MONTANA BAND, Chief Leo Cattleman, Marven Buffalo, Lillian Potts, Cody Rabbit, and Darrell Strongman, Councillors of the Montana Band suing on their own behalf and on behalf of the members of the Montana Band of Indians

SAMSON BAND, Chief Omeasoo and Arnup Louis, Victor Bruno, Leo Bruno, Frank Buffalo, Robert Swampy, Terry Buffalo, Twain Buffalo, Dolphus Buffalo, Emil Cutknife, Raymond Cutknife, Lester B. Nepoose, Jim Simon, and Stanley Buffalo, Councillors of the Samson Band, suing on their own behalf and on behalf of the members of the Samson Band of Indians

ERMINESKIN BAND, Chief Eddie Littlechild and Ken Cutarm, Arthur Littlechild, Richard Littlechild, Lawrence Wildcat, Emily Minde, Lester Frayne, Maurice Wolfe, Brian Lee, Gordon Lee, John Ermineskin, Lawrence Rattlesnake, and Gerry Ermineskin, Councillors of the Ermineskin Band, suing on their own behalf and on behalf of the members of the Ermineskin Band of Indians

LOUIS BULL BAND, Chief Simon Threefingers, and John Bull, Theresa Bull, Henry Raine, George Deschamps, Harrison Bull, Winnie Bull, Jerry Moonias, Herman Roasting, Councillors of the Louis Bull Band, suing on their own behalf and on behalf of the members of the Louis Bull Band of Indians (Plaintiffs)

v.

HER MAJESTY THE QUEEN (Defendant)

[Indexed as: **Montana Band of Indians v. Canada (T.D.)**]

Federal Court, Trial Division, Jerome A.C.J., February 16, 1990

T.R. Berger and R.J. Shulman for the plaintiffs
D.F. Friesen, Q.C., for the defendant

The defendant/applicant applied for an order pursuant to Rule 419 of the *Federal Court Rules,* C.R.C., c.663 to strike out the plaintiffs' statement of claim. Rule 419 allows a statement of claim to be struck out on the grounds that it discloses no reasonable cause of action.

The plaintiff Indians, on their own behalf and on behalf of the plaintiff bands and their members, sought a declaration that the Government of Canada was bound to protect their interests as self-governing entities and their means of maintaining their material well-being. The plaintiffs based their argument on such constitutional instruments as the *Royal Proclamation, 1763,* s.146 of the *Constitution Act, 1867,* the *Rupert's Land and NorthWestern Territory Order* and under international law through Articles 1 and 27 of the *International Covenant on Civil and Political Rights.* The plaintiffs also sought a declaration that the constitutional instruments entailed a fiduciary obligation to the plaintiffs.

The applicants argued that the plaintiffs' statement of claim should be stuck on the grounds that since no breach was alleged it did not raise an issue that would enable the Court to determine the basis, nature, extent or purpose of Canada's obligations to the plaintiffs.

Held: Application granted. Statement of Claim was struck with 60 days to allow plaintiffs to rile an amended Statement of Claim.

1. The failure to identify a breach of duty must result in the statement of claim being struck out.

2. Since the claim was of great importance to native peoples and to the Government of Canada, 60 days leave was given to allow the plaintiffs to file an amended statement of claim.

JEROME A.C.J.: This application for an order pursuant to Rule 419 of the *Federal Court Rules* [C.R.C., c. 6631 striking the plaintiffs' statement of claim came on for hearing before me at

Edmonton, Alberta on October 10, 1989. At the conclusion of argument I indicated that I would take the matter under reserve, and that these written reasons would follow.

According to the plaintiffs' amended statement of claim, the plaintiffs, with the exception of the Montana Band, are Indian tribes, or successors to tribes, who are aboriginal occupants of territory within what was once known as Rupert's Land. The Montana Band was established as a band within Rupert's Land under the *Indian Act* after 1870. All the individual plaintiffs are descended from Indians who were aboriginal occupants of Rupert's Land in 1870.

The amended statement of claim describes a complex series of proclamations, statutory provisions, resolutions and orders dating from 1670, when the Royal Charter of King Charles 11 first granted trading privileges with respect to land which became known thereafter as Rupert's Land. The proclamations and orders relate in part to the protection of Indian tribes within Rupert's Land, and to the protection of lands reserved to the Indians as their hunting grounds.

The Royal Proclamation, 1763 [R.S.C., 1985, Appendix 11, No. 1], which, as the amended statement of claim describes, set up new colonies in North America and provided "that measures should be taken to protect the Indian tribes ... connected with the British Crown" (amended statement of claim, page 3) stated specifically in its preamble:

> ... the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them . . . as their Hunting Grounds. [Amended statement of claim, page 3]

The plaintiffs allege that "as a matter of policy and practice, and as a matter of law," the principles embodied in the Royal Proclamation of 1763 applied to Rupert's Land.

Section 146 of the *Constitution Act,* 1867 [30 & 31 Vict., c.3 (U.K.) (R.S.C., 1985, Appendix II, No. 5) as am. by *Constitution Act, 1982*, Schedule, Item 1] provided for the admission of Rupert's Land and the North-Western Territory into the Union. Provision was made on

> 146. . . .
>
> ... Address from the Houses of Parliament of Canada to admit Rupert's Land and the North-Western Territory ... into the Union, on such Terms and Conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom ...

Following that provision, on June 23, 1870 the *Rupert's Land and North-Western Territory Order* [(R.S.C., 1985, Appendix II, No. 9) as am. by *Constitution Act, 1982,* Schedule, Item 3] ("Rupert's Land Order") was signed, admitting Rupert's Land and the North-Western Territory into Canada as of July 15, 1870. The plaintiffs allege that:

> In the preamble to the Order, Her Majesty signified Royal approval of the terins and conditions relating to the admission of Rupert's Land into Canada set out in [certain] Resolutions and in the Second Address.

The plaintiffs maintain that among these, "the following undertaking by the Government of Canada contained in the Second Address was approved by Her Majesty":

> ... That upon the transference of the territories in question to the Canadian Government it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer.

The plaintiffs are seeking a declaration that the defendant is now bound by the aforementioned constitutional instruments, including the Rupert's Land Order, arguing that:

> By virtue of Section 146 of the *Constitution Act, 1867,* the terms and conditions approved by Her Majesty in the *Rupert's Land Order* and the obligations assumed by the Government of Canada in relation to the Indian tribes of Rupert's Land thereby became constitutional instruments binding on the Government of Canada and the Parliament of Canada as well as the provinces. [Amended statement of claim, page 10]

The plaintiffs further argue that:

> The *Rupert's Land Order,* since it had, by virtue of the *Constitution Act, 1867* force and effect as if enacted by the Imperial Parliament, became a part of Canada's Constitution, and affirmed the distinct place of the tribes located in Rupert's Land within Canada's federal system, that their interests as selfgoverning and self-determining tribes within Canada were to be respected and the means to their well being supplied. [Amended statement of claim, page 10]

On the basis of these arguments the plaintiffs seek a declaration stating that by these constitutional instruments the Government of Canada is bound to protect their interests as self-governing entities and their means of maintaining their material well-being, and a declaration that these constitutional instruments entail a fiduciary obligation to the plaintiffs.

The plaintiffs further seek a declaration that Articles I and 27 of the United Nations *International Covenant on Civil and Political Rights* [Dec. 19, 1966, [1976] Can. T.S. No. 47] are binding on Canada and that they apply to the plaintiffs. Articles 1 and 27 read as follows:

Article 1

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-SelfGoverning and Trust Territories shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

. . .

Article 27

> 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The plaintiffs maintain that by virtue of customary international law and by virtue of its ratification by Canada on May 16, 1976, the *International Covenant on Civil and Political Rights* is binding on Canada. With respect to Article 27 of the Covenant, the plaintiffs submit that:

> ... although, by reason of their being aboriginal people they are not a minority in the usual sense, nevertheless they are entitled to the benefit of Article 27, being a minority for the purposes of the said Article.

In a notice of motion dated September 8, 1989, the applicant seeks an order pursuant to Rule 419 of the *Federal Court Rules* striking the amended statement of claim. Counsel for the applicant has stated that the plaintiffs' failure to allege breaches of duty on the part of the defendant means that the Court is being asked to entertain an action for a purely advisory declaration. Relying on, *inter alia,* the Supreme Court of Canada's decisions in *Operation Dismantle et al. v. The Queen et al.,* [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 13 C.R.R. 287, 12 Admin. L.R. 16, 59 N.R. 1, and *Solosky v. The Queen,* [1980] 1 S.C.R. 821, 105 D.L.R. (3d) 745, 50 C.C.C. (2d) 495, 16 C.R. (3d) 294, 30 N.R. 380 the applicant argues that the Court ought not to entertain an action for a declaration where there is no dispute over the rights of the plaintiffs. The applicant maintains that the amended statement of claim does not raise an issue that would enable the Court to determine the basis, nature, extent or purpose of Canada's obligations to protect the interests of the plaintiffs, and that accordingly the amended statement of claim "discloses no reasonable cause of action".

The plaintiffs, too, rely heavily on the decisions in *Operation Dismantle and Solosky*, *supra,* maintaining that they have a legal interest in seeking this declaration of right, and that it is this real interest that forms the basis of their cause of action. Counsel for the plaintiffs has described the legal interest in the following terms:

> [T]he plaintiffs say we are Indian bands or tribes in Rupert's Land. We always have been. We are still here. And we say that we want the Court to declare that we are entitled to the benefit of the undertaking made by Canada that the Government of Canada acknowledges its duty to take adequate measures to protect the interests and well being of the tribes. We want that declaration . And if we succeed in getting it, then we will in a sense have achieved an amendment to the Constitution because a provision that Canada says is not binding upon it will then be binding upon it.

Counsel for the plaintiffs has further submitted that the action before me falls within the parameters of Rule 1723 of the *Federal Court Rules.* Rule 1723 reads as follows:

> *Rule 1723.* No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Rule 419(1) of the *Federal Court Rules* provides:

> *Rule* 419 (1) The Court may at any stage of an action order any pleading or anything in any pleading to be struck out, with or without leave to amend, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be,
> (b) it is immaterial or redundant,
> (c) it is scandalous, frivolous or vexatious,
> (d) it may prejudice, embarrass or delay the fair trial of the action,
> (e) it constitutes a departure from a previous pleading, or (f) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly.

The very close similarity between this case and the recent dispute in *Operation Dismantle, supra* is such that both counsel argued extensively from it. There, opponents of cruise missile testing in Canada sought declaratory relief by way of an action. The basis of the claim was that the testing would contribute to an escalation in nuclear warfare at some time in the future and thereby increase the risk that the plaintiffs would be victimized. The motion to strike the statement of claim ultimately found its way to the Supreme Court of Canada where the decision to strike the statement of claim was upheld. There is one significant difference in the present case. In *Operation Dismantle,* the harm was considered to be a future possibility too remote to form the basis of the plaintiffs' action. In the present case, no grievance is identified. Indeed, the plaintiffs are proceeding now on the basis of an amended statement of claim and acknowledge that the original statement of claim contained very general allegations of a breach of duty on the part of the defendant which disappear from the amended text. After careful consideration, I have reached the conclusion that the failure to identify any grievance must lead to the same result in the motion to strike. At page 456 [S.R.C.] in the *Operation Dismantle* decision, Dickson, J. [as he then was] said the following:

> The principles governing remedial action by the courts on the basis of allegations of further harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will be justified where the link between the action and the future harm alleged is not capable of proof.
>
> The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:

> 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
>
> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts": *(The Law of Declaratory Judgments* (1978), at p. 179).

None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,

> . . . no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty ...

Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen,* [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In *Solosky, supra,* one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This Court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The Court made it clear, however, at p. 832:

> ... that a declaration will not normally be granted when the dispute is over and has become academic, *or where the dispute has yet to arise and may not arise.* (emphasis added)

Counsel acknowledges that the intention of the plaintiffs should they succeed in the present claim for declaratory judgment is to assess the next step, perhaps negotiation, perhaps further litigation. But trial courts ought to avoid any such two-phase process. The defendant is entitled to know the full case it has to meet. Indeed, any party must have a full understanding of the consequences of the failure to defend or to concede defeat or any aspect of the litigation. The role of the trial court is to resolve disputes where parties are unable to do so themselves. How is this possible if the dispute is not identified in the statement of claim?

Accordingly, I have reached the conclusion that the action in its present form, devoid of any grievance between the parties, cannot proceed. The claim is, of course, anything but frivolous and is of great importance to the Native Peoples and to the Government of Canada. It is appropriate, therefore, that the plaintiffs be given sixty days within which to file an amended statement of claim. Costs in the cause.