File No. CI 81-01-01010

THE QUEEN=S BENCH
WINNIPEG CENTRE

BETWEEN:

MANITOBA MÉTIS FEDERATION INC.,
CONGRESS OF ABORIGINAL PEOPLES AND OTHERS

Plaintiffs (Applicants)

-and-

THE ATTORNEY GENERAL OF CANADA AND THE ATTORNEY GENERAL OF MANITOBA

Defendants (Respondents)

MOTION BRIEF OF THE RESPONDENT, CONGRESS OF ABORIGINAL PEOPLES
Motion to Remove MMF and CAP

Hearing Date: Tuesday, February 18, at 10:00 a.m.
Before Scurfield J.

Joseph Eliot Magnet
57 Louis Pasteur
Ottawa, ON K1N 6N5
ph (613) 562 5800 x 3315
fx (613) 562 5124
email jmagnet@uottawa.ca

TABLE OF CONTENTS

PART I

LIST OF DOCUMENTS TO BE RELIED ON

1. the pleadings and proceedings herein

2. the Affidavit of Lorraine Rochon, sworn Feb. 4, 2003

3. the Affidavit of Victor F. Valentine, sworn Feb. 04, 2003

4. the Affidavits filed in these motions

5. such further and other evidence as counsel may advise and this Honourable Court permit.

PART II

LIST OF AUTHORITIES

TAB

PART III

POSITION OF THE RESPONDENT, CONGRESS OF ABORIGINAL PEOPLES

1. The Congress of Aboriginal Peoples requests an order dismissing this motion.

Overview

2. This is a declaratory action to determine legal issues that have very real practical significance for Métis people. The declaratory action is a time-honoured method to determine issues of public law. No Acause of action@ in the traditional sense is required. The declaratory action does not compel any party to do anything, but rather relies upon the honour of the Crown in assuming that once the legal issues are determined, the Crown will respond appropriately. The declaratory action=s use in support of extra-judicial claims, to help remove obstacles to effective and meaningful negotiations, was approved by the Supreme Court of Canada in relation to this very case in *Dumont v. Canada*.

3. The central issue in this case arises from the Federal Government=s position, as stated by the Royal Commission on Aboriginal Peoples, *Report* IV, p. 246 Athat they did not owe a fiduciary duty to the Métis people; that if they did, it was not violated by the irregularities [administering the *Manitoba Act*]; that if there was a violation, the passage of time has eliminated any right to sue.@

4. The Plaintiffs seek a declaration to resolve this central issue. The declaration sought will resolve a long-standing question of great practical significance. It will remove the key obstacle to the negotiation of a range of matters pertaining to the Métis people. The courts have repeatedly called for governments and Aboriginal peoples to negotiate such matters as the preferred means of resolving them, consistent with the honour of the

Crown. Yet this negotiation process cannot take place until the legal issue in this action is resolved

5. The Plaintiff=s declaratory action is a well-recognized public interest proceeding that the Supreme Court of Canada has approved, and for which it has development specific requirements. The Defendant=s challenge to standing does not address the action as it is. Most of its arguments address other kinds of actions, which have other requirements for the plaintiff class. To the extent that any of the Defendant=s points apply to public interest declaratory actions, the Congress says that the requirements of such an action are met. The Defendant=s motion is designed to hinder, rather than help, and to delay the negotiation process. Accordingly, the motion should be dismissed.

Res Judicata

6. MMF=s and the Congress= standing have been decided adversely to Canada by the Supreme Court of Canada. This issue is res judicata.

Dumont v. Canada (A.G.), [1990] 2 S.C.R. 279

7. The sequence of Court rulings and the reason why they make this issue res judicata have been set out at paras. 2-3, 7-13 of MMF=s Motion Brief to Delete Individual Plaintiffs and Representative Action. The Congress says that these paragraphs correctly show why the issue is res judicata.

8. It is strange B if not singular B for a party to bring a pre-trial motion attacking standing through three levels of courts to the Supreme Court of Canada, and to try to re-litigate the same issue in yet another pre-trial motion. Even were the matter not res judicata, it is an abuse of the process of the Court to raise the same issue again pre-trial. Were this matter again litigible pre-trial, there would be the potential for more pre-trial appeals, including possibly, a second appeal to the Supreme Court of Canada. Scarce judicial resources

cannot be wasted like this, nor can a sound litigation system tolerate such unnecessary opportunity to delay and frustrate the orderly processing of claims.

The Plaintiffs= Case

9. It is fundamental that it is for the plaintiff to state its case. The Defendant must answer that case, and no other. The Defendants here have sought to characterize plaintiffs= action as something which it clearly is not, i.e., a claim by particular individuals for deprivation for not receiving particular land. Having wrongly characterized the claim, the Defendant then criticizes the claim for not conforming the plaintiff class to the requirements of its mis-characterization.

10. It is the Plaintiffs= right to frame their case as an action for a declaration in aid of extra-judicial claims; it is not for the Defendants to convert it into a claim for individual deprivation by a particular individual or group, or to attack the pleadings or plaintiff class on that basis. The Supreme Court held in *Dumont* that the method of proceeding chosen by the plaintiffs here, a declaratory action to determine legal issues of real practical significance for Métis peoples in aid of a prospective land claim negotiation, is both available and appropriate. The Defendants cannot choose for the Plaintiffs how to frame their case or require the plaintiffs to state some other case and certainly cannot attack plaintiffs= standing because some other type of case has different requirements for the plaintiff class.

Dumont v. Canada (A.G.), [1990] 2 S.C.R. 279
Hogg & Monahan, *Liability of the Crown* (3d ed.) at 26-28

11. This is not a proceeding designed to advance the interests of any Aspecific individual who descends from a person entitled to receive benefits under s. 31 or 32 of the Manitoba Act@, as Canada contends in its Motion brief, para 12. This is the case that Canada would like to defend; but it is not the case any plaintiff advances in this proceeding. This is a claim to advance the interests of the Métis people as a collectivity, in aid of

assisting the Métis people, as a collectivity, to bring forward a land claims negotiation. The claim may (or may not) fail at trial, but that is the case the defendants must defend at trial, and no other.

12. If the claim succeeds at trial Canada presumably will act honourably and negotiate with representatives of the Métis people. Perhaps Canada will not act honourably (as Defendant implies at para. 11 of its Motion Brief) and refuse to negotiate. In that case the evolving law seems to create an obligation to negotiate, and perhaps a court would enforce it. All this speculation is irrelevant to the plaintiffs= right which the Supreme Court recognized in *Dumont*, which is a right, by means of this proceeding, to get clarity in the legal position in aid of seeking negotiations.

> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 88 (AThe clear repudiation by the people of Quebec of the existing constitutional order would ...place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles...@)
>
> *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 (As. 35(1) provides a solid constitutional base upon which subsequent negotiations can take place. Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.@)

The Congress= Standing

13. The Congress has standing to bring this action. In *Finlay v. Canada*, the Supreme Court of Canada held that a party without a cause of action in a traditional, private law sense could bring proceedings to vindicate public rights in two situations:

(a) Where the Plaintiff suffered special damage peculiar to himself; or

(b) Where the public interest favours recognizing such standing.

> *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at paras. 18, 31-32

14. Paras 3-5 of the Congress= Motion Brief (responding to MMF=s Motion to Dismiss the

Congress) show that the Congress represents Métis, that it is recognized by Canada as an appropriate interlocutor on Métis matters, and that a Political Accord entered into with Canada obligates the Congress to represent Métis on a National level. As such, Canada=s failure to enter into negotiations with the Congress about the wrongs done to the Métis people as a result of dispossession of Métis lands has caused the Congress Aspecial damage@ of a unique kind from the Defendants= wrongful acts. The Congress cannot carry out the mandate it was created and recognized by Canada to serve, nor can it carry out its obligations under the Political Accord, until the declarations sought here remove Canada=s reasons for refusing to enter a negotiation. This is sufficient to give the Congress standing in its own right.

Daniels v. Canada, [2002] F.C. No. 391
Finlay, supra, at para. 26
Dumont, supra.
Native Women=s Association of Canada v. Canada, [1992] 3 F.C. 192 (C.A.)
Federation of Law Societies of Canada v. Canada (A.G.), unreported decision of B.C.S.C. dated November 20, 2001

15. Alternatively, the Congress submits that it meets the criteria for Apublic interest@ standing set out in *Finlay*. That is:

-There are serious and justiciable issues to be determined;

-The Congress is directly affected by or has a genuine interest in the issues; and

-There is no other reasonable and effective manner in which the issues may be brought before the Court.

Findlay, supra.
Canada (Minister of Justice) v. Borowski, [1981] 2 S.C.R. 575 at p. 598.
Canadian Council of Churches v. Canada, [1992] 1 S.C.R. 236

16. Serious And Justiciable Issues. This litigation unquestionably raises a serious and justiciable issue.

Dumont v. Canada, [1990] 1 S.C.R. 279
Manitoba Métis Federation et. al v. Canada et. al., [2002] MBQB 52, para 29

17. Directly Affected by or Genuinely Interested in the Issues. The relief sought relates

directly to the Congress, in that the Congress asserts that the Defendants are obliged by a Political Accord to negotiate with the Congress as a collective entity, an obligation to which Canada has bound itself. The Congress has a distinct interest as a national, representative body for the Métis in resolving the central issue as to collective deprivation, so that it may carry out its mandate to negotiate a land claim as set out in the Statement of Claim. The practical concerns giving rise to this proceeding are national in scope because of the dispersal of the Métis across Canada, and it is appropriate that the Congress as a national, representative body be included as a party.

18. Reasonable and Effective Alternative Procedure. There is no more reasonable and effective manner in which the issues raised may come to Court. A claim by an aggrieved individual is unlikely to raise squarely the issue of whether Métis as a people were deprived of rights in the way the plaintiffs say they were. The matters complained of in this proceeding are the defendant=s wrongs to the Métis people as a collectivity, not that the Federal Government has acted so as to infringe a particular individual=s rights.

Why the Federal Court Cases on Representative Proceedings do not Apply

19. The Supreme Court held in *Dumont* that the method of proceeding chosen by the plaintiffs, a declaratory action to determine legal issues of real practical significance for Métis people, is both available and appropriate. The Defendants cannot choose for the Plaintiffs how to frame their case. In particular, a representative proceeding is not required for a declaratory action that seeks no damages, mandatory orders, or any individual entitlement to any specific rights or benefits. The declaratory action has coexisted with representative proceedings for many years, yet it has never been suggested that the declaratory action is unavailable, or that public interest plaintiffs should be denied standing, because all persons with a common interest in determining an issue of public law might in theory be able to use the cumbersome vehicle of a representative proceeding. The declaratory action on issues of the kind raised in the case at bar is clearly

distinguishable in this respect from a proceeding by an individual or class of individuals to establish some individual entitlement to compensation for wrongs done to them.

Dumont, supra.
Dyson v. Attorney General, [1911] K.B. 410 (C.A.)
A.G. Canada v. Law Society of British Columbia, (1982) 137 D.L.R. (3d) 1 (S.C.C.) at 13-15
Thorson v. A.G. Canada, [1975] 1 S.C.R. 138
Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265
Canada (Minister of Justice) v. Borowski, [1981] 2 S.C.R. 575

20. The nature of the proceeding also distinguishes this case from *Maurice v. Canada*, and the three other Federal Court trial decisions relied upon by the Defendants (Motion Brief, para 8), where corporate plaintiffs were removed as a party. In *Maurice*, the relief sought was compensation, and this relief related only to the individual plaintiffs. So too, in *Barlow* and *First Nations of Saskatchewan,* where individuals claimed enforceable treaty rights. So too in *Native Council of Nova Scotia*, where individuals claimed an enforceable duty to consult about aboriginal rights. The compensation, treaty and aboriginal rights at issue in those cases are owed to individuals only. As the courts in those cases noted, corporations cannot hold treaty or aboriginal rights. That is not this case in which no treaty or aboriginal rights are claimed or sought to be enforced (as distinguished from a declaration that a treaty existed).

21. The four Federal court cases were all representative actions under Federal Court Rule 144. Rule 144 requires identity of interest between parties in the plaintiff class, and since the corporations could not possess treaty or aboriginal rights this requirement was not satisfied. By contrast, the relief sought here is not any individual right to damages; it is not any specific individual entitlement to treaty benefits or a requirement to consult flowing from an aboriginal right. The relief here is A*Dyson*@ declarations on issues of public law.

22. The Federal Court was confronted with *Maurice* in *Daniels v. Canada*, a case, as here,

seeking Dyson declarations, not enforceable aboriginal or treaty rights. In *Daniels*, Canada moved, as here, to deny standing to the Congress of Aboriginal Peoples. The Federal Court correctly distinguished *Maurice* on the basis of the relief sought, and denied Canada=s motion complaining about the Congress= standing.

Maurice v. Canada, [1999] CarswellNat 2769
Barlow v. Canada, [2000] F.C.J. 282
Native Council of Nova Scotia v. Canada, [2002] CarswellNat 18
First Nations of Saskatchewan v. Canada, [2002 F.C.J. 1324
Daniels v. Canada, [2002] F.C. No. 391

MMF=s Standing

23. This action started as an action for a declaration brought by two public interest litigants. While MMF changed its status to representative, the Congress never did; the Congress has always been a public interest litigant, and was a public interest litigant when the Supreme Court of Canada in *Dumont* decided that the Congress had standing. MMF, apparently misinterpreting the direction in which representative proceedings were developing, changed its status to representative. *Dutton* recently indicated that representative proceedings are not practical to obtain the declarations sought, a development MMF did not foresee. The correct solution here is to allow MMF to return to its original status as public interest litigant, which has been its constant intent, and the constant theory of this case all along, as demonstrated by the Congress= constant public interest status. MMF should not be prejudiced by the unforeseeable change in the case law.

24. If the Congress and MMF are not appropriate plaintiffs to advance the case of wrongs to a people, it is hard to see who is the appropriate plaintiff. These are the parties recognized and funded by Canada to advance Métis issues. These are the parties who interface with the Federal Cabinet Ministers that have responsibility for Métis affairs; these are the parties with whom Canada has negotiated Métis issues previously; the Congress is the party responsible for negotiating the inclusion of Métis in s. 35(2) of the *Constitution Act*,

1982 (RCAP, *Report*, IV, p. 230). The right to legal clarity recognized in *Dumont* cannot be hollow.

25. This case does not merit the admonishment delivered in *Society of Seniors*. *Delgamuukw* demonstrates the preference for negotiation of aboriginal claims; those negotiations are blocked by Canada=s assertion of a contested legal position; *Dumont* rules that blockage is properly unblocked by this proceeding. This clearly is not a case where Athe legal system is being misused.@

> *Manitoba Society of Seniors v. Canada*, [1992] M.J. No 336, p. 3

26. The Defendant rightly foresees the obvious in its Motion Brief, para 16: Aafter 22 years it is a little late in the day to be complaining about standing in an interlocutory motion@. Perhaps it is appropriate to add B *especially* for the second time.

February 4, 2003

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

JOSEPH E. MAGNET

Counsel for the Respondent,
Congress of Aboriginal Peoples