

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.

REPLY

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1. Except as expressly admitted herein, the Plaintiffs deny each and every allegation in the Statement of Defence of Her Majesty the Queen in Right of Canada (“Statement of Defence”) made in response to the Re (x6) Amended Statement of Claim (“Statement of Claim”).
2. The Plaintiffs admit those allegations common to both the Statement of Claim and the Statement of Defence as set out in paragraphs 2 and 3 of the Statement of Defence.
3. In response to paragraph 4 of the Statement of Defence, the Defendant failed to exercise its discretion regarding proof of parenthood in a reasonable manner and, in any event, unjustifiably infringed, impaired and failed to accommodate the OCN Right to Determine by denying Indian registration to the individual Plaintiffs.
4. In response to paragraph 5 of the Statement of Defence, the Defendant has failed to understand the nature and scope of its fiduciary duty and has failed to fulfill its fiduciary duty to the Plaintiff OCN by arbitrarily restricting the eligibility to be registered as an “Indian” under the *Indian Act*, R.S.C. 1985, c. 1-5 (“*Act*”); that is, the Defendant has not recognized or accommodated the OCN Right to Determine in that all children with only one parent registered under section 6(2) of the *Act* are not eligible to be recognized as “Indians” under the *Act* even when these children are considered to belong to the OCN community by the OCN People

themselves. By imposing this unprincipled limitation, without considering or accommodating the OCN Right to Determine, the Defendant has breached its constitutional duty to the Plaintiffs contrary to s. 35 of the *Constitution Act, 1982*.

5. In response to paragraph 7 of the Statement of Defence, the Plaintiffs say that true and effective control over OCN's membership is fundamentally impaired and seriously circumscribed by the definition of "Indian" under the *Act* and by the Crown's failure to acknowledge the individual Plaintiffs as "Indians" under the *Act*. The Crown continues to deny the Benefits and the Treaty Rights and Benefits to the individual Plaintiffs; moreover such rights and benefits will be available to a diminishing number of registered OCN "Indians".

6. In response to paragraph 8 of the Statement of Defence, the OCN Right to Determine has been pleaded as required by law. Prior to European contact, OCN determined who were entitled to belong to their group; this affiliation was based on parentage, marriage, adoption and assimilation by co-residency.

7. In further reply to paragraph 8 of the Statement of Defence, the Plaintiffs say that the Defendant has breached the Crown's fiduciary duty and has not acted honourably by failing to recognize the modern expression of the OCN Right to Determine. The Defendant has repeatedly and unjustifiably infringed and impaired the true expression of the OCN Right to Determine through government actions and policies which limit the breadth and scope of the Defendant's obligations to the Plaintiffs by diminishing the number of OCN People to whom the Defendant owes both Treaty obligations and obligations under an honourable and constitutionally valid application of the *Act*.

8. In response to paragraphs 9-10 and 12-16 of the Statement of Defence, the Plaintiffs say that the Treaty creates distinct benefits to all OCN People, with corresponding obligations on the Defendant in relation to all OCN People. In further reply to these paragraphs, the Crown has a fiduciary duty to fulfill its obligations under the Treaty. The Defendant has breached its duty by failing to recognize that all OCN People have Benefits and Treaty Rights and Benefits, not only those who qualify to be registered under the *Act* as "Indians."

9. In reply to paragraph 11 of the Statement of Defence, the Plaintiffs deny that the laws of prescription or limitation periods, including the *Limitations of Actions Act*, R.S.M., 1987, c. 150, the *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 39, the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 32 as amended, and the equitable doctrine of laches and acquiescence, have any application in the circumstances of this case, or are effective to extinguish or derogate from the Plaintiffs' rights as pleaded in the Statement of Claim.

10. In further reply, to the extent that section 39 of the *Federal Courts Act* purports to apply to the causes of action raised in the present action:

- (a) it is unconstitutional in that it unjustifiably infringes the Plaintiffs' aboriginal and treaty rights contrary to s. 35 of the *Constitution Act, 1982*; and/or
- (b) it is unconstitutional in that it discriminates against the Plaintiffs contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

11. In further reply to the Defendant's limitation period defence, the Plaintiffs say that the causes of action arise from a continuing breach, and deny that their causes of action or rights of action arose more than six years prior to the commencement of this action, or more than six years prior to the commencement of these proceedings and say that their causes of action or rights of action arose when the Plaintiffs discovered, or alternatively, with due diligence ought to have discovered, the material facts upon which this action is based and when a reasonable person would conclude that someone in the Plaintiffs' position could bring an action, acting reasonably in light of all the circumstances including, *inter alia*, the capacity, knowledge and social context of the Plaintiffs and the nature of the relationship between the Plaintiffs and the Defendant, at all relevant times and historically.

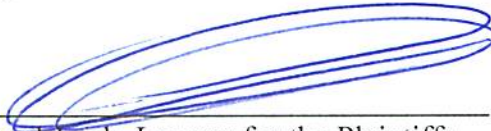
12. In further reply, any applicable limitation period defence is or has been postponed by operation of law or mixed fact and law.

13. In response to paragraphs 15 and 17 of the Statement of Defence, by creating arbitrary divisions among the OCN People, in providing the Benefits and the Treaty Rights and Benefits to some and not to others, the Defendant has undermined the ability of the OCN to properly support all those entitled to be members of their community.

14. In response to the whole of the Statement of Defence, the Crown's unilateral imposition of unjustified policies, practices and legislation relating to who qualifies as an "Indian" under the *Act*, has:

- (a) arbitrarily and unlawfully created different classes and divisions among OCN People, recognizing some as Indians entitled to benefits under the *Act* and others not;
- (b) arbitrarily recognized the Treaty Rights and Benefits of some OCN People but denied the Treaty Rights and Benefits of others, having no regard to the fact that all OCN persons are entitled to the Treaty Rights and Benefits;
- (c) seriously compromised and damaged the cohesion of the OCN People and their ability to live in community by creating the aforementioned arbitrary distinctions and not accommodating the OCN Right to Determine when implementing its policies, practices and legislation relating to who qualifies as an "Indian" under the *Act*;
- (d) never sought the input of the OCN as to how the offending policies, practices and legislation may be modified and improved so as to facilitate the modern-day expression of the OCN Right to Determine; and
- (e) thereby unjustifiably breached both the aboriginal and treaty rights of the OCN.

DATED at Winnipeg, this 14th day of January, 2011.



P. Michael Jerch, Lawyer for the Plaintiffs

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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 Reply by delivering same to the defendant via facsimile at (204) 984 – 7003, 301 - 310
Broadway Avenue, Winnipeg, Manitoba, R3C 0S6 on January 14, 2011.



P. MICHAEL JERCH
Lawyer for the Plaintiffs