

COURT FILE NO.: 23046/04

DATE: 2005 06 17

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ONTARIO METIS AND ABORIGINAL)
 ASSOCIATION, ALLAN BEAUCHAMP,)
 MITCH BERTRAND, ARTHUR BURNS,)
 DALE BURNS, ROGER BURNS,)
 FREDERICK BUSCH, TIMOTHY)
 CRAWFORD, RICHARD DUCHARME,)
 SHAUNA DUCHARME, RENE FORTIN,)
 STEPHANE GAGNON, GILBERT)
 GERVAIS, THOMAS HARVEY, YVON)
 GIRARD, ROY JACQUES, ANNABEL)
 HAMELIN, CLAUDE HUBER, JASON)
 LANGLAIS, JOHN GUY LARABIE,)
 DENNIS LARABIE, GERALD LARABIE,)
 MARCEL LEFEBVRE, BRIAN LEVIGNE,)
 EDWARD C. LLOYD, MARLON S.)
 LLOYD, ROBERT O. LLOYD, SCOTT W.)
 LLOYD, BRIAN LOCKWOOD, GEORGE)
 LOCKWOOD, JOSEPH NAULT, ANNA)
 PRESSEAULT, ROSS PRESSEAULT,)
 JOHN QUIGLEY, MARK L. ROY,)
 LEONARD SECORD, SCOTT TAISEY,)
 PATRICK TOWELL, ALFRED)
 VILLENEUVE, RICHARD WILSON AND)
 JOHN DOE AND JANE DOE)

J.M. Clow, for the Applicants

Applicants

- and -

HER MAJESTY THE QUEEN IN RIGHT)
 OF THE PROVINCE OF ONTARIO AS)
 REPRESENTED BY THE MINISTER OF)
 NATURAL RESOURCES, HER MAJESTY)
 THE QUEEN AS REPRESENTED BY THE)

E. Atkinson for Minister of Natural)
 Resources)
 O. Young for Attorney General of Canada)
 J. Teillet for Metis Nation of Ontario)

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ATTORNEY GENERAL FOR THE)
 PROVINCE OF ONTARIO, HER MAJESTY)
 THE QUEEN AS REPRESENTED BY THE)
 ATTORNEY GENERAL OF CANADA)
 AND THE METIS NATION OF ONTARIO)
)
 Respondents)
 (Moving Parties))
)
) HEARD: May 16, 2005

REASONS FOR ORDER

McMILLAN, J.:

[1] The respondents have moved for the dismissal of this application. The applicants, save and except for O.M.A.A. and John and Jane Doe, are individuals from various geographical locations in this province who are either charged, or against whom charges are contemplated, primarily with respect to regulatory hunting and fishing infractions. The applicants claim to be Metis who were exercising their aboriginal rights pursuant to S.34 of the *Constitution Act* 1982, the *Charter* and the recognitions of the Supreme Court of Canada in *R. v. Powley* and plead same in defence of the charges being advanced in the trial court.

[2] The applicant O.M.A.A. is an incorporated entity, which, *inter alia*, advocates for the aboriginal rights of its members, including the other applicants. Unlike the others, O.M.A.A. does not stand charged with any regulatory offences.

[3] There was not any issue taken regarding this court's jurisdiction to hear the respondents' motions to strike the notice of application and dismiss the application either in whole or in part. There were a variety of arguments advanced, both procedural and substantive, concerning whether or not this court should exercise its concurrent jurisdiction to entertain the application beyond this stage of the proceeding.

[4] There will not be any need to address individually the numerous submissions of counsel as I have concluded that this application does not constitute a matter in which this court should exercise its discretion to intervene in the continuing or pending trial processes involving the vast majority of the applicants. This court's refusal to do so will not result in any failure of justice to the applicants.

[5] In reaching this conclusion, I have been guided by the policy set out in *R. v. Mills* and *R. v. Rahey* which held that the trial court is to be preferred in *Charter* issues unless prerogative relief is sought; which has not been claimed in this application. The jurisdiction of superior courts should only be invoked where there is truly a need such as instances where a trial court is

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not at hand or where the process below has itself been impugned. None of these exceptional circumstances apply to this application

[6] A superior court's discretion to grant relief in matters brought before it in the course of ongoing criminal proceedings was considered by Doherty, J.A. in *R. v. Duvivier* (1991), 64 C.C.C. (3d) 20 at 23.4 (Ont.C.A.). As had been held by Lamer, J. in *R. v. Rahey*, Doherty, J.A. also found that the burden of establishing that the application necessitated the superior court's consideration rested with the applicant. Doherty, J.A. went on to observe that cases containing constitutional dimensions should "routinely be raised and resolved" in the criminal law process that provides for trials and appeals on the record.

[7] In a decision delivered by Rosenberg, J.A. in *R. v. Arcand*, [2004] O.J. No. 5017 the Ontario Court of Appeal held that the policy concerns referenced by Doherty, J.A. in *R. v. Duvivier* applied equally to proceedings prosecuted under the *Provincial Offences Act*. Further, Bastarache, J. writing for the Supreme Court of Canada in *Paul v. B.C.*, [2003] 2 S.C.R. 585, noted in paragraph 36 of the court's decision regarding whether or not S.35 questions were distinct from other constitutional matters, that: "Section 35 is not, any more than the Charter, "some holy grail which only judicial initiatives of the superior courts may touch."

[8] In my view, the applicants will have available to them in the trial courts all of the remedies sought from this court in their application. Although the trial court obviously cannot grant injunctive and declaratory relief, per se, the trial court is empowered to fashion relief and remedies appropriate to the exigencies arising in the trial and consistent with its findings on the evidence adduced on the record. Likewise, there are not any judicial economies of scale available through this application that are not available in the Ontario Court of Justice. In reality, the contrary is more likely the case.

[9] The application is made to this court sitting as a civil application court and if the concurrent jurisdiction was exercised, I would be usurping the role of the Ontario Court of Justice. Rather, the charges pending against the applicants ought to be adjudicated upon a factual foundation established through a trial with emphasis on context and in "a case-by-case basis", as the Supreme Court of Canada observed in *R. v. Powley*, [2003] 2 S.C.R. 207 at page 223 to be "not an insurmountable task."

[10] The applicant, O.M.A.A. is a corporation which does not enjoy Charter rights and which does not appear to have status or standing to challenge the interim agreement entered into between the M.N.R. and the M.N.O. concerning the recognition and regulation of the latter's Metis members.

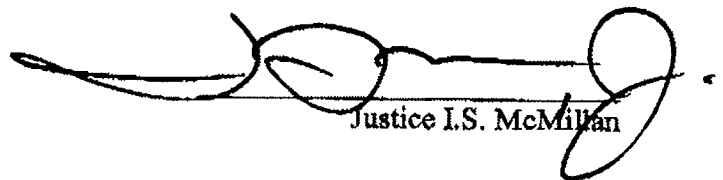
[11] In the result, there is not any necessity to address all of the various arguments and issues advanced by counsel on this motion as the applicants have not in their response demonstrated that the application is an appropriate one for adjudication by the Superior Court and that the application should not be left to the trial court for determination.

[12] I have adopted the approach of Doherty, J. (as he then was) in *Jabaco Inc. v. Real Corporate Group Ltd.*, [1989] O.J. No. 68 at para. 8, where he observed:

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"Apart, however, from any specific rule, a court conducting any proceeding must have authority to order the manner in which the issues will be addressed, so as to secure the just, most expeditious, and least expensive determination of the proceeding. I have discretion to permit the respondents to raise issues by way of preliminary motions.....".

[13] Accordingly, the motion is granted and application is dismissed in its entirety. Costs, if demanded by the respondents, are to be addressed by teleconference upon appointment scheduled through the trial co-ordinator.



Justice I.S. McMillan

Released: June 17, 2005