

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

BUNIBONIBEE CREE NATION,

Plaintiff,

- and -

THE GOVERNMENT OF MANITOBA, CAMBRIAN CREDIT UNION LIMITED,
RESORT MANAGEMENT & CONSULTANTS LTD., and PAYBACK LIMITED PARTNERSHIP,

Defendants.

MOTIONS BRIEF OF THE MOVING PARTY
Hearing date: Wednesday, February 8, 2006, at 2:00 p.m.

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I. INTRODUCTION

1. The Plaintiff is an Indian Band, who, through certain Treaty agreements, statutory enactments and agreements relating thereto, acquired and was guaranteed a right to select land, located in the Province of Manitoba and owned by the Defendant, The Government of Manitoba ("Manitoba"), with a view to having the said lands transferred from Manitoba to The Government of Canada ("Canada") for the purpose of becoming Indian Reserve Lands pursuant to the provisions of *the Indian Act*.
2. The document which contains the provisions material to these proceedings is an agreement known as the "Framework Agreement Treaty Land Entitlement Manitoba" (the "Framework Agreement").
3. It should be noted that by way of paragraph 8 of the Affidavit of Tim Muskego, sworn January 31, 2006, Mr. Muskego makes reference to certain provisions contained in an Agreement known as the "Treaty Land Entitlement Agreement" (the "TLE Agreement"). The said paragraph of Mr. Muskego's Affidavit makes an erroneous reference to the TLE Agreement. The agreement containing the provisions referred to by Mr. Muskego are in fact contained in the Framework Agreement, not the TLE Agreement. Counsel to these proceedings have been advised accordingly.
4. The provisions of Article 2.00 of the Framework Agreement entitled the Plaintiff to select land located in the Province of Manitoba, owned by Manitoba and with a view to having the said lands transferred from Manitoba to Canada for the purpose of becoming Indian Reserve Lands as above-mentioned.

5. Article 3.0 of the Framework Agreement set out a process which would be followed to determine whether or not the selected lands would be transferred as above-mentioned once the Plaintiff makes its land selection.
6. Pursuant to Article 6.02 (6) of the Framework Agreement, Manitoba was prohibited from effecting any disposition of, or authorizing or allowing any disposition of, the selected lands other than in keeping with the provisions of the Framework Agreement. Article 6.02 (6) of the Framework Agreement provides as follows:

"Forthwith upon receipt by Manitoba of the items referred to in Subsection (4), Manitoba will enter the Selection or Acquisition on the Crown Land register maintained by Manitoba, where applicable, and upon that entry, Manitoba will not make any further Dispositions or Mineral Dispositions or issue any further quarry leases or quarry permits under *the Mines and Minerals Act* in respect of the Selection or Acquisition unless and until it is determined that the Selection or Acquisition is not eligible to be set apart as Reserve in accordance with the Principals."

7. "Disposition" is defined in the Framework Agreement as follows:

" 'Disposition' means an act by Manitoba whereby Crown Land or a right, interest or estate in Crown Land is granted or disposed of, or by which Manitoba creates a right, interest or estate in divests itself of or permits the use of Crown Land, but does not include:

- a) a renewal of or consent to the assignment of a right, interest or estate in or permit to use Crown Land which is subject to renewal as a matter of law, established practice or the policy of Manitoba as at the Date of Execution;
- b) a Mineral Disposition; or
- c) a quarry permit issued under *the Mines and Minerals Act* to authorize the use of a specific volume of quarry minerals for a specific period of time from a specific quarry site for a specific project or activity for public purposes;"

8. The Plaintiff made certain land selections in keeping with the provisions of the applicable agreements, one such selection being land commonly known as "Knee Lake Lodge" which land is described in a certain lease in which Manitoba is the "lessor", which lease is known as "Misc. Lease No. 3482" (the "Lease").
9. At no material time has either Manitoba or Canada advised the Plaintiff that the aforementioned land selection is ineligible.
10. Subsequent to the Plaintiff selecting the lands described in the Lease as part of its land selection pursuant to the provisions of the Framework Agreement, Manitoba allowed and authorized two (2) separate assignments of the Lease to be made and registered.
11. The aforementioned assignments were assignments made of the Lease for collateral purposes as the Lease was being used as security in consideration for certain loan advances.
12. The Plaintiff did not approve of, nor consent to, either of the aforementioned purported assignments.
13. Default has occurred with respect to one of the loans with respect to which the Lease was held as security, being an assignment in favour of the Defendant, The Cambrian Credit Union Limited (the "Credit Union").
14. The Credit Union, in the course of acting upon its security, has expressed an intention to sell its interest in the Lease by transferring or assigning same to a third party who is

seeking to purchase the Credit Union's interest in the Lease.

15. It is the Plaintiff's position that the aforementioned assignments of the Lease and the further assignment intended by the Credit Union constitute a "disposition" of a right, interest or estate in the land referred to in the Lease, being land selected by the Plaintiff as above-mentioned. The Plaintiff submits that the said assignments and the said intended assignment are prohibited by virtue of Article 6.02 (6) of the Framework Agreement.
16. The Credit Union takes the position that it holds a valid Assignment with respect to the Lease and is entitled to further assign or transfer same to whomever it chooses.
17. Manitoba takes the position that it was entitled to allow and approve the aforementioned Assignments and is further entitled to allow and approve any further assignment which might be requested by the Credit Union in the course of enforcing its security. Manitoba takes the position that the exclusions contained in the definition of "Disposition" as set out in the Framework Agreement specifically allow Manitoba to approve and process the aforementioned Assignments and the intended assignment.
18. The Plaintiff submits that the exclusions contained in the definition of "Disposition" are in conflict with and contradict the express intent and meaning of Article 6.02 (6) of the Framework Agreement and are therefore null and void.
19. The Plaintiff further states that if the said exclusions are not null and void, subparagraph (a) of the definition must be struck out on the basis that the phrase "established

practice" and the phrase "policy of Manitoba" are ambiguous and create an uncertainty as to terms such that parties to the agreement and parties to attempting to interpret the agreement do not and cannot know which consents might be permissible and which might not.

20. In addition to the foregoing, the Plaintiff states that if the said sub-clause is found to be valid and enforceable, Manitoba has not demonstrated that the aforementioned Assignments and the intended assignment were permissible and would be permissible based upon established practice or the policy of Manitoba as at the date of which the Framework Agreement was executed.
21. By way of the pending Court Motion, the Plaintiff is asking this Honourable Court to enjoin and restrain the Credit Union from effecting any further transfer or assignment of the Lease until such time as the Plaintiff's rights pursuant to the Framework Agreement have been determined.

II. LIST OF DOCUMENTS TO BE RELIED UPON
BY THE MOVING PARTY

1. The Statement of Claim filed February 1, 2006;
2. The Affidavit of Tim Muskego, sworn the 31st day of January 2006, filed February 1, 2006; and
3. Such further and other material as counsel may advise and this Honourable Court may permit.

III. LIST OF CASES AND STATUTORY PROVISIONS
TO BE RELIED UPON BY THE MOVING PARTY

1. Section 55 of the *Queen's Bench Act* S.M. 1988-89 c.4-Cap. C280 Tab A
2. Rules 40.01 and 40.03 of the *Queen's Bench Rules* C280-M.R. 553/88 Tab B
3. RJR – MacDonald Inc. v. Canada (Attorney General),
(1994), 111 D.L.R. (4th) 385 (S.C.C.) Tab C
4. Pereira v. Smith (1993), 88 Man.R. 2(d) 171 (C.A.) Tab D

IV. STATEMENT OF PRINCIPALS RELIED UPON WITH
RESPECT TO CASES CITED BY THE MOVING PARTY

1. RJR – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 Tab C

- a) The three (3) factors to be considered by the Court in considering an application for an Interim or Interlocutory Injunction are:
 - i) Whether there is a serious question to be tried;
 - ii) Whether the Applicant would suffer irreparable harm if the application were refused; and
 - iii) Which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits (the balance of inconvenience and public interest considerations). (p. 400)
- b) With respect to the test of "a serious question to be tried", there are no specific requirements which must be met in order to satisfy the test. The threshold is a low one. The Judge on the application must make a preliminary assessment of the merits of the case. Once satisfied that the application is neither vexatious nor frivolous, the Motions Judge should proceed to consider the second and third tests, even if of the opinion that the Plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. (p.402-403)
- c) Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured. (p.405)

2. Pereira v. Smith (1993), 88 Man.R. 2(d) 171 (C.A.)

Tab D

- a) There is no rule requiring a Plaintiff to establish a *prima facie* case. It need only be shown that the claim is not frivolous or vexatious or, to use Lord Diplock's language "that there is a serious question to be tried". (p.174)
- b) The inadequacy of damages as a remedy is always a condition precedent to the granting of an Interlocutory Injunction. (p.173)
- c) Once a judge is satisfied that damages are an inadequate remedy, the following factors should be balanced:
 - i) The extent to which damages are inadequate as a remedy for the plaintiff, assuming ultimate success;
 - ii) The extent to which damages, on the plaintiff's undertaking to pay them if unsuccessful at the trial, would be an adequate remedy for the defendant;
 - iii) The balance of convenience;
 - iv) The strength of the plaintiff's case;
 - v) The desirability of maintaining the status quo; and
 - vi) Any special circumstance. (p.174)

V. LIST OF POINTS TO BE ARGUED

The following points are in issue and shall be argued at the subject hearing:

1. **Are the aforementioned Assignments and the intended assignment "dispositions"?**
 - a) Article 1.01 (27) of the Framework Agreement contains a definition of the word "Disposition" for the purposes of the Framework Agreement. The applicability and validity of that definition shall be hereinafter addressed.
 - b) For the purposes of this portion of the Plaintiff's argument, the issue to be addressed is that in the absence of a valid express definition of the word "disposition", are the aforementioned Assignments and intended assignment "dispositions" at law?
 - c) Black's Law Dictionary defines "disposition" as follows:

"Act of disposing; transferring to the care or possession of another. The parting with, alienation of, or giving up property."
 - d) It is submitted that the act of assigning ones rights under a lease creates a situation where the assignor is relinquishing or giving up all right, title and interest the assignor has or may have in the subject lease thereby divesting the assignor of any further interest in the subject lease. At the same time, the assignee is acquiring all right, title and interest in the subject lease (which the assignee did not previously have).

- e) It is submitted that the giving up of rights and interest in a lease by one party with another party acquiring those rights and interest constitutes a parting with, alienation of, or giving up, of property, and reflects a transferring of property to the care or possession of another, all of which is strictly in keeping with the legal meaning of the word "disposition". Therefore, it is submitted that unless some special meaning becomes applicable to the word "disposition", the aforementioned Assignments and the intended assignment constitute dispositions at law.

2. **Are the subject Assignments and the further intended assignment prohibited by virtue of the provisions of the Framework Agreement?**

- a) The Plaintiff submits that the exclusions set out in the definition of "Disposition" as contained in the Framework Agreement are void for uncertainty as they are generally in contradiction with the express prohibition contained in Article 6.02 (6) of the Framework Agreement.
- b) Article 6.02 (6) of the Framework Agreement expressly prohibits Manitoba from making any further Mineral Dispositions or issue any further quarry leases or quarry permits under *the Mines and Minerals Act*. The definition of "Disposition" as contained in the Framework Agreement expressly stipulates that a disposition does not include a Mineral Disposition or a quarry permit issued under *the Mines and Minerals Act*.

- c) The Plaintiff submits that if the definition of "Disposition" is followed, two of the three exclusions set out therein negate the force and effect of Article 6.02 (6) of the Framework Agreement as the definition expressly allows Manitoba to do the very things it is prohibited from doing under the operative provision of Article 6.02 (6).
- d) The Plaintiff submits that these ambiguities create an uncertainty with respect to all of the items excluded from the meaning of "Disposition" as defined in the Framework Agreement.
- e) Since a portion of the exclusions contradict the meaning and intent of Article 6.02 (6) of the Framework Agreement, an uncertainty is created with respect to all of the exclusions and as such none of the exclusions can be applied to the matters in issue in these proceedings.
- f) Alternatively, the Plaintiff states that if subsection (a) of the definition of "Disposition" as contained in the Framework Agreement is applicable to these proceedings, the Framework Agreement does not contain a definition nor anything else which sets out particulars relating to the "established practice" or the "policy of Manitoba" as at the "Date of Execution". As such, there exists an uncertainty with respect to the meaning of "established practice" and "policy of Manitoba" because there is no way parties to the agreement or parties trying to construe the agreement could determine whether or not Manitoba was acting in keeping with "established practice" or the "policy of Manitoba". Indeed, the near

meaning of "established practice" is ambiguous as it is impossible to know whether one occurrence or ten occurrences constitute an "established practice". It is therefore submitted that said provisions must be struck out as they are void due to uncertainty.

- g) It is submitted that there exists absolutely no mechanism by which the Plaintiff can independently ascertain whether or not Manitoba's consent to an assignment of a right, interest or estate in Crown Land is being made pursuant to "established practice" or the "policy of Manitoba". As such, the subject provision must be considered void due to uncertainty and therefore not applicable to these proceedings.
- h) In the further alternative, in the event this Honourable Court determines that subparagraph (a) of the definition of "Disposition" as contained in the Framework Agreement is valid and in full force and effect, the Plaintiff submits that until such time as Manitoba can unequivocally establish that the aforementioned Assignments and the aforementioned intended assignment are and would be in keeping with "established practice" and the "policy of Manitoba" as at the "Date of Execution" of the Framework Agreement, Manitoba's consent to same must be considered void and therefore invalid as they constitute dispositions which are prohibited as above-mentioned.

3. **Is there a serious question to be tried?**

- a) There are no specific requirements to be met to satisfy the test as to whether there is a "serious question to be tried". The threshold is a low one. The Court is to make a preliminary assessment of the merits of the case. Once satisfied

that the application is neither vexatious nor frivolous, the Court should proceed to consider the second and third tests, even if of the opinion that the Plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable. (R.J.R. MacDonald v. Attorney General of Canada, *supra*, p.402-403 [Tab C])

- b) It is submitted that the issue as to whether or not the definition of "Disposition" as contained in the Framework Agreement is valid and enforceable constitutes a serious question to be tried. It is submitted that this issue is neither vexatious nor frivolous as the validity of that definition constitutes the cornerstone as to which party will ultimately be successful with respect to the pending proceedings.
- c) Since the threshold is low one, and, since the likelihood of success at trial is an irrelevant consideration (assuming the application is neither vexatious nor frivolous) it is submitted that this test has been satisfied.

4. **Will the Plaintiff suffer irreparable harm if the application is refused?**

- a) Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured. (R.J.R. MacDonald v. Attorney General of Canada, *supra*, p.405 [Tab C])
- b) If the Plaintiff is successful with respect to its position, all assignments subsequent to the Plaintiff's land selection will become void and unenforceable with the result that the Plaintiff will likely acquire its land selection. If this

occurs, the Credit Union will have a claim against Manitoba to recover its monetary loss arising out of Manitoba's error in allowing an assignment to the Credit Union contrary to the provisions of the Framework Agreement, which assignment was relied upon by the Credit Union. This is a pure monetary loss for which compensation could easily be recovered from Manitoba.

- c) At the time the Plaintiff made its land selection, it had actual knowledge as to the leaseholder with whom it would have to deal in terms of a "Third Party Interest" pursuant to the provisions of the Framework Agreement. By allowing subsequent assignments of interests in the Lease, the Plaintiff is being prejudiced as new, previously unknown parties, are being introduced, being parties which were not contemplated at the time the land selection was made.
- d) At present, the lodge operated on the subject property is in receivership. This essentially means the existing owners and operators of the lodge are unable to continue to operate the subject lodge.
- e) If the Credit Union is enjoined and restrained from effecting a further assignment of the Lease, the *status quo* would be preserved. This in turn means the Lease would likely revert back to Manitoba.
- f) If the Lease reverts back to Manitoba, the Plaintiff would only have to deal with Manitoba in terms of acquiring its land selection, thereby eliminating the need to have to deal with third parties who may have an interest in the property forming the subject matter of the Lease.

g) By allowing a further assignment of the Lease at this time, a third party may acquire legal and/or equitable rights which may prevent the Plaintiff from acquiring its land selection, or, which may make it extremely difficult for the Plaintiff to acquire its land selection. From the Plaintiff's perspective, the possible loss of its land entitlement or the possibility that it would not be able to acquire the land as a result of having to deal with a new third party interest, previously not contemplated by the Plaintiff, would result in irreparable harm as it is the land itself, which is important to the Plaintiff, not monetary compensation relating to the land.

h) The possible loss of the Plaintiff's land selection by allowing a further assignment of the Lease would cause irreparable harm to the Plaintiff, not compensable in damages whereas preventing any further assignment until the Plaintiff's rights have been determined could only result in monetary loss to the Credit Union for which it could easily be compensated.

5. **In the event this Honourable Court finds that damages are an inadequate remedy, consideration must be given with respect to the factors set out in Pereira v. Smith (supra). After balancing the subject factors, is the Court satisfied that the injunction ought to be granted?**

a) The factors enunciated in Pereira are as follows:

i) the extent to which damages are inadequate as a remedy for the Plaintiff, assuming ultimate success;

ii) the extent to which damages, on the Plaintiff's undertaking to pay them if

unsuccessful at the trial, would be an adequate remedy for the Defendant;

- iii) the balance of convenience;
- iv) the strength of the Plaintiff's case;
- v) the desirability of maintaining the status quo; and
- vi) any special circumstance.

- b) It is submitted that when all things are factored together, the balance of convenience tips in favour of maintaining the *status quo* and preventing any further assignment of the Lease until the Plaintiff's rights have been determined.
- c) By allowing a further assignment of the Lease, a situation is created where a new third party may be affected by the existing dispute which party is currently unaffected.
- d) By allowing a further assignment of the Lease, a situation will be created where the Plaintiff might be forced to deal with a new party in connection with its land selection as opposed to being in a position where it would only have to deal with Manitoba, or where it would be dealing with the party it originally expected to be dealing with at the time of making its land selection.

- e) It is submitted that the risk of the Plaintiff losing its land selection and/or losing the ability to reasonably deal with parties it expected to deal with at the time of making its land selection far outweighs the potential monetary loss which the Credit Union might sustain if a further assignment is not permitted as the Credit Union can be compensated monetarily.

4. **Should the interim injunction be granted?**

- a) For all of the reasons aforementioned, it is submitted that this Honourable Court impose an injunction preventing any further assignment of any right, title or interest in the Lease until such time as the Plaintiff's rights concerning its land selection have been determined.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF FEBRUARY, 2006.

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