

THE FEDERAL COURT

BETWEEN:

DAKOTA ERIN MCGILLIVARY, DIANA LYNN MCGILLIVARY, DIANE LEHMANN, and
CHIEF MICHAEL G. CONSTANT suing on his own behalf and on behalf of all other
members of the OPASKWAYAK CREE NATION, and the OPASKWAYAK CREE
NATION;

Plaintiffs,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant.

RE (x6) AMENDED STATEMENT OF CLAIM

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1. The Plaintiff, the Opaskwayak Cree Nation (hereinafter referred to as the “OCN”), is a Cree First Nation that continues from the group or band otherwise identified as “The Pas Indian Band”, “The Pas Band”, “Basquia Indians” and “Opaskweyaw Cree”, that has existed as a distinctive society since prior to contact with Europeans at and around what is now known as The Pas in the Province of Manitoba.
2. The Defendant (or the “Crown”) has recognized the OCN as a band within the meaning of the *Indian Act*, R.S.C. c. I-6, as amended by R.S.C. c. 32 (1st suppl.) (“*Indian Act*” or the “*Act*”).
3. The Plaintiff, Dakota Erin McGillivary, is registered in the Indian Register as an Indian pursuant to section 6(2) of the *Indian Act*.
4. The Plaintiff Diana Lynn McGillivary is the mother of Dakota Erin McGillivary. Diana Lynn McGillivary is registered in the Indian Register as an Indian

pursuant to section 6(1) of the *Indian Act*.

5. The Plaintiff, Diane Lehmann, born August 1st, 1975, is the daughter of Elsie Sayese (who is registered in the Indian Register as an Indian pursuant to section 6(2) of the *Indian Act*), and Franz Lehmann (who is not an Indian and is not of aboriginal ancestry).

6. The Plaintiffs described in paragraphs 3 to 5 are hereafter referred to as the “individual plaintiffs”.

7. The Plaintiff Chief Michael G. Constant is the elected Chief of the OCN and sues on his own behalf and on behalf of all people belonging to the OCN.

Registration of the Plaintiff, Dakota Erin McGillivary under the *Indian Act*:

8. Dakota Erin McGillivary was born on January 30, 1990 at The Pas, Manitoba.

9. An application for registration of Dakota Erin McGillivary in the Indian Register was made on April 18, 1991. Her mother, Diana Lynn McGillivary, did not elect to have the identity of Dakota Erin McGillivary’s father disclosed, and therefore his name did not appear on the child’s Certificate of Birth, dated February 2nd, 1990 or on the application.

10. The Defendant registers children on the basis of the sections of the *Act* under which the child’s parents are registered as disclosed in the application for registration, such that in cases of non-disclosure of the identity and particulars of the registration of the father the Defendant’s policy and practice is to register the child under the *Act* as though the father of the child is non-Indian.

11. As a result of the unstated paternity of the Plaintiff Dakota Erin McGillivary, the Defendant registered Dakota Erin McGillivary under section 6(2) of the *Act*.

Registration of Diana Lynn McGillivary

12. Diana Lynn McGillivary's parents, Nathan and Ida McGillivary, are registered Indians pursuant to section 6(1) of the *Indian Act*.

13. Diana Lynn McGillivary has been unable to pass on to her daughter Dakota Erin McGillivary the benefit of being registered under section 6(1) of the *Indian Act*.

Non-Registration of the Plaintiff, Diane Lehmann

14. The Plaintiff Diane Lehmann is denied registration by the Defendant and is not entitled to registration as a result of section 6(2) of the *Indian Act* as she does not have at least one parent entitled to registration pursuant to section 6(1) of the *Act*.

15. The Plaintiff Diane Lehmann is employed within the OCN, her children are registered in the Indian Register as Indians pursuant to section 6(2) of the *Indian Act* as their father is a registered Indian and a member of OCN, and she is a descendant of the Indians who concluded Treaty No. 5 through her maternal grandmother Mary Jane Sayese (nee Constant).

16. The individual plaintiffs are OCN People as defined in this Claim.

The Aboriginal Right

17. Prior to contact with Europeans, OCN exercised its inherent Aboriginal right to determine who belongs to the OCN (the “OCN People”) in accordance with its own laws, practices and customs (the “OCN Laws”). Particulars of the OCN Laws include kinship, community acceptance, ancestry and tribal affiliation. This right is an existing Aboriginal right within the meaning of section 35(1) of the *Constitution Act, 1982*, (hereafter referred to as the “OCN Right to Determine”).

18. The Plaintiff, the OCN, further states that the OCN Right to Determine OCN People in accordance with the OCN Laws is and has been integral to the distinctive culture of the OCN.

Treaty No. 5

19. On or about September 7, 1876, the Crown and OCN entered into an adhesion to Treaty No. 5 (the “Treaty”). The Treaty *inter alia* established the basis for the ongoing relationship between the Crown and the OCN.

20. The OCN Right to Determine continued through and after the negotiation of the Treaty and has never been extinguished by the Crown.

21. At the time the Treaty was signed, the Crown, consistent with the OCN Right to Determine, relied on and accepted the OCN’s determination of the OCN People as the Indians entering into and being bound by and benefitting from the Treaty.

The Crown’s Fiduciary Duty

22. The Crown has a fiduciary duty to act in a manner consistent with the OCN Right to Determine.

23. The Crown has breached its fiduciary duty by failing to implement rules under the *Indian Act* which are consistent with the OCN Right to Determine. In particular, the Crown has not met its fiduciary duty to the OCN to treat all OCN people in an equitable and even-handed manner, avoiding arbitrary distinctions, classification and exclusion in relation to both the OCN Right to Determine and the Treaty Rights and Benefits (as defined in para 24 herein) of all OCN People.

Infringement by the Crown

24. At all material times the Defendant has unjustifiably infringed the OCN Right to Determine by:

- a) unilaterally imposing on the OCN, the Defendant's own definition of Indians in the *Indian Act* and thereby failing to recognize and register OCN People as Indians under the *Act*; and
- b) failing to provide Treaty rights and benefits to those OCN People who have been denied registration as Indians under the *Act*, including the following Treaty rights and benefits:
 - i) education;
 - ii) the pursuit of hunting and fishing;
 - iii) the payment of annuities;

- iv) the provision of articles for the encouragement of agriculture.
(hereafter referred to as the “Treaty Rights and Benefits”)

25. The Defendant has further infringed the OCN Right to Determine by drawing arbitrary distinctions and imposing rules which are incompatible with OCN Laws. Particulars of these infringements include:

- a) dividing the OCN People into various categories under the *Act* (the “Categories”) such that:
 - i) a child is registered under section 6(1) of the *Act* if both of their parents are entitled to be registered;
 - ii) a child is registered under section 6(2) of the *Act* if one parent is not entitled to be registered and the other parent is entitled to be registered under section 6(1) of the *Act*;
 - iii) a child is not registered if one parent is not registered and the other parent is entitled to be registered under section 6(2) of the *Act*; and,
- b) providing benefits to some but not all OCN People including (the “Benefits”):
 - i) the rights and benefits applicable to Indians as defined in the *Indian Act*;
 - ii) the payment of Treaty annuities to Indians as defined in the *Indian Act*;
 - iii) the benefits of programs and services delivered to Indians as defined in the *Indian Act*.

26. Further, these infringements:
- a) interfere with the ability of the OCN to represent all OCN People in OCN's dealings with the Crown;
 - b) interfere with the cohesion, culture and collective identity of the OCN; and,
 - c) result in programs and services provided to OCN for some but not all OCN People.
27. The Crown's infringements set out above are unjustified under section 35(1) of the *Constitution Act, 1982*.

The Duty of the Crown to Act Honourably

28. The Crown has a duty to act honourably in relation to the OCN Right to Determine.
29. The Crown's duty to act honourably requires it to accommodate the OCN Right to Determine by recognizing, adopting and giving effect to all OCN People as Indians under the *Act*.
30. As a party to the Treaty the Crown has a duty to act honourably in all its dealings with the OCN. On the facts of this Claim, the Crown's duty requires it to recognize, adopt and give effect to the OCN's determination of the OCN People, as Indians under the *Act*. Further, the Crown's duty requires it to recognize the Treaty Rights and Benefits of all OCN People irrespective of whether those persons are registered as Indians under the *Act*.

31. The Crown has breached its duty to act honourably in regard to both the OCN Right to Determine and the Treaty by unilaterally applying to the OCN the definition of Indians in the *Indian Act*.

32. The negative impacts of the Crown's breach of this duty include the following:

- a) interfering with the ability of the OCN to represent all OCN People in OCN's dealings with the Crown;
- b) interfering with the collective identity of the OCN;
- c) providing programs and services for some but not all OCN People; and,
- d) denying Treaty Rights and Benefits to non-registered OCN persons.

Charter of Rights and Freedoms - Equality Rights and Section 15(1)

33. The individual plaintiffs state that section 6 of the *Indian Act* violates section 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Section 6 divides the individual plaintiffs into Categories that are unilaterally defined by the Defendant in accordance with section 6 of the *Indian Act*. Section 6 thereby subjects the individual plaintiffs to discriminatory treatment on enumerated or analogous grounds under section 15 of the *Charter*.

34. The Categories under the *Indian Act* prevent Diana Lynn McGillivray from passing on to her children the benefit of being registered under 6(1) of *Indian Act* unless she has a family status that involves co-parenting with someone who is registered under

section 6 of the *Indian Act* and whose identity she wishes to disclose. This burden is imposed on analogous or enumerated grounds including sex, family status, ethnic origin, and quantum of inherited status. This burden exists regardless of the fact that Diana Lynn McGillivary and Dakota Erin McGillivary are determined to be OCN People by the OCN, and whether Diana Lynn McGillivary co-parents in such a manner that her children are determined to be OCN People by the OCN.

35. As a result of her sex, family status, ethnic origin, and quantum of inherited status, Dakota Erin McGillivary is registered under section 6(2) of the *Act*, which prevents her from passing on to her children the benefit of being registered under the *Indian Act* as if she were registered under section 6(1) of the *Act*. This burden exists despite the fact that Diana Lynn McGillivary and Dakota Erin McGillivary are determined to be OCN People by the OCN.

36. As a result of her sex, family status, ethnic origin and quantum of inherited status, Diane Lehmann is denied registration under section 6 of the *Indian Act* and has no ability to pass on to her children the benefit of being registered under the *Indian Act*. This burden exists regardless of the fact that Diane Lehmann is determined to be one of the OCN People by the OCN, and whether she co-parents in such a manner that her children are determined to be OCN People by the OCN.

37. The distinctions drawn by the Categories have demeaned the human dignity of all three individual plaintiffs by lessening their status or that of their children or future children in their community and has reduced their access and that of their children or future children to the Benefits and to Treaty Rights and Benefits.

38. The individual plaintiffs further state that section 6 of the *Indian Act* is invalid and of no force or effect in so far as it is discriminatory and a violation and infringement of their section 15(1) rights and cannot be demonstrably justified under section 1 of the *Charter*.

Charter of Rights and Freedoms - Freedom of Association and Section 2(d)

39. It is a significant collective activity of the OCN as a distinctive society to:

- a) determine the OCN People; and,
- b) deal with the Crown in relation to the Benefits and to Treaty Rights and Benefits of the OCN People.

40. The OCN has history, culture and laws which, in accordance with its traditions, contemporary community expectations and political choice, determine the conditions on which individuals are OCN People.

41. The individual plaintiffs associate with the OCN and each other as OCN People as defined in this Claim.

42. The Defendant has a duty under section 2(d) to recognize, adopt and give effect to the OCN People as determined by the OCN. The individual plaintiffs state that the Categories under section 6 of the *Indian Act* violate section 2(d) of the *Charter* in drawing arbitrary distinctions between OCN People as determined by the OCN in accordance with the OCN Laws and those OCN People recognized by the Defendant as Indians under the *Indian Act*.

43. By drawing the arbitrary distinctions in the Categories under section 6 of the *Indian Act*, the Defendant has substantially interfered with:

- a) the ability of the OCN People, including the individual plaintiffs, to fully and equally belong to the OCN and to access the Benefits and to Treaty Rights and Benefits;
- b) the cohesion, culture and collective identity of the OCN;
- c) the ability of OCN to represent the OCN People in relation to the Benefits and to Treaty Rights and Benefits, and to the special relationship of the OCN with the Defendant;
- d) the ability of the OCN to provide programs and services to all OCN People.

44. The OCN and the individual plaintiffs state that section 6 of the *Indian Act* violates section 2(d) of the *Charter* in so far as it infringes their rights of freedom of association and cannot be demonstrably justified under section 1 of the *Charter*.

45. The Plaintiffs also plead and rely upon sections 2(d), 15(1), 25, 35(1), 35(4) of the *Constitution Act, 1982*, section 91(24) of the *Constitution Act, 1867*, sections 8, 9 and 33 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

The Claim for Relief

46. The Plaintiffs claim:

- a) a declaration that the Plaintiff OCN has an existing Aboriginal right to determine who belongs to the OCN in accordance with its own laws, practices and customs (the “OCN Right to Determine”);
- b) a declaration that section 6 of the *Indian Act* is an unjustifiable

infringement of the plaintiff's OCN Right to Determine and is of no force or effect to the extent of the inconsistency;

- c) a declaration that the Crown has a duty to act honourably requiring it to accommodate the OCN Right to Determine by recognizing, adopting and giving effect to all OCN People as Indians under the *Act*;
- d) a declaration that as a party to the Treaty the Crown has a duty to act honourably requiring it to:
 - i) recognize, adopt and give effect to the OCN's determination of the OCN People as Indians under Act; and,
 - ii) recognize the Treaty Rights and Benefits of all OCN People irrespective of whether those persons are registered as Indians under the Act;
- e) a declaration that the Crown has breached its duty to act honourably in regard to both the OCN Right to Determine and the Treaty by unilaterally applying to the OCN the definition of Indians in the *Indian Act*;
- f) a declaration that the Defendant has breached its fiduciary duty to the OCN by failing to treat all OCN People in an equitable and even-handed manner, avoiding arbitrary distinctions, classification and exclusion in relation to both the OCN Right to Determine and the Treaty Rights and Benefits of all OCN People;
- g) a declaration that section 6 of the *Indian Act* violates section 15(1) of

the *Charter* and is of no force or effect to the extent of the inconsistency;

- h) a declaration that section 6 of the *Indian Act* violates the section 2(d) *Charter* rights of freedom of association of the OCN and the plaintiffs Dakota Erin McGillivary, Diana Lynn McGillivary and Diane Lehmann and is of no force or effect to the extent of the inconsistency;
- i) damages;
- j) such further and other relief as the Court may deem just;
- k) costs.

July 20, 2010



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SOLICITOR'S CERTIFICATE OF SERVICE

I, P. MICHAEL JERCH, lawyer, hereby certify that I caused the Defendant, Her Majesty The Queen in Right of Canada to be duly served by on Cary Clark, lawyer for the defendant, with the herein Re (x6) Amended Statement of Claim by delivering same to the defendant (with the consent of the Defendant) at 301 - 310 Broadway Avenue, Winnipeg, Manitoba, R3C 0S6 on July 20, 2010.



P. MICHAEL JERCH
Lawyer for the Plaintiffs