"Who is a Nation"?

Preliminary Disclaimer

My partner John Gailus and my co-counsel Allisun Rana actually wrote the submissions respecting the question of whether a First Nation can sue in its own name, but I will try to do them justice.

Introduction to the Litigation

In August 2005, six BC Treaty 8 First Nations (West Moberly First Nations, Halfway River First Nation, Saulteau First Nations, Prophet River First Nation, Doig River First Nation and Fort Nelson First Nation) filed a lawsuit in the B.C. Supreme Court seeking a declaration as to the geographic location of the western boundary of Treaty No. 8. The location of the western boundary of Treaty No. 8 directly affects the question of where the Plaintiffs may exercise their rights guaranteed under Treaty No. 8. The Plaintiffs say the western boundary of Treaty No. 8 is the Continental Divide, to the west and south of which water flows to the Pacific Ocean and to the east and north of which water flows to the Arctic Ocean.

The Plaintiffs sued Canada and British Columbia. Canada agrees the location of the western boundary of Treaty No. 8 is along the Continental Divide. British Columbia believes the boundary is located considerably to the east.

In February 2006, the B.C. Supreme Court ordered that the Kaska Dena Council ("KDC"), an incorporated society, be added as a Defendant, on the grounds that the society had contractual obligations to Canada and British Columbia under the British Columbia Treaty Commission process to resolve overlaps between the traditional territory claimed by the Kaska Dena people and the territory encompassed by Treaty No. 8. The KDC alleges that portions of the boundary are even further to the east than alleged by British Columbia.

In March 2007, the Plaintiffs brought an application to amend the style of cause, relating to the representative nature of this proceeding. On March 12, 2007, Mr. Justice Johnston gave leave to the Plaintiffs to clarify that the six Chiefs bring the action on behalf of those First Nations. Three of the Chiefs were substituted for the currently elected Chiefs. The Court posed three additional questions to the parties respecting issues of stare decisis and res judicata. The parties made submissions on those three questions before Mr. Justice Johnston at the end of June 2007. The Court reserved.

On July 4, 2007, Mr. Justice Johnston issued a Memorandum to Counsel asking whether the six First Nations, or any other Treaty 8 First Nations, could sue or be sued in their own name, arising from comments made by McEachern, C.J.S.C. (as he then was) in 1986 in *Clayoquot Band of Indians v. British Columbia.*

On August 31, 2007, Mr. Justice Johnston granted leave to the Plaintiffs to add the six First Nations as parties in their own right. He also allowed the Plaintiffs to delete the phrase "and on behalf of all beneficiaries of Treaty

No. 8" from the style of cause, but directed that the Plaintiffs provide formal notice of the proceedings to all other Treaty 8 First Nations. Part of his Reasons for Judgment included a detailed discussion of the legal capacity of an Indian band to bring a lawsuit in its own name. He concluded that it could.

Reasons for Judgment, 2007 BCSC 1324, at paragraph 54

Substantive Issues

1. Nations have been able to sue for 25 years or more

The Supreme Court of Canada decision in *P.S.A.C. v. Francis* held that a Band Council was a "person" under the *Canada Labour Code* and, accordingly, considered it to be an employer. As reasoned by the Court in that case:

> The Band Council is a creature of the *Indian Act*. It is given power to enact by-laws for the enforcement of which it is necessary to employ staff. In fact, the Council does engage employees to do work for it and pays them. In view of these circumstances, for the purposes of the Code, it is my opinion that the Council could properly be considered to be an employer within the meaning of that Act.

P.S.A.C. v. Francis, [1982] 2 S.C.R. 72 at 78

By 1997, it had become clear to the Federal Court that the issue was no longer whether a Band could sue or be sued, but rather, the circumstances in which such suits could be commenced. In *Montana Band v. Canada*, Reed J. canvassed the current state of the jurisprudence on the legal capacity of a band or a band council to sue or be sued and concluded that "[t]he jurisprudence establishes that because of the particular powers and

obligations imposed by statute on a band council there must exist an implied capacity to sue and be sued with respect to the exercise of those powers and the meeting of those obligations." Reed J. also noted that the Defendant Canada agreed that bands could sue and be sued in their own names, but that it also pointed out that "the extent to which such is effective depends upon the nature of the particular case." According to Reed J., this analysis "accords with the jurisprudence".

Montana Band v. Canada, [1997] F.C.J. No. 1486 (Q.L.) at paras. 22 and 27.

The Federal Court also recognized the ability of a First Nation to commence litigation in its own name when challenging the constitutionality of federal legislation. *Sawridge Band* v. *Canada* was a constitutional challenge to Bill C-31, the federal legislation allowing for re-instatement of Indian status to women who had lost their status under provisions of the *Indian Act* that did not pass *Charter* scrutiny. The case was initially brought by the Sawridge and Sarcee Bands as a representative action in the names of their current Chiefs on behalf of the members of each of the Bands. Many years into the litigation, in November 2002, the *Federal Court Rules* were amended, implementing class action rules and repealing representative actions in Federal Court. The Crown brought a motion to compel the Plaintiffs to seek certification as a class action. Hugessen J. dismissed the Crown's motion and ordered that the action be continued with the style of cause amended to reflect the names of the Bands as Plaintiffs. In reaching this conclusion, Hugessen J. referred to the decision of the Federal Court in *Wewayakum Indian Band v. Canada*, wherein the Court noted that a Band had the legal capacity to sue in its own name:

> The only question that remains is whether a band can sue in its own right. This issue was initially not seriously contested by the Crown, which cited *Roberts v. R.* (1991), [1992] 2 C.N.L.R. 177 (Fed. T.D.) [hereinafter "*Wewayakum Indian Band*"]. In that case, this Court determined that, in fact, an Indian Band was capable of suing in its own right:
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> > There seems to me to be no logical reason why Indian bands, as such should not possess the same rights to sue as corporations for instance, and, similarly, to be subject to various resulting obligations. Although no general statutory enactment so provides, common sense seems to dictate it. I therefore find that they do possess a special status enabling them to institute, prosecute and defend a court action. It follows that those claiming to sue in the name of a band must be prepared to establish their authority to do so when and if that authority is challenged. Any such authorization of course need not be subject to any special rules, laws or procedures other than those prescribed by the traditions, customs and government of the particular band.
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> *Sawridge Band v. Canada*, [2003] 3 C.N.L.R. 358 (F.C.T.D.) at para. 9.

Thus, courts have found that Indian Bands can sue in their own names for matters that are outside the scope of their *Indian Act* powers. The courts in *Wewayakum*, *Sawridge* and *Papaschase* recognized the legal authority of the Indian Bands in those cases to commence actions in their own names, and those cases were about lawful possession of reserve lands, the Aboriginal right to determine Band membership and the constitutionality of Bill C-31, and the wrongful surrender of reserve lands that had been created pursuant to Treaty 6. None of those cases concerned matters arising under the respective plaintiff Band's *Indian Act* authority.

> *Wewayakum Indian Band v. Wewayakai Indian Band*, [1991] 3 F.C. 420 (T.D.)
> *Sawridge Indian Band v. Canada*, [2003] C.N.L.R. 358 (F.C.T.D.)

Telecom Leasing Canada (TLC) Ltd. v. Enoch Indian Band of Stony Plain Indian Reserve No. 135, [1993] 1 W.W.R. 373 (Alta Q.B.) at 376

Papaschase Indian Band No. 136 v. Canada, [2004] 4 C.N.L.R. 110 (Alta. Q.B.) at paragraph 166

2. Plaintiffs tried to limit to treaty litigation but Johnston J. took it further, eliminating the "category approach" altogether.

The Plaintiffs submitted that the issue of whether or not they could sue in the name of their First Nations depended on the subject of the litigation. The case law demonstrated that in treaty litigation First Nations have the legal capacity to sue in their own names respecting Treaty rights.

The Plaintiffs relied, in part, on the *Papaschase* decision. After stating that "[t]he law has now evolved to the point where it is increasingly recognized that a Band does have the capacity to sue and be sued", Slatter J. notes that "[i]n this case both parties proceeded on the assumption that a band cannot sue in its own name, and I will do likewise, although in this case the result would be the same either way." Accordingly, the comments that followed must be understood in this context as it is clear that the Court was proceeding on that assumption only because the action was already framed as a representative action.

Papaschase Indian Band No. 136 v. Canada, [2004] 4 C.N.L.R. 110 (Alta. Q.B.) at paragraph 166 [emphasis added] .

Simply put, as noted by Justice Slatter in *Papaschase*, "[i]f a band has a sufficient existence to sign a treaty, why can it not sue to enforce the treaty?" This is the same logic that applies to the courts' recognition of the legal authority of an Indian Band to sue and be sued in respect of matters relating to its authority to govern as recognized in the *Indian Act*.

This was echoed, in part, in the *Soldier* decision from the Manitoba Court of Queens Bench. In *Soldier*, there were two applications for certification as class actions. The individual plaintiffs were the former chief of one band, and the current chief of another, each of whom argued that Canada had an obligation to pay to each Indian beneficiary under Treaty No. 1 and Treaty No. 2 an annuity in an amount sufficient to purchase a basket of goods at current cost price. They claimed Canada had breached its obligation to do so. Canada argued that the individual plaintiffs had no standing to bring such claims for breach of treaty. The Court did not adopt Canada's distinction between issues pertaining to the interpretation of annuity rights (which should be brought by the collective i.e. the band) and the enforcement of annuity rights (which should be brought by the individual band member):

> While the entitlement of a particular individual to recover a payment not made on the basis of a dispute about band membership could be an individual right, I find that the right to the annuity itself and any interpretation of the treaty necessary to determine that rights are collective.
>
> [Emphasis added.]
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> *Soldier v. Canada (Attorney General)*, 2006 MBQB 50 at paragraph 43

Soldier's approach to identifying the Indian band as the proper litigant to sue respecting Treaty interpretation issues and breaches of Treaty rights is well rooted in the previous case law.

> *Pawis v. The Queen*, [1979] C.N.L.R. 52 (Fed. Ct. T.D.) at para. 17
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> *Wahsatnow v. Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCT 2012 at paragraph 21

However, Johnston J. rejected the "category" approach to this issue. Instead, he held:

> I agreed with those authorities that say that Indian bands ought not to continue under legal disabilities. In my view, neither bands nor their advisors ought to have to concern themselves with whether litigation in contemplation is one of the types where action might be permitted by the band, nor should bands have to continue to vex individuals to act in a representative capacity in order that a band's collective legal interest can be protected.
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> I conclude, therefore, that Indian bands have the capacity to sue and be sued in British Columbia. The plaintiffs' application to add the bands for which they already act in a representative capacity will not be denied on the ground that the bands lack the capacity to sue.
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> *Reasons for Judgment,* 2007 BCSC 1324, at paragraphs 54 and 55

To some degree, this echoed the comments by the Court in *Papaschase*, as reviewed above.

3. Larger Context of "First Nation" Identity Issues

The struggle in the *Martin* case, to some degree was this: how to accommodate claims of Aboriginal groups that possibly transcend "Indian bands"? The claim in *Martin* was filed to establish Aboriginal rights and title to Meares Island. The plaintiffs sought to amend the style of cause from one which named the chief of each of the two Indian Bands on their own behalf and on behalf of all other members of their respective Bands to naming only one of the chiefs on his own behalf and on behalf of both of the two Indian Bands (thus removing the reference to "all other members"). The province objected to the amendment, first arguing that the one chief did not have the same interest in the proceeding as the members of the Band of

which he was not the chief and, second, that the proper plaintiffs were the individual members and not the Bands.

> *Martin et al. v. The Queen in Right of British Columbia and MacMillan Bloedel Limited*, [1986] 3 C.N.L.R. 84 (B.C.S.C.) at paragraphs 7-10, 15

The plaintiffs also sought to make amendments to the Statement of Claim explaining that the membership of the two Indian Bands also included several Indian Tribes or Indian Nations and that the Bands were authorized by the Nations to bring the action on their behalf. In the alternative, the plaintiffs stated that the Bands were the successors to the Aboriginal rights of the Nations.

> *Martin*, *supra* at paragraph 17.

In the result, McEachern C.J.S.C. suggested the language for the amended style of cause:

> As I said to counsel during the hearing, we are in a problem-solving exercise on these applications and I have the view that the best that can be done is to cover all bases by ensuring that all proper interests are represented and to leave it to the trial judge to decide on the evidence whether the rights asserted in the action, if any, belong to the bands or to some other entities or to the members. I therefore suggest, subject to the agreement of counsel and to the consent of the plaintiffs' representatives, a style of cause as follows:
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> MOSES MARTIN, suing on his own behalf and on behalf of the CLAYOQUOT BAND OF INDIANS and on behalf of all other members of the said band, its tribes and nations.
>
> There will have to be a similar description for the Ahousaht band when a representative is nominated and a similar description of such plaintiffs. Then, as I have said, the trial judge will have to specify to whom the benefits of any judgment will accrue.

Martin, *supra* at paragraphs 22-23.

Clearly, given the confusion introduced by the plaintiffs in the proposed amendments with regard to the identification of the claimed rights-holders as the original tribes or nations, their relationship to the existing Indian bands and their consent to be represented by the named chiefs, caused the Court to take certain precautions to ensure that "all proper interests are represented". It should be noted that such complexities do not arise when the plaintiffs are not seeking to establish unproven rights, such as Aboriginal rights and title, that the common law requires to be traced back prior to the assertion of crown sovereignty. In treaty litigation, there is no question about the identification of the rights holders. They are the "treaty signatory bands". That is, the statutory entity, the 'Band' and the Aboriginal nation that signed or adhered to the treaty are more often than not the same entity.

Martin, *supra* at paragraph 22.

Oregon Jack was a case similar to *Martin*, where Aboriginal rights claimed by the plaintiffs belonged not only to members of Indian bands but also the members of Aboriginal Nations or Tribes.

Oregon Jack Indian Band v. Canadian National Railway et al, [1990] 1 S.C.R. 117 at 119

The most recent discussion of these issues is in the *Williams* case respecting Justice Vickers' findings respecting "Aboriginal Group" as the proper rights holder. Briefly, Vickers J. defined the Aboriginal groups to be "a historic community of people sharing language, customs, traditions, historical experience, territory and resources". An Aboriginal group is not necessarily defined by modern Indian bands. These findings may be important to

consider when dealing with issues like who should bring the claim for Aboriginal rights and title - the First Nation or a representative.

> *Tsilhqot'in Nation v. British Columbia* 2007 BCSC 1700 at paragraph 458 and 451

Thus, notwithstanding the *Willson* decision, there still appears to be a need for representative proceedings in Aboriginal litigation.