Canada v. Stoney Band, 2005 FCA 15 (CanLII)

Date:	2005-01-14
Docket:	A-64-04
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CORAM: DÉCARY J.A.

ROTHSTEIN J.A.

MALONE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

STONEY BAND

Respondent

Heard at Calgary, Alberta, December 16, 2004.

Judgment delivered at Ottawa, Ontario, January 14, 2005.

REASONS FOR JUDGMENT BY: ROTHSTEIN J.A.

CONCURRED IN BY: DÉCARY J.A.

MALONE J.A.

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REASONS FOR JUDGMENT

ROTHSTEIN J.A.

INTRODUCTION

[1] Pursuant to a status review, a prothonotary of the Federal Court dismissed the Stoney Band's action for delay (Order, T-1627-88, July 29, 2003). A Federal Court judge allowed an appeal from her decision and ordered that the action should continue as a specially managed proceeding (2004 FC 122 (CanLII), (2004), 245 F.T.R. 288). This is an appeal by the Crown from the judge's order.

FACTS

[2] The action was commenced on August 22, 1988. The Statement of Claim alleges improprieties concerning the transfer of three parcels of surrendered reserve land by the Crown to Calgary Power Company (now TransAlta Utilities Corporation). The three parcels of land are known as the "Ghost Lake", "Horseshoe" and "Kananaskis" lands. The Horseshoe lands were transferred in 1907, the Ghost Lake lands were transferred in 1929 and the Kananaskis lands were transferred in 1914 with certain formalities not completed until 1947.

[3] By letter dated November 3, 1988, counsel for the Band confirmed that although the action had been commenced, it was not the Band's intention to proceed with the action but rather to proceed through a "Specific Claims" process. Although the "Specific Claims" process was not explained in the material before this Court, I infer that it is a mechanism established by the Crown for the settling of Aboriginal claims as an alternative to proceeding in the Court.

[4] All three tracts of land were considered for the "Specific Claims" process. Ultimately, only the Ghost Lake lands were accepted into the "Specific Claims" process in 1989. In 1991, the Ghost Lake claim was settled and a Notice of Discontinuance in respect of those lands was filed on April 17, 1991.

[5] In November 2002, an agreement was finalized between the Stoney Band and TransAlta concerning the Horseshoe lands. While it is not entirely clear from the record, it appears that the Band may now wish to make a residual claim in respect of the Horseshoe lands against the Crown. The claim relating to the Kananaskis lands also remains outstanding.

[6] Since the filing of the discontinuance in respect of the Ghost Lake lands in 1991, the Band has taken no further steps to move the action forward.

[7] By letter dated April 10, 2003, counsel for the Band wrote to the Federal Court seeking "to determine and confirm the current status of this matter." This letter appears to have prompted the Court to issue a Notice of Status Review on April 22, 2003. The Band filed written submissions in response to the Notice and, pursuant to a specific invitation from the prothonotary, the Crown also filed written submissions.

[8] As indicated, the prothonotary dismissed the action. On appeal, the motions judge exercised his discretion *de novo* in that the order of the prothonotary, dismissing the action, raised a question vital to the final issue of the case. In his reasons, the learned judge expressly referred to the decision of Hugessen J. in *Baroud v. Canada* 1998 CanLII 8819 (F.C.), (1998), 160 F.T.R. 91, that on a status review the Court needs to be concerned primarily with the reasons the case did not move forward faster and whether those reasons justify the delay that has occurred, and what steps the plaintiff proposes to move the matter forward. Having regard to *Baroud*, the judge concluded that "the reasons why the action has not moved forward with greater dispatch lie entirely at the door of the plaintiff." He also found that "[t]he steps that the Plaintiff proposed before the learned Prothonotary to move the matter forward were rather specious."

[9] The judge observed that *Baroud* also stands for the proposition that, even though a defendant may have been lax and may not have fulfilled all its procedural obligations, these considerations are largely irrelevant in a status review. However, he found that this proposition did not apply to this case and that the conduct of the Crown was relevant. In his view, the fact that this was Aboriginal litigation brought into consideration two principles affecting the relationship between Aboriginals and the Crown - fiduciary duty and honour of the Crown.

[10] Ultimately, the judge decided that fiduciary duty was not a matter he could address on the status review. However, he did conclude that the conduct of the Crown in the litigation was not consistent with the honour of the Crown and that this was determinative of the status review. In the result, he allowed the appeal and ordered that the action be continued as a specially managed proceeding.

ISSUE

[11] There is no dispute that the learned motions judge properly exercised his discretion *de novo* on the appeal from the order of the prothonotary (see *Canada v. Aqua-Gem Investment Ltd.*, 1993 CanLII 2939 (F.C.A.), [1993] 2 F.C. 425 at 462-463 (C.A.) and *Merck & Co. Inc. v. Apotex Inc. (F.C.A.)*, 2003 FCA 488 (CanLII), [2004] 2 F.C.R. 459 at paragraphs 17 and 18 (C.A.)) and that this Court may only interfere with his discretionary decision if it is determined that he did not give sufficient weight to all relevant considerations (see *Reza v. Canada*, 1994 CanLII 91 (S.C.C.), [1994] 2 S.C.R. 394 at 404-405) , or that he considered irrelevant factors (see *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (S.C.C.), [1995] 1 S.C.R. 3 at paragraph 39 and *Ward v. James*, [1966] 1 Q.B. 273 at 293 *per* Denning M.R.).

[12] The issues are whether fiduciary duty or the "honour of the Crown" are relevant considerations on a status review in the case of an Aboriginal action against the Crown and if not, what the appropriate considerations are on a status review.

ANALYSIS

Honour of the Crown

[13] The principle of the honour of the Crown derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation (see *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), 2004 SCC 74 at paragraph 24). It is a core precept that finds its application in concrete practices (see *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), 2004 SCC 73 at paragraph 16). Further, the honour of the Crown is always at stake in the Crown's dealings with the Aboriginal people (see *Haida* at paragraph 16; *R. v. Badger*, 1996 CanLII 236 (S.C.C.), [1996] 1 S.C.R. 771 at paragraph 41) and it will give rise to different duties in different circumstances (see *Haida* at paragraph 18).

[14] Where the Crown exercises discretionary control over specific Aboriginal interests, the honour of the Crown will give rise to a fiduciary duty (see *Haida* at paragraph 18). However, fiduciary duty is not a source of

plenary Crown liability covering all aspects of the Crown - Indian Band relationship. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests (see *Wewaykum Indian Band v. Canada*, 2002 SCC 79 (CanLII), [2002] 4 S.C.R. 245 at paragraph 81).

[15] The honour of the Crown may also be manifest in the generous interpretation of treaty rights (see *Mitchell v. Canada (Minister of National Revenue)*, 2001 SCC 33 (CanLII), [2001] 1 S.C.R. 911 at paragraph 138). Because the Indians did not have the opportunity to create their own written record, the assumption is that the Crown's approach to treaty-making was honourable and therefore the courts interpret treaties flexibly. However, generous rules of interpretation are not intended to be after-the-fact largesse. Rather, their purpose is to look for the common intention between the parties as the way to reconcile the interests of the Indians and the Crown (see *R. v. Marshall*, 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456 at paragraph 14).

[16] The honour of the Crown has also been found to be relevant in cases in which Aboriginal land claims have yet to be determined, requiring the Crown to participate in processes of negotiation and, where appropriate, to consult with and accommodate Aboriginal interests (see *Haida* at paragraph 25).

[17] Finally, in cases of the infringement of Aboriginal rights by the Crown, the Crown must justify its actions by proving that the attainment of a valid legislative objective does not compromise the honour of the Crown (see *R. v. Sparrow*, 1990 CanLII 104 (S.C.C.), [1990] 1 S.C.R. 1075 at 1110). The special trust relationship and responsibility of the government must be the first consideration in determining whether the legislation or action in question can be justified (see *Sparrow* at 1114). Within the analysis of justification, the Crown must address questions relating to minimal impairment, fair compensation in the context of expropriation, and consultation (see *Sparrow* at 1119).

[18] I conclude that, with respect to the honour of the Crown, the concrete practices required of the Crown so far identified by the Supreme Court of Canada in the Aboriginal context are: acting appropriately as a fiduciary; interpreting treaties and documents generously; negotiating, and where appropriate, consulting with and accommodating Aboriginal interests; and justifying legislative objectives when Aboriginal rights are infringed. However, I do not suggest that this is an exhaustive list of the ways in which the honour of the Crown may be manifest.

Application of the Honour of the Crown Principle by the Motions Judge

[19] In his reasons, the motions judge applied the principle of the honour of the Crown to the litigation conduct of the Crown. Although he cited no supporting authorities, he did refer to a paper and a case comment that dealt with the honour of the Crown generally. In concluding that the Crown did not act in a manner consistent with the honour of the Crown principle, he made findings that appear at paragraphs 35 and 36 of his reasons:

[35] On the facts of this matter, the Defendant clearly chose not to file a defence. It chose not to engage in assembly of documentation to support a defence. It chose not to seek from this Court an extension of time to file a defence. It chose not to seek a stay of the action to justify its inaction. Lastly, it chose not to seek an order from this Court dismissing this action for delay.

[36] To turn to colloquial terminology, the Crown, through its representatives, chose to "lie in the weeds" and hoped this action would go away. It chose to "let sleeping dogs lie". Then, only when status review was implemented, and I reiterate, not on the original initiative of this Court, but rather in response to an enquiry from counsel for the Plaintiff, the Crown chose to "pounce" and cite the prejudice that it would suffer by reason of the long delay.

Arguments of the Stoney Band

[20] In support of the judge's application of the principle of the honour of the Crown to status review proceedings, the Stoney Band elaborated to some degree in its factum and in the oral argument of counsel.

As I understand the Band's arguments, they are:

1. because the substance of the Stoney Band's action is grounded in breach of fiduciary duty by the Crown in the disposition of the Band's reserve land, that fiduciary relationship, arising through application of the honour of the Crown principle, permeates the procedure in the litigation. It is a breach of that duty for the Crown to rely on procedural defences and not to agree that the matter should be determined on its merits;

2. failing proof of a fiduciary duty in respect of litigation procedure, a "relational analysis" based on "confidentiality of the relationship" between the Band and the Crown arises. Again, the Crown may not rely on procedural defences, but must agree that the matter should be determined on its merits; and

3. the doctrine of "generous rules of interpretation," which is also applied under the honour of the Crown principle, requires that in the case of a discretionary decision under the status review rules, the exercise of that discretion must be in the best interests of an Indian band.

Consideration of the Honour of the Crown Principle

[21] The circumstances in which the honour of the Crown principle has so far been applied by the Supreme Court of Canada have not included its application to ordinary litigation conduct of the Crown. I have considerable difficulty with the arguments made by the Stoney Band for its application of this principle to such conduct.

[22] In litigation, the Crown does not exercise discretionary control over its Aboriginal adversary. It is therefore difficult to identify a fiduciary duty owed by the Crown to its adversary in the conduct of litigation. It is true that an aspect of the claim against the Crown by the Stoney Band is based on an allegation of breach of fiduciary duty with respect to the surrender and disposition of reserve land. But even if such a fiduciary duty existed, that duty does not connote a trust relationship between the Crown and the Stoney Band in the conduct of litigation.

[23] As indicated in *Haida* at paragraph 18 and in *Wewaykum* at paragraph 81, the term "fiduciary duty" does not create a universal trust relationship encompassing all aspects of the relationship between the Crown and the Stoney Band. Any fiduciary duty imposed on the Crown does not exist at large but only in relation to specific Indian interests.

[24] Focussing specifically on litigation practices, I find it impossible to conceive of how the conduct of one party to the litigation could be circumscribed by a fiduciary duty to the other. Litigation proceeds under well-defined court rules applicable to all parties. These rules define the procedural obligations of the parties. It seems to me that to impose an additional fiduciary obligation on one party would unfairly compromise that party in advancing or defending its position. That is simply an untenable proposition in the adversarial context of litigation. Even where a fiduciary relationship is conceded, the fiduciary must be entitled to rely on all defences available to it in the course of litigation.

[25] The suggestion by the Band that the invoking of procedural defences by the Crown is inconsistent with the honour of the Crown appears to me to be contrary to existing Supreme Court of Canada jurisprudence. Where equitable duties and remedies are claimed against the Crown by Indian bands, enforcement is subject to the usual equitable defences including *laches* and acquiescence (see *Wewaykum* at paragraphs 108-110). Statutory limitation periods have been applied to bar claims for equitable remedies including breach of fiduciary duty against the Crown by an Indian band (see *Wewaykum* at paragraphs 131 and 135-136). Indeed, the Stoney Band concedes that existing Supreme Court jurisprudence provides that statutory limitation periods apply to Aboriginal litigation against the Crown. If a limitation period defence may be invoked by the Crown, it is difficult to understand why other procedural defences may not be.

[26] However, the Band draws a distinction between defences arising under statutes, i.e. limitations, and those within the discretion of the Court, such as *laches* and acquiescence, which is a general principle leaving wide scope for the exercise of discretion (see Robert J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Books Inc., 2000) at paragraph 1.820). Since the Supreme Court has indicated in *Wewaykum* that

equitable defences, including *laches* and acquiescence, may be invoked by the Crown in Aboriginal litigation, it would follow that the Crown should be able to invoke all procedural defences, discretionary or statutory.

[27] The argument that the honour of the Crown requires that the Crown not rely on procedural defences appears to be an attempt to create for Aboriginal litigation against the Crown a new rule pertaining to status reviews, motions to dismiss for delay, and perhaps limitation period defences that otherwise might avail to the Crown. No authority for such a rule was provided to this Court. As indicated, such an approach runs contrary to the express findings in *Wewaykum* that ordinarily *laches* and acquiescence, as well as limitation defences, are available to the Crown in appropriate circumstances.

[28] The Band's second argument, the relational analysis argument, appears to be taken from a Case Comment on *R. v. Marshall* written by W.W. Hurlburt (2000), 38 Alta. L. Rev. 563 and cited by the judge at paragraph 33 of his reasons. In his comment, Hurlburt appears to be somewhat critical of the principle of honour of the Crown, calling it "an undefinable abstract notion stated in almost mystical terms" (at 573). In Hurlburt's view, it would be better to focus on the confidential relationship between the Crown and Indian groups, which may impose on the Crown a duty to adhere to standards higher than those imposed by "ordinary commercial morality."

[29] I have already found that it would be unfair to impose on one party the constraints of a fiduciary obligation in its conduct in litigation. Even if there exists a confidential relationship that imposes on the Crown a duty higher than that imposed by "ordinary commercial morality," it is not suggested by the Band that the duty is higher than a fiduciary duty. For the reasons why the Band's fiduciary argument must be rejected, I find the "relational analysis" argument also to be without merit.

[30] The Band's third argument appears to suggest that the honour of the Crown principle, manifested in generous rules of interpretation, limits the discretion that the Court may exercise on a status review. However, a status review does not involve the interpretation of treaties, statutes or other documents where the doctrine of "generous rules of interpretation" has been applied. It is therefore difficult to see how the doctrine of generous rules of interpretation could have any application in a status review.

[31] In a status review, the Court is exercising discretion. The Court may exercise its discretion in favour of or against the plaintiff. The Stoney Band argues that in Aboriginal litigation against the Crown the rules are different and that any exercise of discretion must be in the best interests of the Aboriginal plaintiff. Such a rule would, for the purposes of Aboriginal litigation against the Crown, fetter the discretionary power of the Court in a status review. No authority was cited in support of such a proposition.

[32] The honour of the Crown principle places obligations on the Crown and not on the Court. In an appropriate case, the Court will impose an obligation on the Crown where it finds that the Crown's actions are not consistent with the honour of the Crown. Unless it is said that the Court must find that the Crown may not rely on procedural defences in Aboriginal litigation, a proposition that I have already rejected, I cannot see how this third argument of the Band places any obligation on the Crown.

[33] I must conclude that nothing in the reasons of the motions judge or in the arguments of the Stoney Band supports the view that the honour of the Crown is relevant in status review proceedings in the Federal Court.

The Test on Status Review

[34] Status review is provided for in rules 380, 381 and 382 of the *Federal Courts Rules*, SOR/2004-283 , s.2. In *Baroud*, Hugessen J. determined that there were two questions with which the Court must be primarily concerned on status review:

1. the reasons why the case has not moved forward faster and whether those reasons justify the delay that has occurred; and

2. the steps the plaintiff proposes to move the matter forward.

He also determined that the fact that a defendant may have been lax and may not have fulfilled all its procedural obligations is largely irrelevant.

[35] The Crown argues that, in addition, prejudice to a defendant in delay is a relevant consideration on status review. The *Baroud* test does not refer to prejudice to a defendant.

[36] A Notice of Status Review is sent by the Court to all parties to the litigation and all parties have an opportunity to make submissions to the Court. Therefore I cannot say that prejudice to a defendant from delay could not be a relevant consideration in a status review proceeding.

[37] On the other hand, in a status review, the Court may, pursuant to rule 382(2)(*a*), "require a plaintiff, applicant or appellant to show cause why the proceeding should not be dismissed for delay...". The primary focus of the status review is therefore on the plaintiff's, applicant's or appellant's explanation for the delay and on the steps proposed to move the matter forward as prescribed by *Baroud*.

[38] Further, if a defendant or respondent considers that delay has caused it prejudice, it is entitled, under rule 167 to make a motion to dismiss for delay. Generally, I would think that if a defendant or a respondent waits for a Notice of Status Review to make a prejudice argument, that argument will have less weight than if brought on a motion to dismiss for delay.

[39] In the present case, the Crown chose not to make submissions in response to the Notice of Status Review issued by the Court. It only made submissions at the specific invitation of the prothonotary. If a defendant or respondent does not consider prejudice to be important enough to cause it to bring a motion to dismiss for delay, or at least to file a response to a Notice of Status Review of its own volition, very little weight will be accorded to the prejudice argument.

[40] The *Baroud* test has been followed in numerous cases in the Federal Court and in this Court. Together with what I have said about prejudice to a defendant or a respondent from delay where applicable, *Baroud* sets forth the test to be applied.

Should this Court Defer to the Result the Judge Would Have Reached Had He Applied the Correct Law?

[41] It is apparent from the reasons of the learned motions judge that he was mindful of the *Baroud* test and only fell into error when he departed from it. At paragraphs 24 and 25 of his reasons, he stated:

[24] Against the test enunciated in *Baroud, supra*, I must conclude that the reasons why this action has not moved forward with greater dispatch lie entirely at the door of the Plaintiff. While it is undoubtedly to the Plaintiff's credit that it sought to achieve settlement of the issues in the action through negotiation and that it, indeed, achieved partial success in this regard, this can hardly be construed as justifying the complete ignoring of the action. The Statement of Claim was not amended to reflect the partial discontinuance filed in 1991. No process was commenced on behalf of the Plaintiff to stay the action based upon the ongoing negotiations. Indeed, no less formal process was adopted on behalf of the Plaintiff to keep the Court advised of ongoing negotiations and the progress of those negotiations. Nor was the evidence before the Court in the least satisfactory that the Defendant was kept apprised of the ongoing negotiations.

[25] The steps that the Plaintiff proposed before the learned Prothonotary to move the matter forward were rather specious. Amendment of the Statement of Claim was long overdue. Nothing was presented to the Court to indicate that the Statement of Claim would be amended to reflect the impact of the negotiated settlement with TransAlta in relation to one of the two outstanding claims. Further, the Plaintiff proposed to impose on the Defendant deadlines for "further steps" that counsel for the Defendant considers to be entirely unrealistic and that certainly reflected a lack of consultation with counsel for the Defendant.

[42] The judge was satisfied that the Band was solely responsible for the delay and that its explanations did not justify that delay. He was not satisfied with the steps the Band was proposing to move the matter forward. Had the judge gone no further, I think it is likely that he would have dismissed the action.

[43] Is it necessary for this Court to exercise its discretion *de novo*, as if it stood in the shoes of the motions judge, or may the Court simply defer to the conclusion that it appears the judge would have reached had he confined his analysis to the application of the correct law? In a case such as this, it is not difficult to extricate and isolate the legal error. Therefore, it is somewhat inviting to defer to the judge's application of the correct law and to the conclusion he would have reached based on the application of that law.

[44] However, the decision here is a discretionary one. While it would appear that the judge would likely have dismissed the action based on application of the *Baroud* test, I cannot be certain that he would have reached that conclusion had he found that the honour of the Crown principle was not relevant on a status review. I do not see how it is possible for this Court to defer when it cannot be certain as to the decision the motions judge would have reached.

[45] Rather, I think there are only two options available to this Court. One is to remit the matter to the motions judge for redetermination of the status review based on application of the *Baroud* test. The other is for this Court to exercise the discretion the judge should have exercised applying the *Baroud* test.

[46] This matter has been outstanding since August of 1988. This Court has the written submissions of the parties. In the circumstances, I think it would not be unfair and would be more expeditious for this Court to finally determine the matter.

The Band's Answer to the *Baroud* Test

[47] The Band's submissions say that the reasons for the delay are:

1. that determining the steps taken by the parties in respect of the land dispositions required a review of documentary evidence and the establishing of oral history, which the Band describes as a "monumental task";

2. that the Band was diligently pursuing substantive issues underlying its claims, which involved: parallel actions in the Federal Court and the Court of Queen's Bench of Alberta; the "Specific Claims" process, which required that actions be held in abeyance during the course of the process; and settlement with TransAlta respecting the Horseshoe lands that, due in part to delay by the Crown, was only concluded in 2002; and

3. that the Federal Court did not issue a Notice of Status Review at an earlier date when a number of notices were issued in respect of land claims in the "Specific Claims" process and with regard to which the actions were allowed to continue.

[48] The Band proposed:

1. to serve and file an Amended Statement of Claim, which it attached to its written submission, reflecting the "significant progress" made by the Band in resolving and clarifying the issues in the action since the original Statement of Claim was filed; and

2. to consult with the Court and the Crown to establish a time for the Crown to file its Statement of Defence and then to pursue the action as provided under the *Federal Courts Rules*.

Application of the *Baroud* Test by this Court

Reasons for Delay

[49] I will first deal with the Band's explanation for the delay. I accept that reviewing the documentary evidence and developing oral history may be time-consuming. However, the action had been outstanding for almost fifteen years when the Notice of Status Review was issued. Any work in respect of the Ghost Lake lands had been completed by 1991, when settlement was reached under the "Specific Claims" process. No explanation is given as to why an additional twelve years was required in respect of the other two parcels of land. If a plaintiff

alleges that a fifteen-year delay is caused by the amount of work involved, some detail as to what work was involved and the time needed for various steps is required. I do not say a plaintiff must provide extensive detail in responding to all Notices of Status Review. But when a lengthy delay of some fifteen years is involved, details are required. Merely saying that much work was involved does not explain to the Court why a delay of fifteen years was incurred.

[50] There were parallel actions in the Federal Court and the Court of Queen's Bench of Alberta, but there is no explanation as to why the existence of those actions would be the cause of a fifteen-year delay in this action.

[51] That actions be held in abeyance while negotiations are taking place under the "Specific Claims" process would justify a delay to 1991 in respect of the Ghost Lake lands. The Horseshoe and Kananaskis lands were not accepted in the "Specific Claims" process and this reason is irrelevant to the action after 1991.

[52] I accept that the Band's negotiations with TransAlta in the case of the Horseshoe lands were only completed in 2002. Apparently, agreement in principle was reached in 1994 between the Stoney Band and TransAlta. The Crown was not a party to that agreement. But conveyancing details, some of which involved the Crown, were not concluded until 2002. This is some evidence of why final settlement between TransAlta and the Stoney Band did not conclude until 2002. But that evidence does not explain why the action against the Crown was not pursued earlier. If there was some explanation as to why the claim against the Crown had to be held up until final settlement of the claim against TransAlta or indeed even just an explanation of the relationship between the TransAlta negotiations and the action against the Crown, this argument might avail to the benefit of the Band. But no such explanations were provided.

[53] When and under what circumstances the Court issues a Notice of Status Review will not normally be a factor justifying delay by a plaintiff. In any event, the other status reviews to which the Band refers appear to be with respect to actions being held in abeyance pending resolution of claims under the "Specific Claims" process. As earlier indicated, neither the Horseshoe nor Kananaskis lands were accepted in the "Specific Claims" process.

Steps Proposed to Move the Matter Forward

[54] As to the specific steps proposed by the Band, the only substantive amendment to the Statement of Claim is the elimination of the Ghost Lake land claim. There is no indication of what the "significant progress" was that the Band made in resolving and clarifying the issues in respect of the Horseshoe and Kananaskis lands. If there had been some clarification in respect of the Horseshoe lands arising from the settlement with TransAlta, it has not been reflected in the Amended Statement of Claim. The Amended Statement of Claim provides no indication of how the Horseshoe claim was affected by the TransAlta settlement. There is no indication of any clarification or change with respect to the Kananaskis lands.

[55] Consulting with the Court and the Crown with respect to further proceedings first assumes an adequate Amended Statement of Claim is filed. The Band's proposed Amended Statement of Claim does not reflect what the Band says it is intended to demonstrate. I can only infer a lax approach by the Band that appears to be consistent with its approach over many years and not consistent with an intention to proceed with the action in a serious manner.

[56] It is apparent to me that the Band has not satisfied the requirements of the *Baroud* test.

Should the Actions of the Crown be Taken into Account?

[57] The *Baroud* test provides that laxity in fulfilling procedural obligations by a defendant is largely irrelevant in a status review. Certainly, conduct by a defendant that deceives or misleads a plaintiff or induces or otherwise causes a plaintiff not to proceed promptly with an action will always be relevant on a status review and will be raised by the plaintiff as its explanation for the delay. The facts found by the motions judge in respect of the Crown's actions in this case are not evidence of such conduct.

[58] First, he said that the Crown chose not to file a defence. However, it is implicit from the evidence that the Stoney Band had undertaken not to take any further steps in the action without notifying the Crown. Such an undertaking is not unusual in litigation where a plaintiff is pursuing other remedies. In these circumstances, there was nothing inappropriate in the Crown not filing a Statement of Defence.

[59] Second, the judge said the Crown chose not to engage in the assembly of documentation to support its defence. However, there was no obligation on the Crown to incur the time and expense of doing so when the Band was not going to take any further steps without notice.

[60] Third, the judge said that the Crown did not seek an extension of time to file its defence. However, there was no need to do so when the Stoney Band had undertaken to give the Crown notice before taking any further steps in the litigation. For the same reason, there was no reason for the Crown to seek a stay of the action as the judge suggested it should have.

[61] In the context of delay in litigation, inducement implies some action by a defendant that causes the plaintiff not to take steps to move the matter forward. Normally, in status review proceedings, mere inaction or silence by a defendant will not amount to inducement. The inaction of the Crown as found by the judge did not induce the Band not to proceed in a timely manner. There is no suggestion the Crown misled or deceived the Band or otherwise caused it to delay in proceeding with the action.

[62] The judge also said the Crown chose not to seek an order from the Court dismissing the action for delay, rather, choosing to "lie in the weeds" and then to "pounce" in the status review proceedings. I do not see how it can be said that the Crown chose to "pounce" in the circumstances of this case. The Crown initially made no submissions in the status review and only became involved at the invitation of the prothonotary. It made submissions as to why the action should be dismissed. The making of such submissions by the Crown did not constitute sharp practice or other inappropriate behaviour.

CONCLUSION

[63] I conclude that when the Crown is a defendant in an action by an Indian band, the honour of the Crown is not a relevant consideration in a status review. Applying the correct legal test for status review, I conclude that the appeal should be allowed and the action dismissed. The Crown is entitled to costs here and in the Federal Court.

"Marshall Rothstein"

J.A.

"I agree.

Robert Décary J.A."

"I agree.

B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-64-04

STYLE OF CAUSE: HER MAJESTY THE QUEEN v. STONEY BAND

PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	December 16, 2004

REASONS FOR JUDGMENT

BY:	ROTHSTEIN J.A.
CONCURRED IN BY:	DÉCARY J.A.
	MALONE J.A.
DATED:	January 14, 2005

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