Federal Court Cour fédérale

Date: 20260220

Docket: T-2439-97

Citation: 2026 FC 247

Ottawa, Ontario, February 20, 2026

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

THE LOUIS BULL BAND, CHIEF SIMON THREEFINGERS, JONATHAN BULL, JOSEPH DESCHAMPS, CLYDE ROASTING, RUSSELL THREEFINGERS, HARVEY ROASTING, ELAINE ROASTING, TELLY RAINE and IRVIN BULL, THE CHIEF AND COUNCILLORS OF THE LOUIS BULL BAND SUING IN THEIR REPRESENTATIVE CAPACITY ON BEHALF OF ALL THE MEMBERS OF THE LOUIS BULL BAND

Plaintiffs

and

HIS MAJESTY THE KING IN RIGHT OF CANADA

Defendant

ORDER

UPON the trial starting on September 2, 2025;

AND UPON the Plaintiffs closing their case;

AND UPON the Defendant tentatively closing their case on February 5, 2026, pending the resolution of two motions before the Court, including the present one;

AND UPON the Defendant seeking the following orders pursuant to Rules 3(a), 53(1) and (2), 258(3)(d) and 275 of the *Federal Courts Rules*, SOR/98-106:

1. An order that the parties' memoranda of fact and law and the lists of evidence before this Court in *Louis Bull First Nation v Canada*, 2015 FC 1066 (the "2014 Summary Judgment") be entered as exhibits at trial; and

2. An order compelling the Plaintiffs to confirm their statement of issues for determination at trial within two days, and providing justification for any changes;

AND UPON this Court previously ruling in *Louis Bull First Nation v Canada*, 2025 FC 1553 [*Louis Bull 2025*], that the affidavits and cross-examination transcripts of those affidavits from the 2014 Summary Judgment would not be adduced as evidence at trial (at para 103);

AND UPON review of the Defendant's and Plaintiffs' written submissions filed with the Court and oral submissions heard on February 18, 2026, summarized below:

1. The Defendant submits that:
    a. It has plead that some of the Plaintiffs' claims are barred by estoppel, laches and limitations;
    b. Canada specifically pleads issue estoppel, cause of action estoppel and *res judicata*;

c. These pleadings can be found in its Further Amended Statement of Defence, including at paras 5-6, 48-49, 71 and 74;

d. The requested documents from the 2014 Summary Judgment are relevant to determine the issues previously advanced by the parties in the pleadings, particularly the issues of limitations and estoppel;

e. The parties need to refer to the 2014 Summary Judgment evidence;

f. The requested documents are not proffered for their truth, rather, they are proffered to determine what was and was not before the Court in the 2014 Summary Judgment;

g. The memoranda of fact and law provide context to the 2014 Summary Judgment;

h. The lists of evidence provide a record of evidence before the Court in the 2014 Summary Judgment;

i. The Court is permitted to review its own records from the 2014 Summary Judgment, even if those records have not been formally entered into evidence (*Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367 [*Petrelli*]);

j. The Court can look behind a formal order and reasons for judgment when determining if that order already decided an issue;

k. The Defendant wants to confirm the Plaintiffs' statement of issues for trial;

l. Pre-trial conference disclosure is an important aspect of trial preparation because it prevents trial by ambush;

m. Parties have an obligation to be clear about what is at issue during trial;

n. The Defendant believes that the Plaintiffs' statement of issues may have changed slightly;

o. Notably, the Plaintiffs' statement of issues for trial does not mention cultural loss and related damages, but they have called expert witness Robin Gregory at trial who testified about cultural damages;

p. Additionally, changes to the Plaintiffs' pleadings since 2019 are not reflected in the pre-trial memorandum;

q. Canada relied on the Plaintiffs' pre-trial memorandum to structure its litigation strategy and to take instructions; and

r. As a matter of fairness, the Plaintiffs should be ordered to confirm their statement of issues to be determined at trial, and if that statement has changed from before the trial and there is no justification for the change, then the Plaintiffs should be held to their pre-trial statement of issues;

2. The Plaintiffs submit that:

a. The Defendant has cited no legal authority justifying its proposed orders;

b. Rules 3(a), 53(1)-(2), 258(3)(d) and 275 do not permit the Defendant's proposed orders;

c. The Defendant has not complied with Rule 286, which requires them to bring this evidentiary motion prior to trial;

d. The Defendant has missed its opportunity to introduce the memoranda from the 2014 Summary Judgment proceeding into evidence at trial, as set out in this Court's Order in *Louis Bull 2025* at paras 102-103;

e. The Defendant should have included the 2014 Summary Judgment memoranda and lists of evidence in its request that is the subject of the *Louis Bull 2025* decision, not now after the Plaintiffs have closed their case;

f. Moreover, in the *Louis Bull 2025* decision, the Court said that it should not weigh and balance what the 2014 Summary Judgment judge had in their mind;

g. Admitting the Defendant's proposed evidence now would prejudice the Plaintiffs because they have already closed their case;

h. The parties agree on the general principle that the Court can rely on extraneous materials with notice to the parties when determining *res judicata*, but the Defendant's motion prejudices the Plaintiffs because they would have prosecuted their case differently if they knew the memoranda would become evidence at trial;

i. In any event, it is inappropriate for the Court to look at the written submissions from the 2014 Summary Judgment when it can review the order and reasons;

j. The Defendant has not raised the issue of *res judicata* or issue estoppel in its pleadings and cannot introduce those submissions through the memoranda;

k. As for the pre-trial statement of issues, the Defendant's motion materials have not pointed to any inconsistencies, except that during oral submissions they say that the Plaintiffs' pre-trial statement of issues did not include cultural loss and damages;

l. However, the parties' joint table of issues, which Justice Gleeson ordered them to provide to the Court no later than August 19, 2025, includes the cultural issues;

m. Additionally, the pre-trial memoranda are limited to 30 pages, and it is understandable for the document to not canvas every issue;

n. The Plaintiffs' consistent position is that they will be relying on their pleadings; and

o. The Defendant has not been surprised because they consented to the Plaintiffs' amended pleadings in 2019 and even filed an amended statement of defence;

AND UPON considering that a party may tender court records as evidence pursuant to section 23 of the *Canada Evidence Act*, RSC 1985 c C-5 [*CEA*];

AND UPON noting that the Defendant has not adduced the memoranda of fact and law and the lists of evidence used in the 2014 Summary Judgment in this motion in compliance with section 23 of the *CEA*;

AND UPON considering that a court may view its own records, and if a court does so, it should notify the parties (*Petrelli* at paras 36, 38);

AND UPON noting that records contained in the 2014 Summary Judgment are records of this Court;

AND UPON considering *Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34 [*Apotex*], a case where the Federal Court of Appeal, approximately one month before the commencement of the trial, considered two appeals: 1) the defendant's appeal of a Federal Court judge's order upholding a prothonotary's order, dated July 30, 2010, which struck out some of the defendant's amended pleadings (though the defendant could bring a motion to amend its pleadings further); and 2) the plaintiffs' appeal of a Federal Court judge's order overturning a prothonotary's order, dated October 26, 2010, which refused the defendant's request to amend its pleadings (at paras 1-3);

AND UPON considering the reasons in *Apotex*:

1. The Federal Court of Appeal decided both appeals on the basis of the second appeal since both matters were closely tied together (*Apotex* at paras 10-12). The first appeal was dismissed and the second appeal was granted (*Apotex* at paras 39-40);
2. The case was about a proposed amendment to pleadings in the pre-trial context;
3. The appeal was granted because for almost a decade the defendant conducted itself in a manner that suggested the matters that were the subject of the proposed amendment were not real questions in controversy (*Apotex* at para 34), such determination being based on the following factors:
    a. The justification for the amendment was based on a vague, unparticularized pleading in 2004 (*Apotex* at para 21);
    b. The defendant knew that the Court understood the 2004 pleading was narrow and took no steps to clarify the situation (*Apotex* at paras 24-25);
    c. The proposed amendments were not at play during the discoveries conducted on September 2, 2005 (*Apotex* at para 24); and
    d. The proposed amendments were not particularized in the 2007 pre-trial memorandum (*Apotex* at paras 27, 29); and
4. The Federal Court of Appeal said that parties *can* be held accountable to their representations at a pre-trial conference (*Apotex* at para 28);

AND UPON noting that *Apotex* can be distinguished on the basis that it is a case dealing with civil procedure in the pre-trial context and not within the context of a trial that is nearing its conclusion;

AND UPON determining that the Defendant's motion for an Order entering the parties' memoranda of fact and law and the lists of evidence before the Court in the 2014 Summary Judgment as evidence at trial is dismissed:

1. As the parties have acknowledged, there remains a live issue as to whether the 2014 Summary Judgment addressed the Division claim. A similar request for materials from the 2014 Summary Judgment, specifically certain affidavits and cross-examinations on the affidavits, was made by the Defendant but that request was dismissed on September 22, 2025 (*Louis Bull 2025* at paras 95-97, 102). I agree with the Plaintiffs that the proper opportunity for the Defendant to attempt to adduce the 2014 Summary Judgment memoranda of fact at law was during the *Louis Bull 2025* motion. Allowing them to adduce this material now is prejudicial to the Plaintiffs, who have since closed their case. Moreover, the Defendant has not complied with the *CEA* to adduce the proposed evidence and I decline to exercise my power to view the Court's own records; and
2. Despite the Defendant's submission that the parties' memoranda of fact and law and the lists of evidence from the 2014 Summary Judgment will aid the Court determine *res judicata* by providing context, I previously determined that I am not going to attempt to divine what was in the 2014 Summary Judgement judge's mind (*Louis Bull 2025* at para 83). Admitting the proposed evidence would be akin to me attempting to divine what was in that judge's mind. With that said, the parties are permitted to make arguments relating to limitations, estoppel and *res judicata* in their closing submissions at trial, which are presently scheduled from June 1 to June 10, 2026. The parties are also permitted to make submissions on their positions regarding the scope

and meaning of the 2014 Summary Judgment Order and Reasons, including what "brokering the surrender" means;

AND UPON determining that the Defendant's motion for an Order compelling the Plaintiffs to confirm their statement of issues for determination at trial within two days, and providing their justification for any changes, is dismissed:

1. The Defendant is correct that pursuant to Rule 258(3)(d) and *Apotex,* there is no place for strategic non-disclosure or purposeful non-clarification. However, there is no authority that requires a party, prior to closing submissions at or near the conclusion of a trial, to clarify and provide its reasons for any potential divergence from the statement of issues identified in its pre-trial memoranda. Moreover, I am not persuaded that cultural loss issues in this case have caught the Defendant by surprise as the Defendant was aware of the Plaintiffs' expert report and tendered its own expert in response to the Plaintiffs' expert; and
2. In closing submissions, the parties are entitled to rely on the evidence adduced at trial to determine whether or not any or all claims set out in their pleadings are made out. If a party's claim has shifted, then the parties are permitted to address that, and other issues arising from the trial, in their closing submissions.

THIS COURT ORDERS that:

1. The Defendant’s motion is dismissed; and

2. The Plaintiffs are awarded costs in the cause.

"Paul Favel"
Judge