Court File No. T-381-93

IN THE FEDERAL COURT OF CANADA

TRIAL DIVISION

B E T W E E N:

DEBORAH COYNE

Plaintiff

- and -

HER MAJESTY THE QUEEN, THE GOVERNOR GENERAL OF CANADA, THE ATTORNEY GENERAL OF CANADA, and THE ATTORNEY GENERAL OF NEW BRUNSWICK

Defendants

REPLY OF THE
ATTORNEY GENERAL OF NEW BRUNSWICK

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TABLE OF CONTENTS

REPLY

1. The Attorney General of New Brunswick joins issue with the Plaintiff on the arguments made in response to the motions to strike herein.

2. In response to the Plaintiff's general submission that the "plain and obvious" test applies to all the grounds on which the Defendants' motions are based, the Attorney General of New Brunswick submits that this test does not apply to the issues of jurisdiction and standing. It is trite law that a court must be fixed with jurisdiction in relation to the matter and parties before it. Questions of law, such as jurisdiction, must stand or fall on their own merits and irrespective of considerations applicable to motions to strike under Rule 419 of the Federal Court Rules.

> **Trainor Surveys (1974) Ltd.**, above, N.B. Book of Authorities, TAB 9, at p. 232, paragraphs 9, 10 and 11.

3. The Attorney General of New Brunswick will respond to the Plaintiff's arguments in the order presented by her, namely

(a) Merits of the claim;

(b) Standing;

(c) Jurisdiction of the Court; and

(d) Abuse of process.

(a) Merits of the Claim

4. In response to the Plaintiff's arguments on this issue, the Attorney General of New Brunswick acknowledges that the test to be applied is that the Plaintiff's Statement of Claim discloses no reasonable cause of action: It must be plain and obvious that the action contains a radical defect or is without foundation.

> **Hunt v. Carey Canada Inc.**, above, Plaintiff's Book of Authorities, TAB 1.

5. The Attorney General of New Brunswick submits that the Plaintiff's contentions are not in accord with accepted principles of constitutional interpretation and that the interpretations placed on the New Brunswick amendment and s. 43 are manifestly untenable and in conflict with the highest authorities. As these defects are plain, obvious and fundamental, the Plaintiff's action cannot succeed.

6. The Plaintiff's arguments in support of her pleadings present irreconcilable contradictions, including the following:

(1) On the one hand, the Plaintiff contends that s. 43 is restricted to amendments that, in form and substance, change existing provisions. On the other, she acknowledges that s. 43 would allow other provinces to opt into the scheme of sections 16-22, which provisions do not apply to them.

It is submitted that when s. 43 is seen in the context of the other amending procedures in Part V, it must be so construed at least to include additions to existing provisions that apply to one or more but not all provinces. Otherwise, a decision to opt into such provisions as sections 16 to 20 would require the unanimity formula.

(2) The Plaintiff contends that by affirming a role for the New Brunswick Legislature, s. 16.1(2) confers new powers, yet the Plaintiff acknowledges that by affirming existing Aboriginal rights, s. 35(1) does not create new rights.

It is submitted that the use of the word "affirmed" is simply a recognition of existing power not a conferring of new power.

Peter W. Hogg: *Meech Lake Constitutional Accord Annotated*, (Carswell, 1988), at pp. 12-14.

Further, s. 31 applies to this provision and accordingly the Plaintiff's contention that legislative powers are extended by the New Brunswick amendment is without foundation.

7. The Plaintiff's claim that an interpretation of s. 43 that allows an amendment importing collective rights into the **Charter** poses the threat of proliferation of bilateral amendments, produces a "patchwork quilt" and impairs the structure of the **Charter**, is more analogous to the **Operation Dismantle** claim than to the circumstances of the **Hunt** case to which the Plaintiff refers in paragraph 5 of her Memorandum of Argument.

8. In **Hunt**, the issue was whether the Plaintiff could proceed with an action for the tort of conspiracy. The question was whether, on the pleadings, a sufficient factual foundation was laid to support the claim for an extension of the tort. The Court concluded that there were sufficient facts which, if accepted, would allow the Trial Judge to consider the issue of the extension of the tort of conspiracy. The case had a factual basis on which the argument could be built.

Hunt v. Carey Canada Inc., above at p. 990.

9. In **Operation Dismantle**, the claim was for a declaration that **Charter** rights had been violated because of the threat posed by weapons testing in Canada. That claim was premised on assumptions and hypotheses about how sovereign nations would react to Canada testing weapons. The Court held that such assumptions and hypotheses were not capable of prediction on the basis of the best evidence to any degree of certainty approaching probability and that the nature of the reaction to the federal government's decision to permit the testing could only be a matter of speculation. Because the plaintiffs

in that case could never prove the causal link between the decision to permit the testing and the increase in the threat of conflict, the action was struck out.

> **Operation Dismantle v. The Queen**, above, N.B. Book of Authorities, TAB 20, Dickson, J. at pp. 454, 455; Wilson, J. at p. 486.

10. Similarly, in the present case, the Plaintiff's action is not founded on facts but is premised on legal argument, opinion and belief. Therefore, the legal argument itself must be tested with a view to seeing whether it contains a reasonable foundation to support the declaration the Plaintiff seeks. It is submitted that any reasonable examination reveals that, like the hypotheses in **Operation Dismantle**, the Statement of Claim in this action provides only a speculative basis on which the Court could grant the declaratory relief sought by the Plaintiff.

11. In response to the Plaintiff's argument that the New Brunswick amendment is surrounded by, but does not relate to, the subject matter which pervades sections 16 to 20, the Attorney General of New Brunswick submits that this contention is also without foundation because it overlooks the nature and purpose of sections 16 to 20, particularly the declaration of equality and principle of advancement contained in s. 16.

> **Roger Tassé et al.**, Plaintiff's Book of Authorities, TAB 13, pp. 3-5.

12. The Plaintiff's submissions in relation to language guarantees are narrow and technical to the point of avoiding the fundamental purpose and importance of the guarantees themselves. In interpreting s. 23 of the **Manitoba Act, 1870** the Supreme Court of Canada makes the point:

> **Section 23 of the *Manitoba Act, 1870* is a specific manifestation of the general right of Franco-Manitobans to use their own language. The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus live in society.**
>
> ...
>
> **The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government.**
>
> **Re Manitoba Language Rights**, [1985] 1 S.C.R. 721 at 744, 745.

13. Moreover, the Plaintiff's position ignores the nature of s. 16 of the **Charter**, described as the fundamental principle of linguistic equality, the cornerstone or pivot of the language provisions that follow.

> Tarnopolsky and Beaudoin, *Canadian Charter of Rights and Freedoms*, Commentary, (Carswell, 1982), at pp. 446-450.

14. Further, the location of the New Brunswick amendment is not accidental: It builds upon the above principles and, more particularly, is an amendment in relation to s. 16(2) of the **Charter** which provision as well as the amendment itself applies only to the Province of New Brunswick. It is, therefore, an amendment properly made under s. 43 of the **Constitution Act, 1982**, reasonably interpreted.

15. In response to the Plaintiff's contention that the New Brunswick amendment changes s. 23 of the **Charter** (which, subject to s. 59, applies to all provinces), the Attorney General of New Brunswick submits that such a contention is patently erroneous. The New Brunswick amendment is consistent with the very purpose of s. 23, the preservation and promotion of the two official languages and of their respective cultures in New Brunswick. Like s. 23, the New Brunswick amendment contains a remedial aspect and seeks to give effect to the concept of "equal partnership" of the two official language groups. While s. 23 seeks to achieve its goal by granting limited minority language educational rights to certain persons throughout Canada where numbers warrant, the New Brunswick amendment seeks to achieve this goal by means of advancing the concept of equality that is contained to a minimal but significant degree in s. 16(3) of the **Charter**. There is no conflict or inconsistencies between the two provisions.

> **Mahé v. Alberta**, above, N.B. Book of Authorities, TAB 18 at p. 362.

16. It is respectfully submitted that the Plaintiff's contention that the incorporation of collective rights cannot be accommodated in the **Charter** runs counter to findings by the Supreme Court of Canada that one part of the Constitution ought not to be interpreted so as to invalidate or impair another part. It also contradicts the Plaintiff's contention that "there is no constitutional obstacle to enacting an amendment of this nature provided the proper amending procedure is followed".

> **Reference re Bill 30, An Act to Amend the Education Act (Ont.)**, [1987] 1 S.C.R. 1148.
>
> Plaintiff's Memorandum of Argument, paragraph 44.

17. In any event, if by extending the concept of equality of the two official languages contained in s. 16 of the **Charter** to the concept of the equality of the two official language

communities, the New Brunswick amendment imports a new dimension to that concept, including particular rights flowing from that equality, there is nothing in s. 43 that prohibits such importation as the added dimension would relate only to the "province to which the amendment applies". It is respectfully submitted, therefore, that it is plain and obvious that the Plaintiff's contention in this regard is without foundation and could not succeed at trial.

18. The Attorney General of New Brunswick acknowledges the overriding purpose of the Charter to protect individual rights and liberties. But the Constitution protects individuals in various ways. It embodies a set of principles and values, including those reflected in the constitutional preambles, the language provisions themselves, sections 1, 3, 15(2), 27, 33, 35 of the **1982 Act** and 93 and 94 of the **1867 Act.**

19. It is submitted, therefore, that the Plaintiff's claim discloses no reasonable cause of action. Rather, it discloses an academic non-justiciable argument seeking a legal conclusion in relation to collective rights and the Constitution. And that argument is fundamentally flawed - at least in the context of constituting a reasonable cause of action.

(b) Standing

"Serious Issue"

20. In response to the Plaintiff's arguments on this issue, the Attorney General of New Brunswick refers to his submissions outlined in paragraphs 21 to 31 of his Memorandum of Argument and says further that it would appear that the real concern of the Plaintiff is her preoccupation with the proliferation of bilateral amendments. As has been submitted, this is a political not justiciable issue and is not a matter that provides the Plaintiff with the status to initiate an action.

Plaintiff's Memorandum of Argument, paragraph 42.

21. Moreover, in keeping with her views as to the need for broader public scrutiny in relation to constitutional amendments, the Plaintiff contends that the New Brunswick amendment should have been promulgated in accordance with the general amending formula. It is submitted however that as the New Brunswick amendment relates to the use of the English and French languages, and if s. 43 is not the appropriate formula, then the amendment would require unanimous consent in accordance with s. 41 of the **Constitution Act, 1982.**

Plaintiff's Memorandum of Argument, paragraph 43, 44.

22. The contention that New Brunswickers would be no more affected in the event the New Brunswick amendment is declared unconstitutional is equally flawed. On its face the amendment relates only to New Brunswickers and the Plaintiff has failed or omitted to demonstrate its impact on other Canadians.

"Plaintiff's Interest"

23. The Plaintiff seeks to establish an interest by virtue of her academic involvement and organizations opposing certain constitutional agreements. That interest is distinct from an interest that results from being directly affected in a material way as demonstrated in the cases in which public interest has been accorded to individuals.

> See also **Conseil du Patronat du Québec Inc. v. Quebec (A.G.)** (1988), 55 D.L.R. (4th) 523 (Que. C.A.) affirmed in [1991] 3 S.C.R. 685;
>
> **C.A.R.A.L. v. Nova Scotia (A.G.)** (1990), 96 N.S.R. (2d) 284 (N.S. C.A.).

"Immunization"

24. It is submitted that in order to test the question of probable litigation, one must assume that the Plaintiff's action raises a serious and important issue. In the absence of such an assumption it must be acknowledged that no probabilities are raised in relation to litigation.

25. The rationale for granting standing in public interest cases is to prevent the immunization of important public issues from judicial review. Justice Cory's statement in the **Canadian Council of Churches** to which the Plaintiff refers at paragraph 47 of her Memorandum of Argument must be seen in that context. The point is not so much who initiates the litigation but rather whether it is likely to be initiated at all. The cases to which the Attorney General of New Brunswick referred at paragraph 40 of his Memorandum of Argument indicates that it is more likely than not that litigation would be initiated by those directly affect. Whether such litigants are governments seeking to clarify the obligations imposed upon them or individuals who consider their rights to be affected either by governmental action or inaction, it is reasonable to predict that litigation is more probable than not.

26. Further, the Court can take judicial notice of the sensitive nature of the issue of language rights in Canada. It is not implausible, therefore, to suggest that those who consider, like the Plaintiff, that the New Brunswick amendment goes too far in promoting language rights of groups, would seize the occasion to raise the issue of the constitutionality of the amendment. As well, if the Plaintiff's contentions were valid, governments who object to the inclusion of collective rights (as, for example, conferring special status) would, be quick to challenge the constitutionality of the amendment.

27. The Attorney General of New Brunswick, therefore, submits that the Plaintiff has failed to demonstrate, on the face of the pleadings, that there is a serious justiciable issue raised, that she is directly affected by the amendment or, if not, that she has a genuine interest in the sense in which that interest has been described by the courts. Nor has the Plaintiff shown that it is unlikely that those directly affected might be expected to initiate litigation.

(c) Jurisdiction of the Court

28. The Plaintiff acknowledges the statement of Justice Estey in **Northern Telecom** that the **Constitution Act, 1867** was not one of the "laws of Canada" within the meaning of s. 101, but offers no authority for the proposition that that meaning has evolved or changed as a result of the "Patriation" of the Constitution in 1982. On the contrary, there is abundant authority confirming Justice Estey's characterization.

> See Ghislain Otis, *Les obstacles constitutionnels à la juridiction de la cour fédérale en matière de responsabilité publique pour violation de la charte canadienne* (1992), 71 Can. Bar Rev. 647, at pp. 657 to 663.

29. It is trite to state that the **Constitution Act, 1982** was not enacted by the Parliament of Canada and cannot, therefore, be part of the "laws of Canada" within the meaning of s. 101 of the **1867 Act**. Furthermore, the Plaintiff's contention that s. 52 of the **Constitution Act, 1982** brings the Constitution within the meaning of "laws of Canada" in s. 101 is patently untenable. Clearly, the purpose of s. 52, in declaring the primacy of the Constitution, includes providing a prescription for conflicts or inconsistencies between a constitutional provision and an ordinary statutory provision enacted by either level of government within the Federation. It would therefore make no sense for s. 52 to refer to the Constitution of Canada as "the supreme law of Canada" yet at the same time equate it with a law enacted by the Parliament of Canada, as suggested by the Plaintiff.

30. The Attorney General of New Brunswick, therefore, maintains his submission that the tests acknowledged to apply to such cases by the Plaintiff (and set out in paragraph 52 of her Argument) have not been met by the Plaintiff in this action: The issue initiated by this action is restricted to an interpretation of particular constitutional provisions and the Plaintiff is unable to point to any statutory grant of jurisdiction by the federal Parliament authorizing the Court to guide that interpretation.

31. Further, the Plaintiff has pointed to no relevant body of federal common law which nourishes a statutory grant of jurisdiction. It is Part V of the **Constitution Act, 1982** which alone authorizes the Governor General to make proclamations promulgating amendments.

Section 52(3) of the **Constitution Act, 1982** is not ambiguous in relation to how amendments may be made to the Constitution of Canada and s. 48 further provides confirmation as to the conduct of the Governor General in relation to the amending procedure.

32. In response to the argument contained in paragraph 65 of the Plaintiff's Memorandum of Argument, the Attorney General of New Brunswick would refer to **Cree Regional Authority v. Canada**, [1991] 3 F.C. 533 (leave to appeal to S.C.C. refused July 4, 1991), in which the Federal Court of Appeal held that the source of a body's jurisdiction or powers, rather than its document of appointment, was relevant to the determination of the issue of jurisdiction.

33. It is therefore submitted that there is no foundation whatsoever for the Plaintiff's contention (in paragraph 65 through 67 of her Memorandum of Argument) that the law on which this case is based and on which the constitutional validity of the New Brunswick amendment must be determined includes a relevant body of federal common law, including English constitutional law or Crown law.

> **Trainor Surveys (1974) Ltd.**, above, N.B. Book of Authorities, TAB 9, at p. 232, paragraphs 9, 10.

34. In any event, this contention by the Plaintiff does not appear in the Statement of Claim. Rather the gravamen of her claim appears to be set out in paragraph 21 of the Statement of Claim.

35. Paragraph 69 of the Plaintiff's Memorandum of Argument underscores the lack of jurisdiction in this Court to deal with this action: The Plaintiff has sued the Attorney General of New Brunswick but argues that no relief is sought against this Defendant and that "if the New Brunswick government does not wish to attorn to the jurisdiction of the Federal Court" it may apparently withdraw from the action with the consent of the Plaintiff. Recent pronouncements from the Federal Court of Appeal have reiterated the principle that a concession on a point of law by a party in an action, in particular a question relating to the issue of jurisdiction, cannot bind the Court.

> **Salibian v. Canada** [1990] 3 F.C. 250 at 252.

36. In these circumstances, it is submitted that it is abundantly clear that this Honourable Court has no jurisdiction to entertain the Plaintiff's action.

(d) Abuse of Process

37. In response to the submissions made by the Plaintiff in paragraphs 70 to 72 inclusive of her Memorandum of Argument, the Attorney General of New Brunswick refers to his submissions in paragraphs 54 to 56 inclusive of his Memorandum of Argument and maintains his contention that the action constitutes an abuse of process of this Court.

ORDER SOUGHT

38. The Plaintiff argues, in the alternative, for leave to amend her Statement of Claim but gives no indication as to how she would so amend the Claim and has provided no grounds on which such leave might be granted.

39. For the reasons set out in his Memorandum of Argument and this Reply, the Attorney General of New Brunswick respectfully requests that the Plaintiff's action herein be dismissed.

All of which is respectfully submitted this 18th day of June, 1993.

Bruce Judah

Anne Richard

of Counsel on behalf of the Attorney General of New Brunswick, Defendant