

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.

**STATEMENT OF DEFENCE TO THE
RE (x6) AMENDED STATEMENT OF CLAIM**

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The Deputy Attorney General of Canada, on behalf of HER MAJESTY THE QUEEN, in response to the Re (x6) Amended Statement of Claim (the "Claim"), states as follows:

1. Save as hereinafter expressly admitted, he denies each and every allegation in the Claim as if traversed *seriatim*.
2. He admits the allegations contained in:
 - a) paragraphs 2-6 and 8;
 - b) paragraph 9;

- c) paragraph 12;
- d) paragraph 14;
- e) the first sentence of paragraph 19; and
- f) paragraph 41 of the Claim.

3. In response to paragraph 7 of the Claim, he admits only that the plaintiff Michael G. Constant is the current elected Chief of the OCN and purports to sue as representative of the OCN in relation to its claimed Aboriginal right ("the OCN Right to Determine").

4. In response to paragraphs 10, 11 and 13 of the Claim, he says that the Registrar registers children and adults in the Indian Register based on their entitlement pursuant to the *Indian Act*, R.S.C. 1985, c. 1-5 (the "Act"). He further says that in cases where both parents of a child seeking registration have to be registered or entitled to registration under section 6 of the Act, as is the case for purposes of s. 6(1), the Registrar under section 5 of the Act properly requires proof of the allegation. Pursuant to policy, the Registrar has discretion to allow reasonable alternate methods of proof where it is difficult or impossible to obtain a birth certificate with the applicant's parents' names on it. However, he says an election against disclosure of the father's identity would not qualify.

5. In further response to paragraphs 10, 11 and 13 of the Claim, he says that the children of persons who are registered as "Indians" under section 6(2) of the Act are not entitled to be registered as "Indians" in the limited circumstance where their other parent is not an "Indian" within the meaning of the Act.

6. In response to paragraph 15 of the Claim, he admits only that Diane Lehmann's children (Jennifer Jason Ballantyne and Andrew Aiden Ballantyne) are registered Indians pursuant to s. 6(2) of the Act, their father Sidney Solomon Ballantyne is a registered Indian under the Act and Mary Jane Sayese (nee

Constant) is Diane Lehmann's maternal grandmother. He has no knowledge of the remaining allegations in this paragraph.

7. In response to paragraph 16 of the Claim, he can neither confirm nor deny the allegation made therein since OCN controls its own membership pursuant to s. 10 of the Act.

8. In response to paragraphs 17 and 18 of the Claim, he says that:

- (a) the alleged OCN Right to Determine has not been pleaded with sufficient specificity to allow the Court to adjudicate upon it;
- (b) it is the Plaintiff OCN's responsibility to further define what right is being asserted with sufficient specificity in order to be justiciable;
- (c) the Plaintiff OCN has failed to plead the material facts necessary to found the alleged OCN Right to Determine;
- (d) the alleged OCN Right to Determine is asserted in excessively general terms and therefore is not cognizable under s. 35(1) of the *Constitution Act, 1982*;
- (e) the alleged OCN Right to Determine cannot include, as an aspect of that right, the:
 - (i) recognition of that right by other aboriginal groups and bodies before European contact, or by Europeans after contact;
 - (ii) jurisdiction, authority, or ability to determine "Indian status" or entitlement to registration under the Act, which are post-contact concepts embodied in legislation enacted pursuant to s. 91(24) of the *Constitution Act, 1867*;
 - (iii) right to determine how much funding, or which programs or services the Defendant, or other groups or bodies, will provide;

(iv) right to determine the basis upon which funding, programs or services the Defendant, or other groups or bodies, will provide; and

(f) prior to European contact with the OCN or any predecessor Aboriginal group to the OCN, Canada did not exist, and therefore it was impossible that any pre-contact custom, practice or tradition regarding membership of such group included recognition by the Defendant for either OCN's purposes or the Defendant's.

9. In response to paragraphs 19 through 21 of the Claim, he admits that the Defendant and a band of Indians known as "The Pas Band", of which OCN was a constituent part, entered into a treaty conferring various treaty rights upon the OCN, which treaty constituted an adhesion by "The Pas Band" to what is commonly known as "Treaty No. 5". He says neither the treaty negotiations nor the concluded treaty addressed the alleged OCN Right to Determine, and denies any reliance by the Crown on the alleged OCN Right to Determine as a means for determining which Indians were bound by and would benefit from Treaty No. 5.

10. In response to paragraphs 22 and 23 of the Claim, he admits that, in certain limited circumstances, the Defendant and OCN find themselves in a fiduciary relationship, but he says the Plaintiffs have not set out the material facts necessary to show an assumption of a fiduciary duty by the Crown to act in a manner consistent with the alleged OCN Right to Determine. In the alternative, he denies that a fiduciary obligation exists with respect to registration of persons as "Indians" within the meaning of the Act or any other allegations at paragraphs 22 and 23, and denies that any fiduciary duty has been breached as alleged or at all.

11. If there was a breach of fiduciary duty, which is denied, the Defendant says the Plaintiffs' claim was filed more than 6 years from discovery of the

material facts giving rise thereto, and is therefore statute barred under s. 2(1)(k) of *The Limitations of Actions Act*, R.S.M. 1987 c. L150, the *Federal Courts Act*, R.S.C. 1985, c. F-7, sub. 39(1) and the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 32, all as amended from time to time, or barred by the equitable doctrines of laches and acquiescence because of the Plaintiffs' prolonged, inordinate and inexcusable delay in commencing their action.

12. In response to paragraphs 24-27 of the Claim, he denies any unilateral imposition by the Defendant of its definition of "Indian" under the Act on the OCN or the "OCN People" as defined in the Claim. He says the definition of "Indian" in the Act relates to individual persons who make application for, or are entitled to, registration under the Act. He further denies that the definition of "Indian" under the Act infringes the ability of the OCN to represent all its members in its dealings with the Crown, or in any way interferes with the OCN's determination of its people according to OCN laws.

13. In further response to said paragraphs, he denies that OCN's membership rules or the alleged OCN Right to Determine make any provision for the recognition of OCN members as "Indians" within the meaning of, or for the purposes of the Act, or otherwise. In the alternative, if such provision is made, he denies that OCN has the jurisdiction or authority to make such a determination binding on Canada.

14. In still further response to said paragraphs, and to the Claim as a whole, he denies that "OCN People" who have been refused registration as Indians under the Act are prevented from accessing rights and benefits that would be available if the Defendant recognized OCN's definition of its membership. He says that OCN's definition of its membership is recognized by the Defendant since:

- (a) in 1985 the Act was amended so as to permit Indian bands the opportunity to assume control of their membership in accordance with rules which they established and in accordance with the Act;
- (b) pursuant to and with the sanction of the amendments to the Act just referred to, OCN established a set of membership rules, under which certain provisions are made with respect to eligibility for membership in OCN; and
- (c) entitlement to membership in the OCN, including the ability of the plaintiffs and other members of the OCN to "pass on" OCN membership, is not determined by the Registrar under the Act or by the Defendant or by "recognition as an Indian pursuant to the Act", but is instead determined by OCN pursuant to its membership rules.

15. In the alternative, he denies that a failure to provide said rights and benefits, including any discretionary programs and services available only to Indians as defined in the Act, would be an infringement of the alleged OCN Right to Determine.

16. In response to paragraphs 28 through 32 of the Claim, he admits the honour of the Crown is at stake in all of the Crown's dealings with the OCN as an Aboriginal people, but denies the existence of any legally enforceable duty to act honourably as an independent cause of action for which relief may be sought in this claim.

17. In response to paragraphs 33 through 38 of the Claim, he denies any violation of s. 15 of the *Charter*, as alleged, and says OCN's determination of the "OCN People" is irrelevant to the Defendant's determination of who is registered as an "Indian" under the Act for the purposes of federal legislation and programming.

18. In response to paragraphs 39 through 44 of the Claim, he denies any violation of s. 2(d) of the *Charter*, as alleged, and says the individual plaintiffs are free to associate with the OCN and each other without restriction by the Defendant. He further says the Defendant is under no obligation under s. 2(d) to recognize, adopt and give effect to the "OCN People" as determined by the OCN, nor does the said section guarantee OCN the right to determine if a person is an "Indian" within the meaning of the Act.

19. In further response to paragraphs 39-44, he says that OCN does not have standing to claim for relief under section 2(d) of the *Charter* or to bring a challenge under said section on behalf of unnamed persons who are members of OCN.

20. Referring to the Claim as a whole, he says:

- (a) pursuant to section 91(24) of the *Constitution Act, 1867*, the Parliament of Canada is vested with exclusive jurisdiction over, *inter alia*, Indians, and lands reserved for the Indians;
- (b) pursuant to that jurisdiction, Parliament has enacted and had in force at all material times hereto an exhaustive statutory scheme which defines who is to be recognised as an "Indian" within the meaning of the Act;
- (c) further, the impugned legislative scheme is *intra vires* Parliament;
- (d) the purpose of Indian status or entitlement to registration as an Indian under the Act is:
 - (i) distinct from entitlement to band membership in the OCN, which is determined in accordance with OCN's own membership rules;
 - (ii) unrelated to the distinctive political, economic, cultural, spiritual and legal existence of the OCN; and
 - (iii) independent of treaty;


- (e) OCN's definition of its membership is recognized by the Defendant;
- (f) sections 6 and 7 of the Act do not conflict or interfere with any rights of OCN or any of the Plaintiffs;
 - (i) under s. 2(d) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*"), or,
 - (ii) under s. 15 of the *Charter*, or,
 - (iii) under s. 25 of the *Charter*, or,
 - (iv) as recognised and affirmed under section 35(1) or 35(4) of the *Constitution Act, 1982*,
or otherwise, as alleged, or at all;
- (g) the 1985 amendments to the Act were drafted and proclaimed after extensive discussions with aboriginal and other groups and people across Canada;
- (h) further, or in the alternative, if by this legislative scheme there is any breach of any rights of the plaintiffs guaranteed by the *Charter*, which is denied, then that infringement is a reasonable limit prescribed by law which is demonstrably justified in a free and democratic society under s. 1 of the *Charter*;
- (i) further, or in the alternative, if by this legislative scheme there is any infringement of any rights of the plaintiffs affirmed by s. 35 of the *Constitution Act, 1982*, which is denied, then that infringement is justified; and
- (j) he denies that the plaintiffs have suffered any loss or damage as alleged or at all, and denies that the plaintiffs are entitled to the relief claimed.

21. He pleads and relies on sections 2, 4 through 14.3, 81, and 83 of the Act, and on section 22 of *An Act to Amend the Indian Act*, R.S. 1985, c. I-5, ch. 32 (1st supp).

The Deputy Attorney General of Canada therefore prays that the Claim of the Plaintiffs be dismissed against HER MAJESTY THE QUEEN with costs.

DATED at the City of Winnipeg, this 15th day of October, 2010.

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