

09/21/04

COURT FILE NO.: 01-CV-213506CM
DATE: 20040921

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
 SLATE FALLS NATION) *Susan M. Vella*, for the plaintiff
)
 Plaintiff)
)
 - and -)
)
 THE ATTORNEY GENERAL OF CANADA) *Doğan D. Akman, John Rattray*, for the
 and ONTARIO POWER GENERATION INC.) defendants
)
 Defendants)
)
) HEARD: August 10, 11 and 12, 2004

C. HORKINS J.

INTRODUCTION

[1] The defendants, the Attorney General of Canada ("Canada") and Ontario Power Generation Inc. ("OPG") seek summary judgment dismissing the plaintiff's claim.

[2] The plaintiff seeks an order appointing Stanley Carpenter as representative of a named class and leave to amend the amended statement of claim.

[3] The plaintiff is an Indian Band created in 1985 under the provisions of the *Indian Act*. Slate Falls Nation is located in northern Ontario on and around the shores of Lake St. Joseph.

[4] Prior to 1985, the aboriginal people of Slate Falls were part of the Osnaburgh Indian Band. The members of the Slate Falls Nation are descendents of the Ojibway people who hunted and fished for their sustenance in this northern area.

[5] The action is for damages as a result of flooding of reserve land and the traditional territory. Slate Falls Nation's claim against Canada arises from the alleged breach of Canada's fiduciary duty to protect Slate Falls Nation's treaty rights and their interest in the reserves. The

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claim against OPG arises from the torts of trespass, nuisance, and breach of riparian rights that were committed through the initial flooding and ongoing water fluctuations.

THE SUMMARY JUDGMENT MOTION

[6] The plaintiff lists numerous triable issues and says that summary judgment should not be granted. The plaintiff refers to the fact that there were eight days of cross-examination conducted by the defendants. Multiple volumes of evidence have been submitted. The plaintiff submits that this reinforces the complexity of the factual record, which must be determined by a trier of fact.

[7] The plaintiff's evidence is in part based on oral histories, the recollections of elders who only speak Ojibway and evidence gleaned from historical research of ancient sources, which must be interpreted in an aboriginal context. The plaintiff submits that this is not easily condensed to a written record and deserves to be heard by *viva voce* evidence.

[8] As well, the plaintiff says that the legal issues in this case are novel. There is no precedent in Canada that mirrors the facts in this case and so the issues should not be dealt with in a summary manner.

[9] In support of this summary judgment motion, the defendants filed an affidavit from Chris Fleck, currently employed by Canada. He is the Flooding Portfolio Manager for the Litigation Management and Resolution Branch of the Department of Indian Affairs and Northern Development ("DIAND"). He does not have any direct knowledge of the events material to the litigation. The defendants presented no expert evidence.

[10] In response, the plaintiff filed affidavits from three elders of Slate Falls Nation; Sam Carpenter, Charles Wesley and Claude Loon. The elders were not cross-examined. As well, the plaintiff filed an affidavit from Dr. Janet Armstrong, a person with expertise in aboriginal and treaty rights. Dr. Armstrong was cross-examined for eight days.

[11] The defendants submit that the extensive record of documents and the cross-examination of the plaintiff expert disclose the following:

- (a) There is no cogent evidence that the historic Slate Falls Nation ever existed
- (b) There is no cogent evidence that the plaintiff is historically or juridically the successor of a historic Slate Falls Nation;
- (c) There is no evidence that the plaintiff is either the historical or juridical successor to the Osnaburgh Indian Band;
- (d) There is no cogent evidence with respect to the claim advanced in the alternative: that Canada failed to advise members of the proposed Slate Falls Nation that fiduciary obligations owed by Canada to the former Osnaburgh Indian Band were extinguished when they formed Slate Falls Nation.

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[12] A review of the factual background presented by the plaintiff is helpful before considering whether the relief should be granted.

FACTUAL BACKGROUND PRESENTED BY THE PLAINTIFF

[13] For centuries, the area of northwestern Ontario and part of the Northwest Territories was occupied by a nation of Ojibway tribes who hunted and fished for their sustenance over the vast areas of land and water. Different tribes or family groupings occupied and used distinct parts of this general area.

[14] The members of Slate Falls Nation are descendants of these Ojibway people, who continue to live on and use parts of those territories traditionally occupied by their ancestors.

[15] In 1905, the members of Slate Falls Nation were included with other disparate groups of Ojibway people in a band formed by the Canadian government called the Osnaburgh Indian Band. The Osnaburgh Indian Band was formed under the auspices of the James Bay Treaty ("the Treaty").

[16] Prior to the creation of the Osnaburgh Indian Band, treaty commissioners for Canada travelled through the area and met with a number of aboriginal people. The commissioners met Joseph Carpenter and his family. Joseph Carpenter was the paternal grandfather of Sam Carpenter, a member and elder of Slate Falls Nation, one of the elders who has sworn an affidavit.

[17] The treaty commissioners presented the terms of the treaty to representatives of the aboriginal people. Commissioner Duncan Campbell Scott reported this discussion in his diary:

The Indians asked several questions as to whether they would be compelled to live on the reserve to be set apart for them, and as to whether their fishing and hunting privileges would be curtailed. On being informed that they could continue to live as they and their forefathers had done, and that they could make use of any lands not disposed of by the Govt they appeared to be satisfied, but asked to be given to the following day to enable them to talk over the terms of the agreement with the members of the band, which request was at once agreed to .

[18] The following day the representatives notified the treaty commissioners that they would enter into the Treaty.

[19] The parents of elder Sam Carpenter and elder Charles Wesley were among the members of the Slate Falls Ojibway present at the signing of the Treaty at Osnaburgh. This is their sworn evidence that has not been challenged on cross-examination.

[20] Through the Treaty, the aboriginal people residing in the treaty area surrendered land subject to being provided a reserve and the assurances of Canada that they would be entitled to continue hunting, fishing and trapping throughout their traditional land as they had done since time immemorial.

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[21] The Treaty established reserves and recognized traditional hunting and fishing grounds over a large portion of the areas that have been historically used and occupied by members of what became the Osnaburgh Indian Band.

[22] The people that were included in the Osnaburgh Indian Band were not a homogeneous group that considered themselves to be part of the same traditional groupings or tribes, but were grouped together by the government when the band was established. There were several distinct groups included in the band such as the ancestors of the plaintiff.

[23] The ancestors of the members of the Slate Falls Nation, before their membership in the Osnaburgh Indian Band, were people who occupied territory near Lake Bamaji, Slate Falls, and Lake St. Joseph, who hunted and fished in and around Lake St. Joseph and neighbouring lakes. They were traditionally identified in their native Ojibway language as the Big Lake People.

[24] A reserve composed of two parcels was established at Lake St. Joseph for the Osnaburgh Indian Band. However, even after the reserve was established, the groups continued to generally live apart from each other on the different parcels of the reserve. The Slate Falls Ojibway lived on the southern shore of Lake St. Joseph.

[25] The plaintiff has retained Dr. Janet Armstrong. Dr. Armstrong has a doctoral degree in political science. According to her résumé she has expertise in the area of aboriginal and treaty rights. In particular she has conducted historical research covering various aboriginal issues including the historical background of the Treaty.

[26] Dr. Armstrong's report dated July 29, 2003 was filed in response to the defendants' motion. The defendants conducted an extensive cross-examination of Dr. Armstrong.

[27] Dr. Armstrong's report discusses the following topics:

- (1) The history of the Slate Falls Ojibway.
- (2) The relationship between the Slate Falls and the Osnaburgh Indian Band particularly at the time of the treaty in 1905 and in 1935 when the Rat Rapids generating station was built.
- (3) The history of the Rats Rapid Generating station and the Root River diversion at Lake St. Joseph.
- (4) The process by which the Slate Falls Band was officially recognized by DIAND in 1985.

[28] To prepare her report, Dr. Armstrong reviewed the affidavits from the three elders, and numerous historical documents.

[29] The defendants say there is no cogent evidence to show that Slate Falls Nation ever existed. The evidence from the elders, the report of Dr. Armstrong and the documentation that she refers to suggest otherwise.

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[30] The affidavits of the elders present the following historical evidence about the Slate Falls Nation. The members of the Slate Falls Nation, apart from a handful that have married into the band or otherwise have been permitted to transfer to the band, are descendents and present day members of a historical and traditional band of aboriginal people described in Ojibway words meaning "the Big Lake People". This group of people is referred to in the amended statement of claimant as "Slate Falls Ojibway."

[31] The Slate Falls Ojibway have inhabited the area of Bamaji Lake, a lake that connects to Lake St. Joseph, for more than three generations, dating back to a period prior to the signing of the Treaty in 1905. During the fall and winter, the Slate Falls Ojibway camped at and around the old Slate Falls Village, which was located on Bamaji Lake. From this base they would hunt and fish. During the summer, the Slate Falls Ojibway travelled to locations all over Lake St. Joseph and made stops at Osnaburgh house, where a Hudson Bay Company trading post and store was located. While on Lake St. Joseph, the Slate Falls Ojibway would hunt, fish, track and harvest (collectively known as the traditional activities).

[32] The Slate Falls Ojibway also used Ace Lake, adjacent to and connected with the southern side of Lake St. Joseph, where wild rice and berries were harvested during the summer.

[33] The families which inhabited locations along the shores of Bamaji Lake during the fall and winter included those with the following familial based surnames: Carpenter, Wesley, Loon, Skunk, Cranc, Necan, Ash, Kitchense and Cook. These people were self identified as the Big Lake people and also known as the Slate Falls people, which the plaintiff has collectively referred to as of the Slate Falls Ojibway.

[34] Approximately three quarters of the present members of Slate Falls Nation are descendents of the traditional families identified by elder Carpenter.

[35] Members of the families identified by elder Carpenter traded fur at the Osnaburgh trading post and were known to the Hudson Bay Company managers who worked there.

[36] The parents of elder Sam Carpenter and elder Charles Wesley were among the members of the Slate Falls Ojibway present at the signing of the Treaty at Osnaburgh.

[37] The Slate Falls Ojibway were part of the trading post band at the Osnaburgh post, and assembled at Osnaburgh along with other members of the trading post band to sign the Treaty. As a result the historical Slate Falls Ojibway came to be incorporated into a legal band with others from the region recognized by Canada under the *Indian Act* as the Osnaburgh Indian Band.

[38] The Treaty provided that the Osnaburgh Ojibway would:

Cede, release, surrender, and yield up to the Government of the Dominion of Canada, for His Majesty the King and his successors forever, all of their rights, title and privileges whatsoever to the lands within the following limits

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[39] The Treaty further provided that the Osnaburgh Ojibway:

... shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading, or other purposes.

[40] The Treaty also provided that reserves would be set aside for each band, the boundaries to be surveyed and defined to be held and administered for the benefit of the Indians. As well, the Treaty provided:

... that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by his Majesty's Government for the use and benefit of the Indians entitled thereto, with their consent first had and obtained;

THE FLOODING DAMAGE

[41] Between 1905 and 1934, the members of the Osnaburgh Indian Band carried on their traditional way of life, hunting in the regions in and around Lake St. Joseph, and fishing on Lake St. Joseph. The lake and its surrounding lands and waterways are collectively referred to as of the "traditional territory."

[42] In 1934 to 1935, the predecessor of OPG began construction of dams and a hydro-electric generating station, which flooded Lake St. Joseph. The shoreline disappeared underwater, along with camps, burial grounds, raw materials and sources of food.

[43] This construction was ultimately done with the permission of the Canadian and Ontario governments. However, it was not done with the permission of the members of the Osnaburgh Indian Band, who were not even aware of the plan to build the hydro-electric works until after construction of one of the dams had already started.

[44] Canada took steps to investigate the impact of the flooding on the band, and concluded that compensation should be paid by OPG. However the only compensation which Canada considered, was for the damage to marketable timber and homes on the reserve lands. Canada did not consult with the Osnaburgh Indian Band regarding the damage that would be caused to their traditional territory or navigation on Lake St. Joseph and adjoining waters. As well, the area that was flooded and damaged by seepage and wave action was underestimated in calculating the compensation. There is no proof that the compensation offered was ever paid.

[45] Canada took no steps to ensure that the people of the Osnaburgh Indian Band were consulted before the flooding, or even advised that it was to take place, took no steps to protect the reserve lands and traditional territory, and took no steps to ensure that adequate or any compensation was paid to the people of the Osnaburgh Indian Band for the ongoing effects of the flooding and water fluctuations.

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THE ROOT RIVER DIVERSION

[46] In the mid-1950s, use of the dams on Lake St. Joseph changed. Instead of direct generation of hydro electricity on the lake, the dams were used to divert water from the Albany River system into the Root River system and ultimately into the English and Winnipeg Rivers, facilitating power generation in both Ontario and Manitoba.

[47] The plaintiff alleges that Canada did not consult with the Osnaburgh Indian Band to determine the effect that the Root River diversion would have on navigation around the traditional territory of these peoples, particularly on the Albany River, before approving of the diversion. The Root River diversion resulted in substantial decreases to the flow of water leading from Lake St. Joseph into the river system, with corresponding increases in the flow leading from Lake St. Joseph through the Root River to Lac Seul and ultimately into the English and Winnipeg Rivers.

CREATION OF THE CURRENT SLATE FALLS NATION

[48] In the early 1980s, several traditional bands under the jurisdiction of the Treaty began to assert their desire to become recognized as separate bands by DIAND. The Slate Falls Ojibway were among the traditional bands that sought this recognition.

[49] The separation and division of Indian bands was subject to a DIAND policy. While the Minister of Indian Affairs and Northern Development was empowered under s. 17(1) of the *Indian Act* to create new bands, the Minister did not wish to do so without determining the wishes of the aboriginal people concerned. It was the policy of DIAND to hold a plebiscite to approve the creation of a new band out of the membership of an existing band, after the terms of the separation had been worked out. Where band divisions, as opposed to amalgamations, were occurring, the band council of the existing band had to be involved in setting acceptable terms of separation, including a clear allocation of land and other assets.

[50] In a memorandum concerning a meeting held September 21, 1983 between DIAND and several Indian representatives, W. J. Easton wrote that "it was quickly determined that the status Indians of Slate Falls want the purchase and establishment of a Reserve and individual Band status."

[51] DIAND had concerns about Slate Falls' request. The formation of the new band would reduce the membership and therefore the funding of the Osnaburgh Indian Band and several other bands.

[52] In August 1984, the Minister of Indian Affairs advised the grand chief representing all Treaty Indian bands, that five new bands, including Slate Falls, would be given *de facto* recognition, subject to some conditions.

[53] The Minister of Indian Affairs subsequently committed in January 1985 to ensuring that the five bands be given formal recognition by the Ministry by April 1, 1985.

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[54] DIAND's policy was not followed in the creation of the Slate Falls Nation. In the winter and spring of 1985, DIAND became concerned with constituting the new bands as quickly as possible. This was because the proposed amendments to the *Indian Act*, would have removed the discretion of the Minister to constitute new bands.

[55] A working group was established by DIAND around March 1985 to obtain the necessary information to constitute the new bands. On April 10, 1985, Eugene Harrigan from DIAND reported that visits to five communities, including Slate Falls, had been completed. In particular Mr. Harrigan reported that the process included a visit to each location with the purpose of advising the members of the communities "on the status of current situation, and discussing concerns and questions raised".

[56] Mr. Harrigan also reported that community members who wished to become members of the proposed new band were asked to sign a document indicating their intention to be part of such a band. As well he reported that persons eligible to transfer membership were, in some cases, absent from the communities during the visits and community members were advised to tell the absent members that they could likely transfer their membership in accordance with usual transfer procedures at a later date.

[57] Mr. Harrigan refers to a meeting held at Slate Falls to discuss the formation of a new band. Elders Loon, Carpenter and Wesley say that they did not attend such a meeting and are not aware that such meeting was held. Elder Carpenter deposed that, as a member of the Osnaburgh Indian Band at the time, he believes he would have been informed of any such community meeting.

[58] The cross-examination of Chris Fleck shows that Canada has no information regarding:

- (a) what was said or discussed at the meeting that was apparently held at Slate Falls;
- (b) who from DIAND attended at Slate Falls for the alleged meeting;
- (c) when the meeting was, the length of the meeting or whether notice of the meeting was given to the residents of Slate Falls.

[59] Chris Fleck confirms that Canada cannot locate the documents that were allegedly signed by status Indians resident at Slate Falls for the purpose of expressing their intention to join the proposed new band. Other than the hearsay contained in the report of Mr. Harrington, there is no evidence that any such meeting was held. In contrast Slate Falls has affidavit evidence from elders that no such meeting was held.

[60] Canada is unaware of any Osnaburgh Band Council resolution supporting the creation of Slate Falls.

[61] The plaintiff says that no information was given to proposed Slate Falls members explaining the consequences of separating from the Osnaburgh Indian Band.

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[62] Despite the policies of DLAND, no plebiscite was held at the Osnaburgh Indian Band concerning the creation of Slate Falls Nation. As well, Canada is unaware of any band Council resolution supporting the creation of Slate Falls Nation having been passed by Osnaburgh Indian Band.

[63] On April 15, 1985, a ministerial order was made establishing the "New Slate Falls Band of Indians" together with seven other bands. While this order refers to the new band as "New Slate Falls Band of Indians", the Indian registration system document refers to the new band as "Slate Falls Nation".

[64] An initial band list for the Slate Falls Nation was appended to the ministerial order. It lists 76 individuals, 69 of which were previous members of the Osnaburgh Indian Band. Six were members of the Lac Seul Indian Band and one was a previous member of the Lake Indian Band. This initial band list was temporary, pending the establishment of the new band's membership code. The members of the new band lost their rights to preside on the reserves of their previous band of membership upon becoming members of Slate Falls Nation. At the time Slate Falls Nation was created, it was Canada's intention to provide the new band with a reserve.

[65] The ministerial order did not purport to deal with entitlement issues with respect to claims relating to reserves, capital or revenue, which pre-dated the establishment of the new bands. The plaintiff argues that the order only addresses Slate Falls Nation's future entitlement to assets held by or on behalf of the Osnaburgh Indian Band.

[66] The proposed reserve for Slate Falls Nation has not yet been designated by Canada. The people of Slate Falls Nation have no reserve, notwithstanding its creation approximately 19 years ago.

[67] Canada has no evidence that any of the proposed members of Slate Falls Nation were told prior to the establishment of the band, that as a consequence of leaving the Osnaburgh Indian Band, they would lose their rights to assert a claim for compensation against Canada and OPG arising from wrongful acts predating 1985, which gave rise to direct damages to the proposed members. They were not told that they would lose their right to assert treaty claims based on these wrongful acts and resultant damages.

[68] Canada has provided no evidence that it declared any conflict of interest throughout whatever discussions occurred concerning the proposed band division and the creation of Slate Falls Nation, even though Canada now seeks to deprive these members of claims against Canada, which they could have asserted had they stayed with the former Osnaburgh Indian Band.

[69] The remaining members of the Osnaburgh Indian Band have commenced an action against Canada and OPG seeking relief for the damages caused by the flooding. This band has settled its claim with OPG and its action against Canada continues.

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THE NAN AGREEMENT

[70] On December 9, 1991, an agreement (the NAN agreement) was entered into between Canada, Ontario, the Nishnawbe-Aski Nation (the aboriginal organization representing the interests of all Treaty Indian bands) and six bands within the Treaty territory, including Slate Falls Nation. The NAN Agreement also provided for matters such as community development and the provision of operating and capital funds to the new bands.

[71] The plaintiff points to the NAN Agreement to show that members of Slate Falls Nation were recognized by Canada and Ontario in this agreement to be among the traditional aboriginal inhabitants of the James Bay and Hudson Bay watersheds. Canada disputes this point. The preamble states:

... whereas the people of the first nations, together with other aboriginal people residing within, and in the vicinity of, the James Bay and Hudson's Bay watersheds, are the original inhabitants of the land, having depended upon the land and its resources since time immemorial.

[72] In the NAN agreement, Canada confirmed that the conferring of reserve land on the new first nations, including Slate Falls, would not prejudice or derogate from any existing rights:

Nothing in this Agreement shall be so construed as to prejudice or derogate from aboriginal, treaty, constitutional or any other rights, privileges or freedoms which have accrued to or may accrue to the First Nations or their members or NAN regardless of whether such rights, privileges and freedoms are recognized, established or defined before or after the execution of this Agreement

ISSUES IDENTIFIED BY PLAINTIFF

[73] The plaintiff identifies the following triable issues to be determined in this action:

- (1) Whether the current members of Slate Falls Nation have standing to assert claims for damages that they and their ancestors suffered while members of the Osnaburgh Indian Band, notwithstanding that they separated from the Osnaburgh Indian Band to form a sister nation in 1985;
- (2) Whether Canada breached its fiduciary duty to the members of Slate Falls Nation when it failed to protect the treaty rights in the reserve lands and traditional territory of the former Osnaburgh Indian Band from the effects of the flooding;
- (3) Whether Canada, in the alternative, breached its fiduciary duty to the members of Slate Falls Nation, in failing to advise them that they would be foregoing any right to claim damages for their losses if they left the Osnaburgh Indian Band to form a new band; and
- (4) Whether OPG is liable to Slate Falls Nation for breach of riparian rights, trespass, and nuisance.

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THE DEFENDANTS' POSITION

[74] Did Slate Falls Nation ever exist? The defendants say it did not. They say there is no evidence of anyone purporting to speak on behalf of this group from 1901 through to 1985. The plaintiff must be a member of an identifiable historical community otherwise it has no claim.

[75] The defendants argue that the plaintiff's expert has failed to prove the existence of this ancestral group. The defendants have prepared a "preliminary list of the shortcomings of the experts report." Relying on this list, the defendants say that statements made by the expert and the material she refers to are either irrelevant or of no probative value. They point to statements made by the expert that in their view are unsubstantiated, misleading, erroneous, coy, evasive, and untrue. They say that the expert's report contains faulty logic, flimsy references and contorted explanations. To support these submissions, the defendants have prepared a detailed chart of the evidence.

[76] In support of their motion, the defendants have also prepared a chart with detailed critiques of the affidavits of the elders, Sam Carpenter, Charles Wesley and Claude Loon. These charts list the inconsistencies and contradictions in the evidence of the three elders that the defendants say exist. They have analyzed the evidence of the elders and the expert and offered this in support of their position that Slate Falls Nation never existed and that summary judgment should be granted.

[77] The plaintiff has responded by providing two detailed charts. One seeks to demonstrate that there are no inconsistencies in the affidavits of the elders. The second chart lists the admissions that the defendants say the plaintiff has made which justify the summary judgment. The plaintiff responds with a detailed chart setting out the "actual evidence" and denying the alleged admissions.

ANALYSIS

[78] The court may grant summary judgment where there is no genuine issue of material fact requiring a trial. While the onus is on the moving party to demonstrate that there is no genuine issue for trial, a party responding to a motion for summary judgment may not rest on the allegations or denials in its pleading, but must provide evidence of specific facts.

[79] The plaintiff has not rested on its allegations, but has provided extensive evidence from the elders and an expert, the details of which are set out above.

[80] It is readily apparent from the defendants' material that in order to accept the defendants' position, I would be required to weigh the evidence, assess credibility and find facts. It is not for a motions judge on a Rule 20 motion to assess the strengths and weaknesses of this claim. See *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (C.A.).

[81] There is evidence capable of supporting this claim and to go any further in assessing this evidence involves weighing the evidence, assessing credibility and ultimately finding facts. A review of the competing charts analyzing the evidence makes this abundantly clear.

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[82] There are genuine issues of material fact that require a trial. By way of example, some are listed in the plaintiff's factum and are referred to above.

[83] The defendants' motion for summary judgment is dismissed.

MOTION TO APPOINT A REPRESENTATIVE PLAINTIFF AND AMEND THE AMENDED STATEMENT OF CLAIM

[84] Stanley Carpenter is a member of the plaintiff. He requests an order appointing him as a representative of a class of persons described as follows:

All persons who were members of the Osnaburgh Indian band (now Mishkeegogamang First Nation) between 1934 and 1985 and are now members of the Slate Falls Nation as well as the estates of all former members of the Slate Falls Nation who died in the two years prior to August 2004 and who were members of the Osnaburgh Indian Band between 1934 and 1985.

[85] As well, the plaintiff and Stanley Carpenter move to add Mr. Carpenter as a co-plaintiff and request amendments to the amended statement of claim to specify the claims made by Stanley Carpenter on behalf of the persons he seeks to represent.

[86] The plaintiff and Stanley Carpenter highlight the following facts in this case, which they says favour the relief being granted.

[87] There are over 200 members of Slate Falls Nation. Most of the membership of Slate Falls Nation who were born prior to 1985 were, prior to 1985, members of the Osnaburgh Indian Band

[88] The class of persons who Stanley Carpenter seeks to represent are all of the persons who were members of the Osnaburgh Indian Band at anytime between 1934 and 1985 and are now members of the Slate Falls Nation, as well as the estates of all former members of the Slate Falls Nation who died in the two years prior to August 2004 and who were members of the Osnaburgh Indian Band at anytime between 1934 and 1985.

[89] Some of the members of the class of persons that Stanley Carpenter seeks to represent are not fluent in English. For many of the members, their first language is Ojibway. Stanley Carpenter is fluent in English and Ojibway.

[90] Slate Falls Nation is a remote community in northwestern Ontario. It is only assessable year-round by airplane. There is limited land access in the winter by a logging road. The community has a single radio phone line located in the band office for use of the residents. It would be difficult for counsel to reliably communicate with many individual plaintiffs.

[91] Stanley Carpenter is a member of the proposed class. He was born on the southern reserve of the Osnaburgh Indian Band. He is a descendent and present member of the people known as the Slate Falls Ojibway or Big Lake People. He was a member of the Osnaburgh Indian Band from birth in 1952, until 1985 when he became a member of Slate Falls Nation, following the formation of that band.

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[92] Rule 10.01 (1) of the *Rules of Civil Procedure* states:

In a proceeding concerning,

....

(f) any other matter where it appears necessary or desirable to make an order under this subrule,

a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served.

[93] The members of the group in this case can be found and ascertained. However given their remote location they cannot be readily served. In *Police Retirees of Ontario Inc. v. Ontario Municipal Employees' Retirement Board* (1997), 35 O.R. (3d) 177 (Gen Div.), the court reviewed the cases which have considered this rule and stated:

However, an analysis of the cases in which the wording of this provision has been considered suggests that a liberal interpretation of this requirement has been employed by the courts. In two recent decisions in which representation orders were made pursuant to rule 10.01(1)(f), the group of persons could be readily ascertained and/or found, but the court determined that it would be inconvenient for each member of the group to be individually served. ...

....

These cases suggest that the test to be applied in considering a request for a representation order is not whether the individual members of the group can be found or ascertained, but rather whether the balance of convenience favours the granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. ...

[94] I am satisfied that the balance of convenience in this case favours the making of the representation order under rule 10.01(1) for the following reasons:

- (1) The group Stanley Carpenter seeks to represent is fairly large.
- (2) The members of the group reside in a remote community with limited telephone access. Stanley Carpenter resides at Slate Falls Village and his work as a pilot takes him to Sioux Lookout almost daily.
- (3) Many members of the group are not fluent in English. Stanley Carpenter is reasonably fluent in English. He can correspond with and instruct counsel in English and assist members of the group who understand Ojibwa, in understanding what happens in the action.

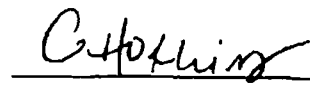
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- (4) The rights, which the members of the group held in the reserve prior to the creation of Slate Falls Nation, were held collectively pursuant to the Treaty. As a result the damages claimed by the group as a result of the flooding are similar. Considerable judicial economy may be achieved by adjudicating the issues relating to these damages through a single action by a representative plaintiff, rather than many individual actions.
- (5) The treaty rights of the group to the traditional lands and waters of the Slate Falls people were held collectively pursuant to the Treaty. The damages claimed by each member of the group as a result of harm to the traditional lands and waters are similar. As with claims relating to the reserve lands, the claims relating to the traditional lands are best adjudicated in a single action by a representative plaintiff.
- (6) There is a significant body of evidence in this case that originates from a review of historical documents, the testimony of expert witnesses and the testimony of elders from the community. As a result, the individual participation of numerous individuals may add little to the record before the trial court.

[95] I grant an order appointing Stanley Carpenter as representative of the following class of persons: all persons who were members of the Osnaburgh Indian Band (now Mishkeegogamang First Nation) between 1934 and 1985 and are now members of the Slate Falls Nation as well as the estates of all former members of the Slate Falls Nation who died in the two years prior to August 2004 and who were members of the Osnaburgh Indian Band between 1934 and 1985.

[96] I also grant leave to amend the amended statement of claim of Slate Falls Nation to add Stanley Carpenter as a co-plaintiff, on his own behalf and as representative for the above described class of persons, and allowing the amendments of the amended statement of claim in the form attached to the case management motion form.

[97] If the parties cannot agree on the costs of the two motions, the plaintiff will provide its costs submission to me by October 15, 2003. The defendants will provide their costs submission to me by October 29, 2003.


C. Horkins J.

Released: September 21, 2004

COURT FILE NO.: 01-CV-213506CM
DATE: 20040921

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SLATE FALLS NATION

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA and
ONTARIO POWER GENERATION INC.

Defendants

REASONS FOR JUDGMENT

C. Horkins J.

Released: September 21, 2004

SLATE FALLS NATION

AND

ATTORNEY GENERAL OF CANADA AND ONTARIO POWER
GENERATION INC.

Plaintiff

Defendant

(Short title of proceeding)

SEP 22 2004 10:11

1E-22-2004 03:40

S. Vella for the P
D Akman for Canada
J Railtray for OPG

Sept 21/04

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
Toronto

Motion for summary judgment
is dismissed per reasons released today

JOINT CONSOLIDATED MOTION RECORD
OF THE MOVING PARTIES
CANADA AND ONTARIO POWER
GENERATION INC.
(VOLUME I OF XVII)

C. Horliss

On consent during the motion I extended an order
made by Master Egan sealing parts of the file.

(See her order Feb 18/04) There is now a further
sealing which includes ~~Volume 16A~~ Exhibit 5

in the Joint Consolidated Motion Record of the
Defendants, Volume XVII A.

Brian J. Saunders
Senior General Counsel
Department of Justice
Civil Litigation Section
234 Wellington Street, East Tower
Ottawa, Ontario
K1A 0H8

Per: Doğan D. Akman
Out of Province Practitioner - (OP0014)
Tel: (613) 946-6648
Fax: (613) 954-1920
Our File: 2-362947

Solicitors for the Defendant, Attorney General of
Canada

416 327 5417

PAGE: 02

TOTAL P.

SLATE FALLS NATION
Plaintiff

v.

THE ATTORNEY GENERAL OF CANADA and ONTARIO POWER GENERATION INC
Defendant

Court File No. 01-CV-213506C

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

MOTION RECORD

GOODMAN AND CARR LLP
Barristers and Solicitors
200 King Street West
Suite 2300
Toronto ON M5H 3W5

Susan M. Vella (LSUC #28697G),
Damian J. Rogers (LSUC #45511A)
Tel.: 416.595.2300
Fax: 416.595.0567

Solicitors for the plaintiff

Susan Vella for the plaintiff
Dogan Akman for Canada
John Rattray for OPG

Request for Relief is granted per reasons released
today.

Channing

Sept 21/04

SEP-24-2004 13:54

JUDGE'S HURDLE KIT 2004

SEP 24 2004 14:20

416 327 5417

TOTAL P. 03
PAGE 03