opinions are admissible only at trial, and inadmissible on a motion, even a motion for final judgment. If that were correct, then every Alberta mortgage foreclosure order based on an affidavit of value was wrongly obtained. And so was every assessment of damages got by an affidavit by a bodyshop mechanic, physician, or accountant. Indeed, expert evidence is often found in affidavits used to get interlocutory orders, such as medical examinations under R. 217.

[24] But that argument is wrong. The appellants rely upon R. 218.1, but it is merely a Rule about giving advance notice, or the form of the expert evidence. It is not on point, and says nothing express to help the appellants. The fact that no Rule expressly calls for advance notice of expert evidence outside the trial context, does not imply that such evidence is admissible only at trial (as the appellants argued).

[25] Evidence law in common-law Canada is not codified. Still less is it codified by the Rules of Court. Evidence law is largely judge-made law, with a few alterations by the ***Canada Evidence Act***, by the various provincial ***Evidence Acts***, and occasionally by the Rules of Court (and a few English statutes).

[26] At common law, judges cannot take judicial notice of matters of expertise or opinion, and non-experts cannot testify as to them (with a small number of narrow exceptions irrelevant here). Evidence must come from someone with sufficient expertise. Otherwise the Court cannot act. Oral argument of counsel for the appellants contended that deciding this suit requires expert evidence. So the appellants' argument would make summary judgment impossible in all cases involving expertise. Indeed, that argument would **allow** summary judgment in cases where only the person resisting summary judgment wishes to rely on expert opinion.

[27] Such a rule would multiply the number of trials held, and cause arbitrary injustice.

[28] Instead the suitability and need for expert evidence is the fundamental rule. Mere machinery (an affidavit) is provided by Rr. 159 and 261.

[29] Our Court has upheld the propriety of expert evidence on a motion for summary judgment: ***Stoddard v. Montague***, 2006 ABCA 109, Edm. 043-0154-AC (Apr. 5) (para. 20). Earlier, Master Funduk had held the same: ***Kravontka v. Cap. Reg. Health Authy.*** 2002 ABQB 652, 319 A.R. 277.

[30] Crown counsel here alleges that the proposed expert evidence was discussed previously at two case management hearings, and that the appellants did not then object to what the respondent Crown proposed to do, and even consented. The appellants' brief in the Court of Queen's Bench did not object to admissibility, though a letter to the Crown reserved that right. The appellants themselves filed some opinion evidence by a historian.

[31] This ground of appeal fails.

F. What Was In Issue on This Motion?

[32] The appellants strongly contend that the chambers judge unfairly took them by surprise, by going off on a journey of his own, without notice. They suggest that the respondent Crown's motion to dismiss the suit was confined to two issues only: standing and limitation periods. They complain that the chambers judge wrongly considered the merits of the suit.

[33] But at least one of the affidavits filed by the appellants (by Augustus) does go into the merits of the suit to some degree.

[34] Paragraph 28 of the appellants' original factum gave a table listing 16 propositions and facts found in the Reasons under appeal. (Their second factum reiterates some of this.) The two opposing parties had filed written briefs in the Court of Queen's Bench, and the appellants' table in their

original factum had boxes to show where each of the 16 propositions of law (or fact findings) was in the two Queen's Bench briefs. The word "nowhere" appeared in each box, i.e. 32 times.

[35] One must compare the two opposing briefs filed in the Court of Queen's Bench to that table. In three or four instances, the briefs do not expressly mention the point. In at least one instance, that is for good reason.

[36] However, in the other 28 or 29 instances, the Queen's Bench briefs expressly discuss the judge's point. So the word "nowhere" is not accurate. In most instances, **both** trial briefs discussed the point; but sometimes only one did.

[37] Then again, the chambers judge found several substantive liability issues to be triable, and did not give effect to them only because of limitations and standing issues. The appellants cannot complain of that. Similarly, some of the impugned factual discussion by the chambers judge was about issues which could only help the appellant plaintiffs, and might have barred summary dismissal.

[38] There is a bigger answer to this ground of appeal. One cannot fairly treat all the 16 topics which the appellants listed as little autonomous issues. They touch each other, and some are really branches of broader issues. It is very doubtful that one can say that those 16 narrow topics were completely irrelevant to the standing and limitations issues, which admittedly were properly before the chambers judge. The argument of the intervener, the Federation, supports such a connection. The original factum of the appellants did not, but then the oral argument of the appellants' counsel also supported the connection.

[39] There is no suggestion that the appellants sought and were denied an adjournment of the summary dismissal motion at any time. Admittedly, they were never denied the right to adduce more evidence. And yet the respondent Crown's Court of Queen's Bench brief was filed first (April 16, 2004), and the appellants' brief over two weeks later.

[40] So the chambers judge did not err in procedure, and acted fairly.

G. Hearsay

[41] Both Rr. 159 and 305 bar a party moving for summary judgment from relying upon hearsay (with a few exceptions). The appellants contend that the Crown violated that prohibition here. The historian put forward by the respondent Crown did not swear an affidavit, and instead his report was exhibited to the affidavit of a different witness, a manager.

[42] But that objection is one of form only, lacking any practical effect. The objection to annexing an expert report to someone else's affidavit is usually that that deprives the opponent of any meaningful cross-examination. But here, by agreement, counsel for the appellants did cross-examine the Crown's historian under oath about his report and whether it was well founded. That cured any

possible unfairness. It is patent from the expert's cross-examination, that the report was his and that he stood by it.

[43] The chambers judge plainly inferred that the Crown's historian meant that his report was true and sound. Any contrary inference or doubt would be unreasonable.

H. Expertise and Interest

[44] The appellants' oral argument on appeal repeatedly objected that there had been no judicial definition of the scope of the Crown historian's expertise. Indeed, the suggestion was apparently that it was impossible.

[45] But such definition was unnecessary, or of slight moment. When expert evidence is oral, it is customary to split it into two. The Court hears evidence on qualifications of the expert, and first rules on whether he may give admissible opinion evidence. That ruling naturally involves identifying the topic on which he may **thereafter** testify.

[46] But where the expert's evidence is written, it is never split that way; such a split would waste weeks. The judge gets all the evidence at once (in writing) and admits it or excludes it. If the judge recites and follows it, obviously the judge considers it admissible.

[47] The appellants' next objection is supposed lack of expertise. They briefly contend that the Crown historian's only revealed history expertise was in weeds, not aboriginals (para. 48(a)).

[48] That contention is inconsistent with the evidence.

[49] This expert has an Honours Bachelor of Arts, and a doctoral degree, both in history. And he has since worked at the University of British Columbia in the general field of history. His research for this suit was of original primary sources in public archives, to learn about events about 120 years ago. That is what historians do. Such evidence is not novel in aboriginal litigation. Since graduating, he has taught, researched, testified, and consulted, all in the field of post-Confederation Canadian history, including the history of Indian treaties.

[50] The historian's research for his thesis was about some aspect of history which intersected with weeds. A Ph.D. also requires course work, and often a general examination. This expert did one year of work in the M.A. program, which certainly requires that.

[51] This weed objection to expertise has no merit.

[52] The appellants also argued that this historian's evidence should not be received by the Court because he worked partly for the Crown which led his evidence, and so was biased. Weight of evidence is largely for the Court of Queen's Bench judge.

[53] The appellants' argument (para. 41) was that such expert evidence should not be admitted. Long ago, witnesses with an interest in the suit (including parties) were incompetent to testify. But

6 & 7 Vict. c. 85 (Ld. Denman's Act) removed the disqualification. That old statute has been re-enacted in Canada: see the ***Alberta Evidence Act***, s. 3(1), and the ***Canada Evidence Act***, s. 3.

[54] Counsel for the appellants repeatedly complained that this expert gave only a preliminary opinion after incomplete review of the papers.

[55] But that is not a fair summary of his cross-examination (on pp. 74-5). He made his own full review of the archival papers. No one suggested that the appellants had another independent source of records. He did not confine himself to the defendant Crown's formal production. He said that research by its very nature is open-ended (pp. 75-6). That offers no ground to exclude his evidence. This precise topic was for the chambers judge.

[56] The appellants also argued that the chambers judge did not evaluate the historian's credentials or report, but that is simply incorrect. See, for example the Reasons paras. 66-68.

I. Incompleteness of Plaintiffs' Evidence

[57] Counsel for the appellant plaintiffs complains that the Court of Queen's Bench heard little evidence from the appellants or from any aboriginal person. He argues that the respondent has filed all its evidence, but the appellants did not. Their counsel suggest that they have more evidence which they will lead at trial. The appellants filed four affidavits (and a fifth on costs). Three were by historical researchers, and one or two express opinions.

[58] If the party moving for summary judgment or summary dismissal files the requisite affidavit, the respondent to the motion must meet it with evidence (unless the party moving relies on a point of pure law). That is well settled. See ***Stoddard v. Montague***, ***supra***, and cases cited; ***Murphy Oil Co. v. Predator Corp.***, 2006 ABCA 69, 384 A.R. 251 (paras. 24-9), affg and adopting 365 A.R. 326, 331 (para. 17(3), 4)); ***Watts Est. v. Contact Can. Tourism Services***, 2000 ABCA 160, 261 A.R. 66, 79 (para. 86). Note Master Funduk's rejection of a Micawber-like strategy, in ***Kravontka v. Cap. Reg. H.A.***, 2002 ABQB 652, 319 A.R. 277, 281-82 (para. 22). So "I am not ready yet, but will get ready for trial" is rarely an answer to a summary judgment motion. Cf. ***Coral-Reef Hldg. v. C.I.B.C.*** [1995] 5 W.W.R. 1, 7, 100 Man. R. (2d) 224, leave den. (1996) 199 N.R. 156 (S.C.C.). "I should not have to go to the bother or risk of revealing all my important evidence until the day of trial" is never a valid answer.

[59] None of the affidavits filed for the appellants swore to a temporarily unavailable witness, nor even to need for more discovery. We cannot act upon unsworn statements by counsel. This Court has repeatedly refused to accept backdoor "evidence" of that sort from counsel. See ***Cairns v. Cairns*** [1931] 3 W.W.R. 335, 344-45 (Alta. C.A.); ***Starko v. Starko*** (1991) 80 Alta. L.R. (2d) 368 (para. 2) (C.A.); ***Chern v. Chern***, 2006 ABCA 16, 380 A.R. 267 (para. 12).

[60] The appellants do not suggest that they were putting together their evidence, but were hurried along. Nor did the chambers judge exclude any tendered evidence.

J. Whether Pleadings are Closed

[61] The appellants argued that if pleadings are not closed, that is an argument against any form of summary judgment. But they did not cite any authority for that. Rule 159 only requires a statement of defence, not a reply, nor closed pleadings.

[62] The appellants say that they had not yet filed a reply here, and so argue that pleadings were not closed. But pleadings are deemed closed if no reply is filed eight days after the statement of defence is delivered: Rr. 102, 103.

[63] The appellants say that they have another outstanding appeal on whether pleadings are closed. But that 2003 appeal has been dormant since September 2004. That dormant appeal is not even about filing a reply, nor time to do so. The Queen's Bench judge there appealed said expressly that he would not decide the right to reply, and pointed out that the Rules usually allow eight days. The appellants' notice of appeal there does not mention replies. The order and the appeal there were all about which amendments would be allowed.

[64] That dormant appeal has become moot, because at most that appeal could impact on failure to file a reply eight days after the **original** statement of defence by the Crown. Since then, the Crown has filed an amended statement of defence. That started running a new eight days for a reply, but the appellant plaintiffs did not file a reply the second time either.

[65] Counsel for the appellants argues that agreeing to postpone the appeal about whether the pleadings are closed, was an implied agreement to extend time to file a reply. But later events cannot cause earlier ones.

K. Whether Discovery is Needed

[66] There is no direct evidence to say that the appellant plaintiffs seriously need (more) discovery and have a real prospect of thus getting significant evidence.

[67] Clearly there is no eyewitness of those 1880s and 1890s events alive to question orally. Nor is there any sworn evidence of useful oral traditional evidence. Alberta was not even created until 15 years after the events in question.

[68] The only evidence or likely evidence revealed by the affidavits is government files. Those files appear to be in public archives, or otherwise accessible to the public, scholars and researchers. Indeed, the appellant plaintiffs and others interested in bringing such a suit, have been thoroughly searching the archives for many years.

L. Pleas of Malice, Fraud etc.

[69] The appellants' statement of claim pleads wilfulness, malice, bad faith, equitable fraud, reckless or fraudulent misrepresentation, coercion, and duress by the Dominion government or its

officials. The chambers judge says that no one adduced any evidence which supports any such pleas (Reasons, para. 54).

[70] On appeal, the appellants' counsel directed no written argument to that topic. (Two or three of their words about the Dominion government are critical, but seem to be about other topics.) There was but a brief passing reference in oral argument to unspecified "culpable" conduct. There was a second passing reference to undue influence and duress, but counsel volunteered that it is not a crucial point and goes only to size of band and hence to number of people sharing.

[71] None of the argument or evidence shown to us respecting other topics supports those pleas. Crown counsel says that there is not a stitch of evidence of such bad-faith conduct. Counsel for the appellants pointed to none. I have seen none. The Court of Appeal gave the appellants liberty to amend their factum to include argument on equitable fraud, and they declined to do so. That the band were short of food at times, or that they were allowed to take land scrip, is not evidence of malice or fraud, in my view. That is doubly so in the light of the evidence that the impetus for scrip was theirs, not the government's.

[72] Yet evidence is necessary to rebut summary judgment, as noted above in Part I. That is doubly so for fraud or the like. The law never encourages speculative unfounded pleas of fraud: Odgers on ***High Court Pleading & Practice*** 223 (23d ed. 1991); ***Ferguson v. Wallbridge*** [1935] 1 W.W.R. 673, 690-91, 692 (P.C.(B.C.)); ***Assoc. Leisure v. Assoc. Newsp.*** [1970] 2 Q.B. 450, 456, [1970] 2 All E.R. 754, 757-58 (C.A). Still less vague unparticularized pleas, such as a number of those found here, especially para. 29(g). See the classic passage in ***Re Rica Gold Washing Co.*** (1879) 11 Ch. D. 36, 43 (C.A.), and 2 Williston and Rolls, ***Laws of Civil Procedure*** 658-59 (1970).

[73] A striking and apposite example is the leading case of ***Wallingford v. Mutual Socy.*** (1880) 5 App. Cas. 685, 50 L.J.Q.B. 49, 54-55, 57, 61 (H.L.). There a mortgagee in possession sued the mortgagor for the mortgage debt, and the House of Lords held that summary judgment should not have been given, because the defendant was entitled to have an account taken. However, they refused to allow defences of fraud to be tried, and let the summary judgment stand and bar those defences. Fraud had been pleaded generally and vaguely, so the House of Lords simply ignored that plea. Similar modern examples are ***Prentice v. Barrie Comm. C.U.*** (1988) 26 C.P.C. (2d) 178 (Ont. Dist.) (undue influence); ***Downtown Furnished Suites v. Metro. Toronto Condo. Corp. 976***, 2001 Carswell Ont. 2364, file 00-CV-200602 (June 27), affd. 2002 Carswell Ont. 194, docket CA C36756 (C.A. January 17); ***Bank of Mtl. v. Yow*** (1986) 16 B.C.L.R. (2d) 249 (C.A.), leave den. 73 N.R. 387 (S.C.C.).

[74] If one looks at the pleas of fraud, bad faith, duress, and the like in the amended statement of claim, one sees that a number of them are completely vague and bereft of any details. One gives particulars of misrepresentation, but pleads that it had no effect. A few purport to give particulars of fraudulent misrepresentation, but few if any of the items listed are particulars of misrepresentation at all, still less fraudulent misrepresentation. Knowledge that the statements were untrue, or recklessness that they were, is nowhere pleaded, let alone identified with any decision-maker in the Dominion government.

[75] On a motion to strike out pleadings for want of a reasonable cause of action (R. 129(1)(a)), the remedy for vagueness of a plea of fraud might be to amend the statement of claim, especially as evidence is barred on such a motion. But this is a motion for summary judgment, with full power to lead evidence. The plaintiffs led none to support these pleas.

[76] In ordinary litigation, one might possibly hope that some new relevant evidence might emerge at trial, or that the trial judge would benefit from seeing and hearing the principal actors. Not so here: they are all dead, and only well-combed archives remain.

[77] No one has shown us any authority for barring summary judgment by fraud pleas supported neither by evidence nor argument. I am aware of none. What is not supported by evidence cannot be a genuine issue for trial.

[78] Many of the pleas of fraud and dishonesty here relate to collateral issues, or those of little significance, such as the initial size of the reserve, or temporary trespasses upon the reserve, or the whole history of land scrip for Métis. To allow these pleas to be tried would enormously expand the scope of this fairly discrete lawsuit, and embarrass the trial.

[79] Accordingly, I would let stand so much of the judgment as summarily dismisses the pleas of fraud or other bad faith by the defendants, found in the statement of claim. Such passages form parts of paras. 11, 12, 13, 14(h), 23 preamble, 25(b) preamble, 29 preamble, 29(c), 29(d), and 29(g) of the amended statement of claim. I would return this topic to the chambers judge to specify the exact amendments to the pleadings thereby made necessary.

M. Any Misunderstanding of Fundamental Aboriginal Rights?

[80] The appellants' original factum argued (on pp. 13-14) that the chambers judge had a "fundamental misapprehension of the Plaintiffs' case and Canadian jurisprudence on the constitutional status of 'existing' aboriginal and treaty rights . . .". As evidence of such a grave error, the appellants pointed to para. 50 of the Court of Queen's Bench Reasons.

[81] The appellants refer to s. 35 of the ***Canada Act*** 1982, a section often cited to the chambers judge. They complain that the Reasons referred only to the ***Charter***, but that s. 35 is not in the ***Charter***.

[82] This is an arid question of nomenclature or subheads in a statute. The ***Canada Act*** 1982 is all one Imperial Act with consecutive section numbers. Publishers and lawyers commonly refer to the whole thing as "the ***Charter***". No one ever calls it by its correct name, "Schedule B to the ***Canada Act***, 1982", let alone some part of Schedule B.

[83] Nor did the appellants plead any events after the 1930s, let alone after 1982. Nor were notices of constitutional questions given.

N. Drawing Inferences

[84] The new factum tendered by the appellants at the opening of oral argument makes an argument only indirectly raised by their original factum. And it offers two new tables or compilations found neither in their original factum, the appeal books, nor in the books of authorities.

[85] The complaint is that the chambers judge drew factual inferences. The appellants suggest that drawing any inference is improper on a motion for summary judgment. I cannot agree that there is any such rigid or blanket prohibition. I will begin with general principle, and then discuss the binding authority specifically on point.

[86] What is proper depends on the facts. If the evidence is strong and one-sided, such inferences are proper, even necessary.

[87] In the first place, inferences are neither unusual, nor laxity on the part of the judge deciding an issue. Wigmore points out that inferences are merely a logical deduction that a fact is true (or probably true) because one or more other facts are proven: 1A Wigmore on ***Evidence***, § 37.4 (rev. ed. 1983). Both Lord Wright and McWilliams properly treat them as part of circumstantial evidence. See Lord Wright in ***Caswell v. Powell Duffryn etc.*** [1940] A.C. 152, 169-70 (H.L.(E.)), and ***Canadian Criminal Evidence*** (4th ed., looseleaf) Chap. 28. In other words, **most** factual conclusions by courts require some inferences. Unless there is unimpeachable impressive testimony by eyewitnesses to every detail, then any fact "finding" includes an inference, or a nest of inferences. Every case will involve hiatuses in the evidence which can be filled only by inference: ***C.P.R. v. Murray*** [1932] S.C.R. 112, [1932] 2 D.L.R. 806. Cf. ***R. v. Graat*** [1982] S.C.R. 819, 45 N.R. 451, 468, 469-70 (paras. 45, 50).

[88] Maybe inferences are easier to draw at a trial with some live evidence, and maybe often less easy on summary judgment than at summary trial. But the appellants' contention here is not about ease or doubt or weight; it is that inferences are entirely forbidden on any summary judgment (dismissal) motion.

[89] The simplest type of civil litigation is a debt action for the price of goods supplied. Occasionally there is no hearsay problem, and the plaintiff supplier can get first-hand evidence from every employee involved. But even then, the court will still have to draw inferences. For example, was the person who ordered (by phone or mail) the defendant, or an imposter or forger? Did the defendant **personally** receive the goods? Did the defendant accept them? Were they in working order? Were all the accessories and parts there? Did the defendant ever pay for them? 99% of the time, the seller moving will not have any direct evidence; those points can and must be established only by inference. If inferences were improper on any summary judgment motion, there could rarely be summary judgment in its original home, ordinary debt actions. That cannot be correct.

[90] As noted, the appellants cited no authority for their attack on inferences. They did not cite a recent decision of this Court which upheld summary dismissal of most of a counterclaim. One complaint of the appellant there was that the chambers judge should not have drawn an important

inference as to the purity of motives of the party who moved to dismiss summarily. The appellant suggested the opposite inference. Our Court found that chambers judge's inference "far from unreasonable" and specifically upheld that part of his Reasons (which they quoted). See ***Murphy Oil Co. v. Predator Corp.***, 2006 ABCA 69, 384 A.R. 251, 55 Alta. L.R. (4th) 1, affg. 2004 ABQB 688, 365 A.R. 326. That is binding authority.

[91] A decision of the Supreme Court of Canada also governs the point. A bonding company sued for rescission of its policy and for a declaration that a claim under it was too late. That plaintiff moved for and got summary judgment. The Ontario Court of Appeal reversed that, but the Supreme Court of Canada restored the summary judgment: ***Guarantee Co. of N. Amer. v. Gordon Cap. Co.*** [1999] 3 S.C.R. 423, 247 N.R. 97. At the beginning of its substantive discussion of the case (para. 29), the Supreme Court describes how the chambers judge inferred that the insured company could reasonably have assumed at an early date that there would be a loss covered by the policy. The Supreme Court said, "We are all of the view that the undisputed facts in this case lend strong support to the motion judge's inference," (para. 30). That was so despite some question there as to credibility (para. 31). They concluded:

> "that the motions judge committed no error in determining that this was a proper case for summary judgment. Gordon has not met the evidentiary burden to show there is a genuine issue for trial." (para. 36)

[92] A number of Ontario decisions cite ***obiter*** a three-or-four-word contrary earlier ***dictum*** in ***Aguonie v. Galion Solid Waste etc.*** (1998) 38 O.R. (3d) 161, 173 (C.A.). But it offers no authority or reasons, and there is contrary Ontario authority allowing inferences: ***Ron Miller Realty v. Honeywell*** (1991) 4 O.R. (3d) 492, 495. That decision gave summary judgment based on inferences. The Ontario Court of Appeal affirmed it: see (1993) 16 O.R. (3d) 255 (C.A.) (varying quantum). That is ***ratio***, not a ***dictum***.

[93] The appellants' legal argument barring all inferences is not sustainable. So there cannot be blanket prohibitions. Instead, the apposite question about inferences is what standard of proof is needed for summary judgment (on which see Part D). The question is whether the inference in question could fairly be drawn to that requisite level of proof, on the evidence in question.

[94] As Lord Wright says, inferences are sometimes as strong, giving "as much practical certainty as if [the facts in question] had been actually observed." See ***Caswell v. Powell***, ***supra***. Indeed, every day, criminal courts find facts beyond a reasonable doubt and convict, on purely circumstantial evidence. See ***McGreevy v. D.P.P.*** [1973] 1 W.L.R. 276, 285, [1973] 1 All E.R. 503 (H.L.(E.)). Footprints, fingerprints, DNA evidence, invariable routines, and a multitude of probabilities, often offer far stronger proof than would an eyewitness or two, especially when events are fast or complex. A mesh of contemporary records is often more reliable than one or two old memories. There can be no general rule about which is stronger, eyewitness testimony or inferences from other types of evidence. It all depends on the facts. Some inferences can create practical certainty; others are weaker: ***C.P.R. v. Murray***, ***supra***. See also 32A ***Corpus Juris Secundum*** pp. 763-4 (§ 1341).

[95] Of course summary judgment does not permit choosing among competing reasonable inferences arising from the primary facts in evidence: ***Walters v. Clark*** (2006) 211 O.A.C. 278, 279 (para. 6) (C.A.). But that did not occur here.

[96] Therefore, throughout my Reasons, the test and the standard which I have used for factual inferences (subject to the usual standard of review on appeal), is the requisite degree of certainty. Was there enough doubt to found a genuine issue for trial?

O. Evidence of Consent to Surrender

[97] The heart of this lawsuit is the appellant plaintiffs' claim that the reserve in question was cancelled improperly. At that time, the ***Indian Act*** required for cancellation a vote for surrender by the adult male members of the Indian band resident on or near the reserve.

> "**39.** No release or surrender of a reserve, or portion of a reserve, held for the use of the Indians of any band, or of any individual Indian, shall be valid or binding, except on the following conditions:–
>
> (a.) The release or surrender shall be assented to by a majority of the male members of the band, of the full age of twenty-one years, at a meeting or council thereof summoned for that purpose, according to the rules of the band, and held in the presence of the Superintendent General, or of an officer duly authorized to attend such council, by the Governor in Council or by the Superintendent General; but no Indian shall be entitled to vote or be present at such council unless he habitually resides on or near and is interested in the reserve in question;"

(And I understand that the Supreme Court of Canada has since interpreted that to require a vote for surrender by a majority voting, and votes by a quorum, being the majority of the eligible persons.)

[98] The chambers judge found from the evidence that at the time of surrender, no one remained who was eligible to vote. Therefore, he considered that the Crown acted legally and reasonably in gaining the consent of former members (those formerly eligible to vote).

[99] However, the oral argument of the intervener pointed out something interesting. The band and reserve, called in this suit "Enoch", were not very far away. The appellants did not get down to such specifics; their argument on this topic of who was eligible is general and does not deal with the distance to Enoch (see original factum p. 26, para. 69(3) and supplemental factum para. 4(3)).

[100] The Enoch reserve is also known as Stony Plain Indian Reserve #135, it exists today, and abuts the present western edge of the City of Edmonton. The Crown conceded in oral argument, and

the evidence here shows, that that is the same Enoch Band and reserve discussed in the evidence in this lawsuit.

[101] Counsel for the intervener points out that there is evidence in the Harris affidavit that the former reserve in question in this suit was about 20 km. from that Enoch (Stony Plain) reserve (A.B. v. 2, p. 34, para. 10 last line). I have seen no evidence of a longer distance, and the Crown referred us to none. (Indeed the chambers judge recites that 20 km. distance in another context: see Reasons, para. 42.) The Tyler Thesis gives an even shorter distance: A.B. v. 4, p. E325. The descriptions of the location of the former reserve in question here are compatible with 20 km. Counsel told us that its boundary was Whitemud Creek, and that it ran from there to Ellerslie and extended east of the present Highway 2 (Queen Elizabeth II Highway). The one map in evidence seems to confirm that, though it is very small and blurry in the appeal book.

[102] Though the North Saskatchewan River lies between the former and the continuing (Enoch) reserve, no one has shown us any evidence that that required a long detour or large delay in travel, even in the 1880s.

[103] The chambers judge was alive to the legal issue of whether former residents of the reserve to be surrendered then lived on other reserves nearby. There was evidence before him that a number of former residents of the reserve to be surrendered were living on several other reserves at the time of the consent.

[104] The chambers judge properly concluded that the word “near” in the then ***Indian Act*** did not refer to 21st Century highways or means of travel, but rather to means of travel available at the time of the surrender. His Reasons pointed to evidence of a distance of about 65 km. The Reasons said that that might be near today, but at the relevant time it represented two or three days’ travel, and so was not near. That legal proposition and factual inference seem to me correct, reasonable, and open in this summary judgment motion.

[105] However, that distance of a little over 60 km. does not accord with the 20 km. to Enoch referred to above. It may be that the 60 km. evidence was a different distance: a maximum distance for a number of other reserves with former residents.

[106] Counsel for the intervener Federation asserts that 20 km. could be walked in a few hours, certainly well inside a day, and so should be considered “near”. That proposition or inference appears to me to be arguable, but not considered by the Reasons under appeal. It may well not have been put to the Court of Queen’s Bench, as the appellants still do not make that precise argument, and the intervener (who did) took no part in the Court of Queen’s Bench proceedings. That evidence about 20 km. may have been filed for the companion representative action motion, and maybe that is why the Reasons under appeal did not refer to it. But the Crown did not object to our looking at it, especially as both motions form part of the present appeal.

[107] Contrary evidence might be led later, but on this record, this factual proposition is uncontradicted.

[108] And it seems to be clear that a number of former residents of the reserve being cancelled had moved to live with the Enoch Band on the Enoch reserve. Indeed, the two bands later joined, and the sale proceeds of the former reserve went to that Enoch Band. Oral argument in the Court of Appeal mentioned numbers like 7 or 9 or 10 former male residents who moved to Enoch. As only three former residents signed the surrender, those are significant numbers. So the three signing might not be a majority of a majority. Three is only a majority of five, not of any larger number. And how those "voting" were selected or notified could be relevant. It becomes more complex still, because some of the three who did consent were living on the Enoch reserve. So precise counting is important.

[109] Therefore, it appears that on this record, an argument can be made that enough former members lived near the reserve to be cancelled, that the three consents were not enough, and that more consents, or a different procedure, were needed.

[110] Crown counsel replies that residence on Enoch might not be "near" in law, no matter how short the distance. That is because the ***Act*** prohibited membership in more than one band or reserve; and the question is habitual residence. That is arguable, but so is the contrary legal proposition. The Crown has no direct authority.

[111] Given the degree of proof needed for summary dismissal (see Part D), nearness on Enoch is a triable genuine issue as to liability. (I doubt that counsel have had a chance to consider whether defects in the surrender could also affect quantum.)

[112] Of course, that leaves other questions. One is whether the appellant plaintiffs should be restricted to trying that question (and the other question which the chambers judge found to be triable). Part R below discusses that. Bigger questions are whether the Crown's defences of standing and limitations make this question (about mode of consent to surrender) academic, and so not worth trying. I will now turn to those bigger questions, in Parts P and Q.

P. Standing to Sue

[113] The amended statement of claim does not confine itself to asking for declaratory relief, or for public law measures. Among other things, it seeks damages, interest, and land: the land sought is either one square mile of land per family, or 128 acres for each qualifying person, or restitution based on the replacement value of the land as of the date of judgment. As the lands once constituting the cancelled reserve are now a big part of Edmonton, any amount of money presumably could be huge.

[114] The amended statement of claim and all the arguments of the appellants, are on behalf of the descendants of the former band which once had the reserve in question. Therefore, standing is an important issue in this suit, not a technicality. This is not a suit to benefit the general public, as might be true of a suit to strike down an unconstitutional statute or to open a blocked highway.

[115] In view of the conclusion which I reach ultimately, the trial judge will have to decide these issues. But I cannot explain whether there is a genuine issue for trial here, unless I make some tentative comments. My discussion here is not intended to settle any law of standing for anyone in this suit or any other; it is only to see if there is a triable issue here.

[116] The Crown points out that at all times, the ***Indian Act*** has put various statutory restrictions on who could belong to an Indian band, and who was entitled to the benefits of a reserve. For one thing, no one could enjoy two or more bands. And every reserve was for a specific band.

[117] The appellants argue that some of the Crown's reasoning is circular, or bootstrapping. The very abolition of the reserve created the alleged holes in standing, the appellants contend. It seems to me quite arguable that not all of the Crown's standing arguments can be construed that way. For example, giving up Indian status and then taking "Half-Breed Scrip". Or leaving the reserve which was later cancelled, before its cancellation, and joining another band or another reserve (other than the Enoch Band and reserve). I will not go further into examples.

[118] But I do agree that for certain parts of the Crown's standing arguments, the appellants' circularity rebuttal is an arguable legal proposition.

[119] So a big question becomes whether the appellants' circularity argument has any factual foundation in the evidence here, so that circularity is not merely an academic question.

[120] The Crown suggested to the chambers judge, and counsel for the appellant plaintiffs admitted, that no living individual had yet been found who satisfied the standing criteria, as refined, restated and adopted by the chambers judge. (See Reasons para. 206, p. F79 A.B.) And so no one had been found who would therefore arguably (let alone actually) have standing either to sue or to share in any relief, even if the appellants' argument and evidence on the merits convinced a trial judge.

[121] In most lawsuits, that would likely end the matter. "Wait until someone with standing sues, and the Court will decide then and not before", would be the answer.

[122] However, this is not an ordinary suit by five named plaintiffs. It is expressed to be by them "on their own behalf and on behalf of all descendants of the band" who once lived on the reserve in question. And the cross notice of motion (which led to para. 1 of the order under appeal) asked to confirm this as a representative suit under R. 42. (This suit was before Alberta's ***Class Proceedings Act***.)

[123] What if the five named plaintiffs lack standing to sue, but there is someone alive today who has that standing? Then the right remedy for such lack of standing in the named five is arguably not dismissal of the action, but rather substitution of different representative plaintiffs. In that event, the group for whom suit is brought would exist.

[124] That then suggests examining the evidence here. The evidence filed concentrates on only two of the people now alive, named, or at least known. It traces their ancestry upwards, and the ***Indian Act*** status of some of their male ancestors so found. On the Crown's view of the law, some intervening disqualifying act breaks each of those two chains of ancestry (quite apart from cancellation of the reserve in question). There is no such evidence for any other living people. The chambers judge says that the other named plaintiffs did not press their claims (Reasons para. 211).

[125] However, admittedly neither side has started from the other (trunk) end of the genealogical tree. A review of the evidence confirms that. The Indian band which once had and resided on the reserve in question was fairly small: about 82 people in 1886, of whom 10 were adult males (A.B. v. 5, p. E520). But no one has put into evidence what happened to the descendants of each of those members, nor even of those male adults. Did every member either surrender treaty status and take scrip, join another band (or one other than Enoch), or leave no issue surviving today? We do not know.

[126] But it is the respondent Crown which raises lack of standing, and moves to dismiss the suit summarily and completely. It has the onus of proof.

[127] This is not a proceeding to set a time limit for claimants to come forward and prove their ancestry; it is a motion to dismiss the entire suit in respect of all members of the "class" (more accurately, the numerous R. 42 group of plaintiffs).

[128] There is another factual aspect. As noted, some of the former members of the band which once had the reserve in question moved to the Enoch reserve and became residents. They either joined the Enoch Band, or effected a formal union between their group and the Enoch Band. They consented to the federal government's using the proceeds of the sale of the former reserve for the Enoch Band, mixing them with the funds of the Enoch Band. This was discussed by the Reasons under appeal, but only in the context of the validity of the 1894 agreement to merge the two bands. That may well have been the only way that these facts were argued in the Court of Queen's Bench.

[129] The Dominion government evidently felt that that was a legal and proper thing to do, for they did as those band members asked.

[130] That being so, it is arguable that those former residents of the reserve in question who moved to Enoch reserve and joined the Enoch Band have a somewhat different status. That is so at least as to the proceeds of sale (for which an accounting is sought in this suit), and maybe generally. This question is unusual and intricate, and not much developed in argument. Curiously, there is evidence that by 1974, the Enoch Band had claimed the cancelled reserve in question here: A.B. v. 3, pp. E186, 188. Being arguable, this topic is a triable issue.

[131] Therefore, there may be a class of people (as yet unlocated or unidentified descendants) who escape a number (or all) of the Crown's arguments about standing. And there is a class of people (those transferring to Enoch) whose descendants might be able to.

[132] Were it the case that no living individual satisfied the criteria as refined, restated and adopted by the chambers judge, it is correct that the very abolition of the reserve created the hole in standing. Such a conclusion would preclude an eventual adjudication of the merits of the claims I have otherwise found triable, and be a bar to the appellants. That could raise a further issue. Would it be just on the facts here to deny the appellants a forum in which they can claim the rights that this Court has found triable? Then on the unique facts here, notably that the reserve was abolished, should the criteria for standing be as defined by the chambers judge? Should the plaintiffs in that event be considered to have standing on the basis of being a descendant of an original band member? If this were not the case, would there be circularity in the Crown's position and no litigant to assert the claim of improper cancellation of the reserve?

[133] That also is arguable and so a triable issue.

[134] In view of the conclusion which I reach below, it is unnecessary to discuss, let alone decide, whether there are any other triable issues about standing.

Q. Limitation Periods

[135] The Queen's Bench Reasons here concluded that discoverability or its lack was not an argument on which the appellant plaintiffs could succeed. Therefore, various limitation periods must have expired long ago, they reasoned. As a question of law, that is a very weighty argument, possibly unimpeachable.

[136] However, it needs a factual foundation in order to operate here.

[137] The Reasons for Decision here began with the original members of the band whose reserve was cancelled. They reasoned that most were present when the reserve was cancelled and saw what occurred, and so the events were actually known to them, not merely discoverable. The Reasons noted that some members could have been away at the time (for example hunting). But when the hunters came back, they would readily see and learn what had occurred (Reasons para. 147). For many of the facts alleged by the appellant plaintiffs, that inference of knowledge or actual discovery is reasonable, and might even be strong enough to found summary dismissal.

[138] However, in Part O, I described the possible flaw in the surrender process which ties in with whether living on the Enoch reserve was "near" the cancelled reserve.

[139] If some male member of the old band temporarily absent had then been elsewhere and not at Enoch, then he might well not know the facts to found the "near" argument. Even the local government officials might not have known those facts or grasped their importance.

[140] Furthermore, since the ***Act*** contemplated calling a meeting, getting a quorum, holding a vote, and getting a majority, the postulated absentee might well not learn enough details even on his return. "They asked people to consent to surrender the old reserve, and got some consents from some

of the band members, cancelled the reserve, and sold the land", might be about all that his inquiries of local residents would yield.

[141] Therefore, discoverability is a live issue. Alberta did not enact a 10-year ultimate limitation period (which prevails despite lack of discoverability) until recently. That ***Limitations Act*** applies to actions begun after March 1, 1999. This suit began in 2001. Therefore, times are intricate, and it is arguable that the action did not become statute-barred in the 1880s or 1890s.

[142] Some people learned all the relevant facts in the 1970s: Mr. Robb (an Edmonton lawyer), his researchers, and certain academics. And maybe the Enoch Band: A.B. v. 5, p. E453, v. 3, p. E197. But we do not seem to have any real evidence of who Mr. Robb's clients were, nor what they knew. He seemed to contemplate a suit by or for descendants of the former band in question here; A.B. v. 3, p. E188. But if they were alleged "descendants", they need not be the five appellant plaintiffs.

[143] Nor do we seem to have any evidence of how easy it would be for a diligent lay person to have found the facts in public archives or by a reasonable search in a publicly-accessible library. The Tyler thesis was available if one asked for it (A.B. v. 2, p. 26), but there is no evidence about how easy it was to find by a general investigation. For example, is navigating the public archives easy for lay people? (The Department of Indian Affairs set up a centre to help: A.B. v. 3, pp. E186, E190.) Is that the precise test? Did the media cover the topic? Discoverability in the 20th Century is thus unclear on this record.

[144] It is true that the onus may well lie on the appellant plaintiffs to prove non-discoverability. But on a defendant's motion for summary judgment, they need only show (or find in the Crown's evidence) enough to raise a big enough doubt. The "nearness" of, and residence on, the Enoch reserve were found late, and require collating a number of records. Therefore, I have some doubt whether they were discoverable. (The Queen's Bench Reasons of course did not discuss that precise question.) That is a triable issue.

[145] That renders it unnecessary to discuss other limitations issues such as the argument against the competence of provincial legislation to trench upon aboriginal or treaty rights, or the rebuttal that that provincial legislation is federal legislation by incorporation.

R. Conclusion on Liability

[146] I concluded in Part L that the phrases in the amended statement of claim alleging malice, fraud, and similar bad faith should remain dismissed, not be tried. And the chambers judge left trial open for (and did not dismiss) the claim for an accounting of the proceeds of the sale still in the possession of the defendant federal Crown. No one has cross-appealed that, nor even addressed any argument to it or to the temporary stay of it.

[147] That leaves for decision everything else, virtually the whole lawsuit.

[148] Part O showed some doubt as to whether the surrender of the reserve was correctly consented to. And Parts P and Q showed some doubt as to whether the Crown can make out either lack of standing, or limitations statutes, as a complete defence. So it is unduly difficult, or impossible, to dismiss the whole suit summarily: there are issues which should be tried.

[149] Precisely what to do in the light of all that is not obvious. The ultimate result at trial with a laxer standard of proof might resemble the result reached in Court of Queen's Bench chambers. But a reasonable chance of that does not suffice for summary dismissal on even one issue, let alone all issues.

[150] Rule 159 gives the Court ample power to grant partial summary judgment. The holes or soft spots in the defence of the federal Crown may be somewhat limited, especially as respects standing and limitations. So I believe that it might be possible to create lists or diagrams of issues, and thereby find issues or possible plaintiffs which or whom the Crown has fully blocked by its remaining defences. In other words, it might be possible to dismiss summarily some more parts of this lawsuit, and so dismiss more parts of the appeal. Certain groups of people may lack an arguable class of action or standing, for example. The Crown's arguments tend in that direction. The fact that it would be hard work thus to define those people or issues should not be a deterrent.

[151] However, even if one could use that diagram-and-list method, I am not confident that after that one could reliably and readily define who or what was thus inside and outside the parts of the suit to be thus dismissed. Thereafter, there could well be disputes about what was to go to trial, and what was not.

[152] Furthermore, one would then have to list more than three issues going to trial, because merits, standing, and limitations each contains more than a single topic. And the appellant plaintiffs' claims involve a number of people or classes of people, a number of causes of action, and a number of reliefs claimed. The number of permutations and combinations of all that would be large. They would be large enough that I would fear some interactions not clearly foreseen, and not discussed yet in argument. A trial judge might well find doubts or problems not yet foreseen.

[153] Since some issues would be tried, the evidence at trial could be different than some of the evidence now before the Court of Appeal.

[154] Experience shows that splitting trials and trying some issues separately is very apt to cause serious problems. Some of them are hard to predict or to guard against. Some of those problems are merely effects of postponement or delay, and would likely not apply here, but not all are so limited.

[155] I have concluded that to try only a few such issues, and dismiss the rest, on balance would likely do more harm than good. So here I would confine the summary dismissal to the bad-faith pleas described in Part L.

[156] There are many other substantive arguments by all four sets of counsel which I have not mentioned. The conclusion which I reach here makes it unnecessary, maybe undesirable, to discuss them here.

[157] The end of paragraph 2 of the judgment under appeal contains a temporary stay. The whole order was appealed. I would refer the question of that stay back to the chambers judge to rehear in light of these Reasons. He is also the case management judge for this suit. If he ceases to be the case management judge, then it should go to the new case management judge.

S. Costs

[158] The chambers judge dismissed all but one corner of the suit. Despite the argument of the appellant plaintiffs that they should not have to pay any costs, he awarded some costs against them under Schedule C.

[159] Since I would send most of the suit to trial, and since the result of that trial is not certain, that costs award necessarily must be altered. I would substitute an order that costs in the Court of Queen's Bench will be awarded and fixed by the judge who hears the trial. If no trial is held, any Court of Queen's Bench judge may award and fix them.

[160] That leaves the question of costs in the Court of Appeal.

[161] Interveners usually neither pay nor receive costs. The intervener here found the winning point on the merits (the "near" issue), but only after the 11th hour. Furthermore, that was clearly outside the scope of its intervention permitted by this Court's orders. It did not find the winning points on standing or limitations, which were the two topics on which it was allowed to intervene. Its factum does not ask for costs on the appeal.

[162] In all the circumstances, I would order that the intervener Federation neither pay nor receive costs.

[163] The third party Crown in Right of Alberta did not give arguments much different from those of the federal Crown. Its factum seeks costs and dismissal of the appeal, which presumably means costs against the appellants. It should neither pay to, nor receive, costs of the appeal from the federal Crown. As for costs ***vis-à-vis*** the appellants, the situation seems to be similar to that for costs between the appellants and the federal Crown on the appeal.

[164] Now I will turn to that last question.

[165] I would let the appellants and the respondent Attorney-General of Canada each bear their own costs, for ten reasons. (Two or so would suffice.)

1. The result is somewhat mixed.

2. Neither party found the precise winning points on appeal.

3. There will be a trial; who will win the suit is not clear.

4. The appellants argued and emphasized many hopeless procedural points (as shown above), and raised a number of tangential points, which consumed considerable time and effort. Conversely, the winning points consumed little time or paper.

5. The appellants' factum contained some statements incorrectly characterized as fact recitals, and unsupported allegations of conflicts in evidence, often offering no citation of the appeal books to allow checking.

6. A number of times, the appellants inaccurately recited the record or the respondent's argument.

7. The appellant handed the Court and the respondents a new factum at the last moment.

8. The appellants consumed significant time and paper with unnecessary oration.

9. The appellants made the appeal books; considerable passages were shrunk and poor derivative copies, contrary to Rr. 530(2)(f) and 729.5, and the Court's Practice Directions.

10. On some topics, the appellants did not cite enough legal authorities, nor check the later history of all cases cited.

Appeal heard on September 7, 2006

Reasons filed at Edmonton, Alberta
this 19th day of December, 2006

Côté J.A.

Reasons for Judgment Reserved of
The Honourable Madam Justice Paperny
Concurring in Part

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[166] I concur in the result reached by Côté J.A., with one exception; his conclusion upholding the dismissal of the claims for malice, fraud and bad faith. For the reasons that follow, those claims should also be allowed to proceed to trial.

[167] The appellants allege wilfulness, malice, bad faith, equitable fraud, reckless or fraudulent misrepresentation, coercion and duress by the Dominion government or its officials. They maintain that the Papaschase Band was deliberately dispersed and dissolved as a result of the Crown's own wrongdoing and a series of improper acts and omissions by her officials. These acts include:

> a) The failure to provide land, agricultural support and relief during times of starvation and pestilence as promised under Treaty 6;
>
> b) A unilateral decision to transfer 84 members to an "Edmonton Straggler's" list and reduce the size of the Papaschase Band's reserve from 48 to 40 square miles in 1880;
>
> c) A substantial reduction of the Papaschase Band membership by offering "half-breed" scrip to Treaty Indians as an inducement to withdraw from treaty;
>
> d) The removal of the "remnants" of the Band to Enoch;
>
> e) Taking surrender of almost 40 square miles of valuable reserve land on a maximum of four days notice from only three members without the consent of the majority of the Band;
>
> f) Obtaining an amalgamation of the Papaschase Band with the Enoch Band with the consent of only 2 members; and
>
> g) breaching the express terms of the surrender agreement and assignment of trust monies from the sale of the reserve land to the Enoch Band without the express consent of the beneficiaries or other lawful means.

[168] In essence, the appellants allege that the federal government, through its own wrongful acts and omissions, caused the break-up of the Papaschase Indian Band. The members of the Papaschase

band did not voluntarily surrender the reserve land but did so only as a result of the government's coercive measures.

[169] The chambers judge concluded at para. 54 of the reasons for judgment that there was no evidence adduced to support these allegations. However, later in his reasons, he reviewed the evidence which the appellants put forward to support these claims.

[170] As an example, the appellants adduced evidence of "dire circumstances" including, starvation and difficult economic conditions, a lack of food rations and a failure by government to provide timely agricultural assistance to the Band. The appellants submitted correspondence which it argues makes clear that the Crown was aware of the Band's improvident situation and the effect that it had on their willingness to take scrip. This, it submits, is evidence of government wrong doing.

[171] In stating that there was no evidence to support the allegations, inferentially, I understand the chamber's judge to have concluded that the evidence available was insufficient to support the conclusion urged. To reach this conclusion, however, he was required to weigh and assess the evidence, after careful scrutiny, and to make and to choose among a host of possible inferences to be drawn from it. In my view, this is a function properly left to a trial judge. Moreover, these claims are inextricably linked to the balance of the litigation and should not be prematurely dismissed without consideration of the broader factual context in which they are alleged to have occurred.

[172] The appellants' evidence is sufficient to rebut summary judgment and leave the issues related to malice, fraud and bad faith to be tried.

Appeal heard on September 7, 2006

Reasons filed at Edmonton, Alberta
this 19th day of December, 2006

Paperny J.A.

Reasons for Judgment Reserved of
The Honourable Madam Justice Sulyma
Concurring in Part and in the Result

[173] I concur in the result reached by Côté J.A., and concur with and adopt his reasons with respect to all issues considered by him with the exception of his conclusion regarding the claims for malice, fraud and bad faith. In that regard, I agree with the reasons and conclusion of Justice Paperny.

Appeal heard on September 7, 2006

Reasons filed at Edmonton, Alberta
this 19th day of December, 2006

Sulyma J.

Appearances:

E.E. Meehan, Q.C.
R.S. Maurice
M.-F. Major
for the Appellants (Plaintiffs)

M.E. Annich
S.C. Latimer
for the Respondent (Defendant) Attorney General of Canada

D.N. Kruk
A.L. Edgington
for the Respondent (Third Party) H.M.Q. in Right of Alberta

M.J. Ouellette
for the Intervener Federation of Saskatchewan Indian Nations

Corrigendum of the Reasons for Judgment Reserved

In the style of cause the following changes have been made to the status of the parties:

Rose Lameman, et al has been corrected to read “Appellants (Plaintiffs)”

Attorney General of Canada has been corrected to read “Respondent (Defendant)”

Her Majesty the Queen in Right of Alberta has been corrected to read “Respondent (Third Party)”

Federation of Saskatchewan Indian Nations has been corrected to read “Intervener”

These changes are also reflected on the Appearances page.