TRACEY ANN SMITH (Applicant) v. HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA AND THE MINISTER OF EMPLOYMENT AND IMMIGRATION (Respondents)

[Indexed as: **Smith v. Canada (Minister of Employment and Immigration)**]

Ontario Court (General Division), Kozak J., February 2, 1993

F.J. Thatcher, for the applicant
L. Wall, for the respondents

The applicant, an American citizen and a member of the Red Lake Band of Chippewa Indians of Minnesota, has three children who hold American citizenship and are members of the Red Lake Band in Minnesota. Since September 1989, the applicant has been living with her common-law spouse, a member of the Stanjikoming First Nation of Ontario and a Canadian citizen, and their two children, who are also Canadian citizens and members of the Stanjikoming First Nation. The applicant applied for membership of the Stanjikoming First Nation. On November 16, 1992 the applicant entered the United States and was refused reentry into Canada on the grounds that she did not have, nor applied for an immigration visa to enter and reside in Canada. The applicant was permitted to re-enter Canada on November 20, 1992 provided that she attend an Immigration Inquiry which was ultimately adjourned sine die by the Ministry. On November *25,* 1992 counsel for the applicant requested that the Ministry permit the applicant to leave and re-enter Canada pending the Immigration Inquiry so that she could visit her children and family in the U.S. This request was denied and the applicant was then informed that if she left Canada she would be denied re-entry.

The applicant brought a motion for an interlocutory injunction which was ancillary to an earlier application for a declaration that s.9(1) of the *Immigration Act,* R.S.C. 1985, c.I-2 is inconsistent with constitutionally protected Aboriginal and treaty rights contrary to *s.35(1)* and *5.52(1)* of the *Constitution Act, 1982.* The treaty rights referred to in that application are the rights contained in the Jay Treaty of 1794. The injunctive relief sought was (a) to restrain the respondent Minister of Employment and Immigration from proceeding with the Immigration Inquiry, the purpose of which was to deal with the applicant's entry into Canada for the purposes of immigration; and (b) to permit the applicant to leave and re-enter Canada pending the final disposition of the application.

Held: Injunction granted.

1. The three-step analysis for determining whether an interlocutory injunction should be granted pending the constitutional challenge of a legislative provision is, as per the Supreme Court of Canada decision of *Re AG (Man.) and Metropolitan Stores (MTS) Ltd., et al.:*
   (a) The first step is a preliminary and tentative assessment of the merits of the case.
   (b) The second step is to ask the question: if the injunction is not granted, would the applicant suffer irreparable harm?
   (c) The third step is a consideration of which of the two parties will suffer the greatest inconvenience if the injunction is granted.

2. The Jay Treaty does not confer or create rights in favour of the applicant. Therefore, the existence of Aboriginal rights to freely pass on either side of the boundary line and not the terms of the Jay Treaty form the basis of the application. The court has insufficient facts to deal with the issue of the Aboriginal rights and it is best left for trial.

3. Irreparable harm would be caused if the injunction was not granted to the applicant in that it would deprive her of access to her young children and family residing at the Red Lake Indian Reservation, Minnesota, and she would also be deprived of her medical and dental benefits in that State. Similarly, if she was to reside in Minnesota pending the hearing of the application, the relationship with her common-law spouse and young family in Ontario would suffer irreparable harm. The balance of convenience favors the applicant in that the harm done to herself and her family outweighs the harm that would be done to the respondent.

4. An order for an interlocutory injunction restraining the Minister of Employment and Immigration from proceeding with the Immigration Inquiry pending the hearing of the application made herein was granted. The Minister was further ordered to permit the applicant to leave and re-enter Canada pending the final disposition of the application made.

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KOZAK O.C.J.: This is a motion by the applicant for an interlocutory injunction which is ancillary to an application commenced on January 5, 1993 for a declaration that s.9(1) of the *Immigration Act,* R.S.C. 1985, c.I-2, as amended R.S.C. 1985 (4th Supp.), c.28 and c.29 is inconsistent with constitutionally protected Aboriginal and treaty rights contrary to ss.35(1) and 52(1) of the *Constitution Act, 1982,* and is to that extent of no force and effect. The injunctive relief being sought is an order:

(a) to restrain the respondent Minister of Employment and Immigration from proceeding with the Immigration Inquiry, the purpose of which is to deal with the applicant's entry into Canada for the purposes of immigration and

(b) to permit the applicant to leave and re-enter Canada pending the final disposition of the application.

I. Background Information and Material Contentious

The applicant is an Indigenous North American, a member of the Red Lake Band of Chippewa Indians of Red Lake Minnesota and holds American citizenship. She has three children who are members of the Red Lake Band, who hold American citizenship and who currently reside with their maternal grandmother at the Red Lake Indian Reservation at Red Lake, Minnesota. Since September 1989 the applicant has been residing in Canada at Stanjikoming First Nation, north of Fort Frances, Ontario. She has been living there with her common-law spouse Allan Henderson Jr. who is a member of the Stanjikoming First Nation, a registered Indian and a Canadian citizen. As a result of this union there are two children namely: Allan James Benedict Peter Henderson III, born June 19, 1990 and Micah Donal Leonard Henderson, born December 21, 1991. Both of these children are members of Stanjikoming First Nation, registered Indians and Canadian citizens. Both of the applicant's children with Allan Henderson Jr. were placed in customary care and are currently with foster parents pursuant to a customary care agreement involving Weechi-it-te-win Family Services Inc. The applicant also had a child of a previous relationship namely, Gregory James Smith, born May 7, 1988 in Bemidji, Minnesota who is a member of the Red Lake Band of Chippewa Indians, a holder of American citizenship and a resident of Canada. This child was placed in customary care with Weechi-it-te-win Family Services Inc. of Fort Frances, Ontario, a mandated Children's Aid Society on October 26, 1992. Both the applicant and Allan Henderson Jr. will be participating in an alcohol treatment program which must be successfully completed before they can regain custody of the children. The applicant's children at Red Lake, Minnesota range in age from almost 9 to 6 years of age.

The applicant has applied for admission as a member of the Stanjikoming First Nation pursuant to the Stanjikoming First Nation Band Membership Code. In her application she has included all of her children in Red Lake, Minnesota. As a registered American Indian, the applicant is eligible for treaty and other entitlements including medical and dental coverage which is only available to her in the United States.

On November 16, 1992 the applicant entered the United States at International Falls, Minnesota for the purpose of a dental appointment and when she attempted to re-enter Canada at Fort Frances, Ontario, she was denied re-entry on the grounds that she did not have, nor had she applied for an immigration visa to enter and reside in Canada. The applicant was permitted to re-enter Canada on November 20, 1992 on condition that she attend an Immigration Inquiry in Thunder Bay on November 25, 1992. The said inquiry was adjourned to January 13, 1993 on consent and then was adjourned *sine die* by the Ministry. On November 25, 1992 counsel for the applicant requested that the Ministry permit the applicant to leave and re-enter Canada pending the Immigration Inquiry so that she could visit her children and family in the U.S. This request was denied and the applicant was informed that if she left the country, that she would be denied re-entry into Canada. This then prompted the applicant to commence the herein application.

II. Grounds for the Motion

Counsel for the applicant takes the position that the injunctive relief should be granted because there is a substantial or serious issue to be determined on the application based upon the applicant's Aboriginal and treaty rights, that the balance of convenience lies in favour of staying the Immigration Inquiry and permitting the applicant to leave and re-enter Canada on compassionate and humanitarian grounds pending the disposition of the application; and that irreparable harm would be caused to the applicant and her children if the Immigration Inquiry is not stayed and the

applicant is not permitted to leave and re-enter Canada as necessary for family protection reasons.

Counsel for the respondents submits that to the extent that the relief sought in the within motion requires a determination of the constitutional validity of legislation, that this Court as a Provincial Superior Court shares concurrent jurisdiction with the Federal Court which has exclusive jurisdiction to deal with matters pertaining to immigration. Accordingly, counsel for the respondents argues that this Court ought to decline to exercise its jurisdiction in favour of the Federal Court so that the *Immigration Act,* which is a comprehensive statutory scheme for immigration law, and the determination of the status of persons seeking entry to Canada as visitors, immigrants or refugees can be fully considered. In the alternative, the respondents submit that should this court assume jurisdiction that injunctive relief as requested should not be granted in that the applicant has failed to prove irreparable harm should the status quo continue.

III. Legal Consideration

In determining whether to exercise its discretionary power to grant interlocutory relief pending the constitutional challenge of a legislative provision, this court is guided by the decision of the Supreme Court of Canada in *Re AG (Man.) and Metropolitan Stores (MTS) Ltd., et al.,* [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321. At page 334 the Court endorsed a three-step analysis as follows:

> The first step is a preliminary and tentative assessment of the merits of the case.
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> …
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> In my view, however, the *American Cyanamid* "serious question" formulation is sufficient in a constitutional case where the public interest is taken into account in the balance of convenience.
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> …
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> The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is, harm not susceptible or difficult to be compensated in damages.
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> …
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> The third test, called the balance of convenience and which ought perhaps to be called the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a discussion on the merits.

In discussing the first step of this analysis, the preliminary and tentative assessment of the merits of the case Mr. Justice Beetz at page 337 stated for the Court:

> I therefore fully agree ... in particular with respect to constitutional cases "that courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiffs case." At this stage, even in cases where the plaintiff has a serious question to be tried or even a *prima facie* case, the Court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

Cases seeking the granting of a stay from the implementation or administration of legislation are of two varieties: suspension and exemption cases. At page 338 it is stated:

> In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type I will call exemption cases.

The public interest considerations which a Court must weigh in deciding whether to grant a stay are often less significant for exemption cases. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when impugned provisions are broad and general and such as to affect a great many persons.

The evidence to be presented by the applicant at the hearing of the application following:

(1) That thc applicant is descended from members of the Ojibway Chippewa Nation who at all relevant times occupied the lands traversed by the Canada-United States border including those lands now known as Minnesota and Northwestern Ontario and as such acquired aboriginal rights.

(2) That the Government of the United Kingdom and of the United States entered into a *Treaty of Amity, Commerce and Navigation* (The Jay *Treaty)* in 1794. Article 3 of the Jay *Treaty* states *inter alia:*

> It is agreed that it shall be at all times be free to His Majesty's subjects, and to the citizens of the United States, and also to Indians dwelling on either side of the said boundary line freely to pass and repass by land, or inland navigation, into the respective territories and countries of the two parties on the continent of America (The country within the limits of the Hudson's Bay Company on excepted) and to navigate all the lakes, rivers and waters thereof and freely to carry on trade and commerce with each other.
> includes the

The Jay Treaty was considered by the Supreme Court of Canada in 1956 in the case of *Francis* v. *The Queen,* [1956] S.C.R. 618, 3 D.L.R. (2d) 641, 56 D.T.C. 1077. This case stands for the proposition that in 1956, the provisions of Article 3 of the Jay Treaty and Article 9 of the Treaty of Ghent were not enforceable because there was no Canadian legislation implementing the terms of the treaty so as to make those terms part of the domestic law of Canada. Mr. Justice Rand explicitly declined to consider the question of whether the treaty rights had been extinguished stating that “Whether, then, the time of its expiration has been reached or not it is not here necessary to decide.”

Section *35(1)* of the *Constitution Act, 1982* reads as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

In the case of *R.* v. *Vincent* a decision of the Ontario Court of Appeal, released on January 22, 1993 and as yet unreported [reported *supra* at p.165], it was held that the Jay Treaty is not a treaty within the meaning of paragraph (1) of s.35 and that the provisions of Article III do not confer treaty rights under the meaning of s.35(l). This is a case where the appellant, a member of the Huron Band of Lorette was found guilty of a breach of the *Customs Act,* S.C. 1986, c. 1. She had been charged with illegally importing into Canada tobacco in contravention of s.155 of the *Customs Act.* The appellant contended that she was exempted from customs duties by virtue of the Jay Treaty of 1794 as well as other treaties and promises of the same period. In reaching this decision the court distinguished between international treaties such as the Jay Treaty where the Indians were not parties but beneficiaries whose rights could be cancelled at any time; and treaties that are concluded with Aboriginal peoples where rights actually belong to the Aboriginal people and confer justiciable rights.

In *R.* v. *Sparrow,* [1990] S.C.R. 1075 at 1091, [1990] 3 C.N.L.R. 160 at 169, [1990] 4 W.W.R. 410, 70 D.L.R. (4th) *385,46* B.C.L.R. (2d) 1, 56 CCC. (3d) 263, 111 N.R. 241:

> The word existing makes it clear that the rights to which s.35(1) applies are those that were in existence when the *Constitution Act, 1982* came into effect.

IV. Conclusions

In mounting a constitutional challenge, the applicant submits that s.9(l) of the *Immigration Act* is inconsistent with her constitutionally protected Aboriginal and treaty rights. The treaty rights referred to in the application are the rights contained in the Jay Treaty of 1794. The cases would appear to indicate that the Jay Treaty does not confer or create rights in favour of individuals such as the applicant or groups. That being the case, then the applicant's Aboriginal rights would be the relevant consideration during the hearing of the application. It is the existence of Aboriginal rights to freely pass on either side of the boundary line and not the terms of the Jay Treaty that form the main basis for the application.

The court at this stage lacks sufficient facts to decide upon the merits of such Aboriginal rights. It does, however, recognize that there is a serious question to be tried in this regard and it cannot be said that the applicant's Charter argument is specious. The nature and extent of the Aboriginal

rights which existed at the time of the *Constitution Act, 1982* is an argument that will be fully developed at trial and the applicant should not be deprived of her day in court.

The injunction, if not granted, would result in irreparable harm to the applicant in that it would deprive her of access to her young children and family in Red Lake, Minnesota with the result that there would be psychological impairment to the young family unit. Such harm could not be compensated in damages. Similarly, if she was to reside in Minnesota pending the hearing of the application, the relationship with her common-law spouse and young family in Ontario would suffer irreparable harm.

The balance of convenience also favours the applicant. Refusal of the interlocutory injunction will result in greater harm to the applicant than to the respondent. The applicant in addition to not seeing her children and family in Red Lake, Minnesota, would also be deprived of her medical and dental benefits in that State. The harm to the respondents in the granting of injunctive relief would be minimal. It would involve exempting the applicant temporarily from the impugned legislation. This involves a consideration of the public interest and their perception of the administration of the immigration process. In this case we are dealing with a matter involving Indigenous North American people.

Accordingly, there will be an order for an interlocutory injunction restraining the respondent Minister of Employment and Immigration from proceeding with the Immigration Inquiry pending the hearing of the herein application. It is further ordered that the respondent Minister of Employment and Immigration permit the applicant to leave and re-enter Canada and thereby pass between Ontario and Minnesota pending the final disposition of the herein application.

Order to issue accordingly.