# Stoney Band v. Canada, 2004 FC 122 (CanLII)

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Date: 20040129

Docket: T-1627-88

Citation: 2004 FC 122

BETWEEN:

STONEY BAND

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER

**GIBSON J.:**

THE INTRODUCTION

[1] These reasons follow the hearing at Calgary on the 13th of November, 2003 of an appeal by way of motion pursuant to Rule 51 of the *Federal Court Rules, 1998*[1] of an order of Prothonotary Tabib wherein, following a status review, she dismissed this action for delay in proceeding with the action. The order under appeal is dated the 29th of July, 2003.

[2] At the close of the hearing of this matter, the Court requested written submissions on the question of whether the established test for dismissal for delay following a status review should be modified where, as here, a First Nation has sued the Crown, given the unique relationship that exists between First Nations and the Crown. Written submissions were filed on behalf of the Defendant on the 18th of December, 2003. Reply submissions were filed on behalf of the Plaintiff on the 16th of January, 2004.

THE BACKGROUND

[3] This action was commenced by Statement of Claim filed in August, 1988. The Statement of Claim alleges certain improprieties concerning the transfer of surrendered reserve lands by the Defendant to Calgary Power Company. The lands surrendered and transferred consisted of three (3) separate parcels known respectively as the "Ghost Lake", the "Horseshoe", and the "Kananaskis" Lands. The transfers occurred in 1907 in relation to the Horseshoe Lands and at separate later dates up to 1947 in relation to the Ghost Lake and Kananaskis Lands.

[4] In 1985, the Plaintiff had submitted specific claims to the Federal Government in respect of all three parcels. Only the claim in respect of the Ghost Lake Lands was accepted for negotiation under the specific claims program. Negotiations in respect of the Ghost Lake Lands were successfully completed in 1991 and, in the result, a notice of discontinuance of this action, only as it relates to the Ghost Lake Lands, was filed on the 17th of April, 1991.

[5] Since the 17th of April, 1991, no further steps have been taken in this action. More specifically, no statement of defence has been filed, no stay of proceedings has been sought, no motion to dismiss for delay has been filed and no status review was instituted by the Court, under the current Rules of the Court, until current counsel for the Plaintiff wrote to the Court on the 10th of April, 2002 seeking "...to determine and confirm the current status of this matter". Counsel's enquiry would appear to have provoked action by the Court, since a Notice Of Status Review issued the 22nd of April, 2003.

[6] Inactivity on this action did not signal inactivity on the part of the Plaintiff with respect to its claims in relation to the Horseshoe and Kananaskis Lands. Following the successful Ghost Lake Lands settlement, the Plaintiff, in an effort to regain ownership and possession of the Horseshoe and Kananaskis Lands, entered into negotiations with TransAlta Utilities Corporation, the successor in title to Calgary Power Company. The extent, if any, to which representatives of the Defendant were party to such negotiations is a matter of dispute.

[7] Negotiations with TransAlta Utilities resulted in an agreement with respect to the Horseshoe Lands claim and a Consent Judgment was entered into between the Plaintiff and TransAlta Utilities in a parallel proceeding to this action that was before the Alberta Court of Queen's Bench. The Plaintiff alleges that the settlement with TransAlta Utilities "...effectively mitigated [the Plaintiff's] damages that might have occurred had the property been transferred to a subsequent purchaser." The Plaintiff further urges that the settlement constituted a significant contribution towards "...quantifying the monetary damages claimed against [the Defendant] with respect to the Horseshoe Lands."

[8] The Plaintiff now advises the Court that a successful settlement with TransAlta Utilities in relation to the Kananaskis Lands "is unlikely and that a litigated determination may be necessary."

[9] Both the Plaintiff and the Defendant responded to the Notice Of Status Review earlier referred to. Following those responses, the Order of Prothonotary Tabib that is here under appeal issued.

THE SUBMISSIONS ON STATUS REVIEW

**a) On behalf of the Plaintiff**

[10] After reciting the factual background in somewhat greater detail than appears in these reasons, counsel for the Plaintiff turned to the issue of why this action "...has not proceeded as quickly as it might have." Counsel cited: the nature of the action itself, including the difficulty in developing the historical record in light of the elapsed time since the surrenders and transfers at issue; the extensive negotiations that have taken place; and finally, the fact that, at various times, this action has run parallel to other actions in this Court and, more particularly, in the Alberta Courts, that were pursued by the Plaintiff and its members. Counsel noted that only this action remains outstanding.

[11] Finally, counsel sought to lay a degree of responsibility for delay at the doorstep of this Court on the basis that a status review was not instituted by the Court as early as it might have been. More will be said of this later.

[12] Counsel then proposed steps to move this action forward and concluded in the following terms:

The Stoney Band has been actively pursuing a resolution of the issues raised in [this action] since the filing of the Statement of Claim. The complexity of the action and the multiplicity of parties that are impacted by it, have stretched the traditional timelines for this litigation. However, the success of the negotiations that [have] been pursued by the Stoney Band are compelling evidence of their commitment to moving this Action forward.

b) On behalf of the Defendant

[13] In its submissions on status review filed the 30th of June, 2003, after briefly reviewing the factual background, counsel referred to the Plaintiff's references to "related" proceedings. Counsel noted the following:

In its Written Submissions, the Plaintiff refers to two other "related" Court proceedings. The first, Action 8501-10304 filed in the Court of Queen's Bench of Alberta in 1985, was between the Stoney Band and TransAlta Utilities. Canada was not a party to that action, nor was it a party to the negotiations between the Stoney Band and TransAlta Utilities.

The second related proceeding, T-2377-88 [in this Court], was filed against Canada and TransAlta Utilities by a group of members of the Stoney Band, purporting to act in a representative capacity for all members of the Bearspaw Band ("the Bearspaw Band") which is a sub-group of the Stoney Band. In 1990, T-2377-88 was stayed pending disposition of T-1627-88 [this action], as the actions were duplicitous.

In 1991, the Stoney Band filed a motion in T-2377-88 to have the Stoney Band substituted for the Bearspaw Band in the style of cause, on the basis that only the Stoney Band, through its Chief and Council, can represent the membership of the Band in litigation or negotiation. The motion was contested by the Bearspaw Band, and was ultimately denied.

In 1991, steps were taken to have the Ghost Lake portion of T-2377-88 dismissed, in parallel with the Partial Discontinuance filed in the instant case. After that, the file remained dormant until 1997, when TransAlta Utilities succeeded in having the action struck as against it. T-2377-88 was ultimately dismissed on Status Review in July of 1999.

[14] Following extensive paragraphs of written argument, emphasizing, among other things, prejudice to the Defendant, the Defendant's representations were concluded in the following terms:

As a result of the Plaintiff's inaction, this case has suffered an inordinate delay of fifteen years. Needless to say, it would be several more years before the matter could be brought to trial. The explanations offered by the Plaintiff are insufficient to justify the delay, and any next steps, if expedited, would only operate to Canada's unearned

disadvantage. If the matter were to proceed, Canada would likely suffer tangible prejudice as a result of the delay.

Further, the delay, and its probable effects on the availability and quality of evidence, would have an adverse impact on the quality of the trial process. Permitting this matter to move forward at this stage would undermine the standards the Federal Court has established for the just and orderly progress if [sic] its litigation.

Canada respectfully requests that this Honourable Court exercise its discretion to dismiss this action.

c) No Plaintiff's Reply

[15] By communication dated the 8th of July, 2003, the Plaintiff was invited, "... no later than July 18th, 2003," to serve and file representations in reply. A review of the file indicates that no reply submissions were filed.

THE DECISION UNDER REVIEW

[16] In recitals to her order dismissing this action for delay, Prothonotary Tabib, more briefly than has been done in these reasons, summarized the background leading up to Status Review in this action. Following that summary, she further recited:

It appears from these clarifications [clarifications flowing from the Status Review submissions of the Defendant] that there has in fact been no reasons for the delay in proceeding with this litigation since the settlement of the "Ghost Lands" claim in 1991. While the Plaintiff may have been busy negotiating and settling the "Horseshoe Lands" claim with the third party successor in title, the Defendant was not a party to these negotiation[s] and the third party [TransAlta Utilities] is not involved in the present action. While the Plaintiff may have found the exercise and its results useful, the benefit to the Defendant or to the administration of justice - and hence, the justification for the delay - is not apparent.

The Defendant further argues that the twelve-year unjustified delay in moving this matter forward will likely cause it prejudice. While the evidence in land claims litigation often relies on the historical record, that evidence does not remain static over time, especially that part of the evidence consisting of the oral history of the elders. A delay of twelve years in proceeding is bound to cause prejudice to the Defendant, especially as the Plaintiff in this case has had the opportunity to gather and constitute its evidence in parallel proceedings while the Defendant remained on the side lines.

In the exercise of my discretion, I conclude that the Plaintiff has failed to show cause why this action should not be dismissed for delay.

THE ISSUES

[17] The issues on this appeal by way of motion are, I am satisfied, the following:

a) the test for determining the appropriate decision on a status review;

b) the standard of review on an appeal of a decision of a prothonotary; and

c) whether or not the prothonotary erred on the facts of this matter in a manner such that this Court should intervene.

ANALYSIS

a) The test for determining the appropriate decision on a status review

[18] The seminal authority on this issue is *Baroud v. Canada*,[2] where Justice Hugessen wrote at paragraphs [4] and [5] of his reasons:

In deciding in what manner to exercise the wide discretion granted to it by Rule 382 [of the *Federal Court Rules, 1998*] at the conclusion of a status review, it seems to me that the Court needs to be concerned primarily with two questions:

1) what are the reasons why the case has not moved forward faster and do they justify the delay that has occurred? ; and

2) what steps is the plaintiff now proposing to move the matter forward?

The two questions are clearly inter-related in that if there is a good excuse for the case not having progressed more quickly, the Court is not likely to be very exigent in requiring an action plan from the plaintiff. On the other hand, if no good reason is advanced to justify the delay, the plaintiff should be prepared to demonstrate that he recognizes that he has a responsibility to the Court to move his action along. Mere declarations of good intent and of the desire to proceed are clearly not enough. Likewise, the fact that the defendant may have been lax and may not have fulfilled all his procedural obligations is largely irrelevant: primary responsibility for the carriage of a case normally rests with a plaintiff and at a status review the Court will look to him for explanations.
[emphasis added]

[19] Later in my analysis, I will turn to the question of whether the Defendant, on the facts of this matter, may not have fulfilled all her "procedural obligations" and, indeed, more substantive obligations, and whether that is a relevant consideration, given the relationship between the parties to this action.

**b) The standard of review on an appeal of a decision of a prothonotary**

[20] In *Merck & Co. v. Apotex Inc.*[3] where reasons were delivered on the 22nd of December, 2003 and therefore after the hearing in this matter, Justice Décary, for the majority, wrote at paragraphs [17] and [18] of his reasons:

This Court, in *Canada v. Aqua-Gem Investment Ltd.*, 1993 CanLII 2939 (F.C.A.), [1993] 2 F.C. 425 (F.C.A.), set out the standard of review to be applied to discretionary orders of prothonotaries in the following terms:

[...]Following in particular Lord Wright in *Evans v. Bartlam*, ..., and Lacourcière J.A. in *Stoicevski v. Casement* ..., discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:

(a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or

b) they raise questions vital to the final issue of the case.

Where such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept

in which I include a discretion based upon a wrong principle or upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion de novo.

[MacGuigan J.A., at pp. 462-463]

[footnote omitted]

MacGuigan J.A. went on, at pp. 464-465, to explain that whether a question was vital to the final issue of the case was to be determined without regard to the actual answer given by the prothonotary:

[...] It seems to me that a decision which can thus be either interlocutory or final depending on how it is decided, even if interlocutory because of the result, must nevertheless be considered vital to the final resolution of the case. Another way of putting the matter would be to say that for the test as to relevance to the final issue of the case, the issue to be decided should be looked to before the question is answered by the prothonotary, whereas that as to whether it is interlocutory or final (which is purely a pro forma matter) should be put after the prothonotary's decision. Any other approach, is[sic] seems to me, would reduce the more substantial question of "vital to the issue of the case" to the merely procedural issue of interlocutory or final, and preserve all interlocutory rulings from attack (except in relation to errors of law).

This is why, I suspect, he uses the words "they (being the orders) raise questions vital to the final issue of the case", rather than "they (being the orders) are vital to the final issue of the case". The emphasis is put on the subject of the orders, not on their effect. In a case such as the present one, the question to be asked is whether the proposed amendments are vital in themselves, whether they be allowed or not. If they are vital, the judge must exercise his or her discretion de novo.
[some citations omitted]

[21] Against the foregoing, I am satisfied that the issue that was here before Prothonotary Tabib raised a question vital to the final issue of the case and that conclusion is, of course, reinforced, but not fundamentally impacted, by the fact that the learned Prothonotary chose to exercise her discretion to dismiss this action.

[22] Justice Décary continued on in his reasons at paragraph [19] to "clarify" the foregoing. He wrote:

To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read:

Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:

a) the questions raised in the motion are vital to the final issue of the case, or

b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[23] Against the foregoing, I am satisfied that this appeal raises a question vital to the final issue of the case, not because of the decision arrived at by Prothonotary Tabib, but rather because the issue before her on status review could have produced a result vital to the final issue of the case, that in fact being the result of her decision.

c) The appropriate disposition on consideration de novo

[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 was 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.

[26] All of the foregoing being said, I turn to the affirmation by Justice Hugessen in *Baroud, supra*, to the effect that:

...the fact that the Defendant may have been lax and may not have fulfilled all his procedural obligations is largely irrelevant... .

[27] On the facts of this matter, and given the relationship between the parties, with great respect, I am not satisfied that Justice Hugessen's assertion applies here.

[28] As indicated early on in these reasons, the Court invited submissions in writing from counsel on whether or not the Defendant owed the Plaintiff any fiduciary duty that would be applicable on the facts of this particular status review. Counsel for the Defendant urged that the response to my concern should be in the negative. She referred me to *Wewaykum Indian Band v. Canada*[4] where Justice Binnie, for the Court, wrote at paragraphs [80] and [81]:

This *sui generis* relationship had its positive aspects in protecting the interests of aboriginal peoples historically (recall, e.g., the reference in *Royal Proclamation, 1763,* ..., to the "great Frauds and Abuses [that] have been committed in purchasing Lands of the Indians"), but the degree of economic, social and proprietary control and discretion asserted by the Crown also left aboriginal populations vulnerable to the risks of government misconduct or ineptitude. The importance of such discretionary control as a basic ingredient in a fiduciary relationship was underscored in Professor E. J. Weinrib's statement, quoted in *Guerin*, ..., that: "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion." ... Somewhat associated with the ethical standards required of a fiduciary in the context of the Crown and Aboriginal peoples is the need to uphold the "honour of the Crown": ... .

But there are limits. The appellants seemed at times to invoke the "fiduciary duty" as a source of plenary Crown liability covering all aspects of the Crown-Indian band relationship. This overshoots the mark. The fiduciary duty imposed on the Crown does not exist at large but in relation to specific Indian interests. In this case we are dealing with land, which has generally played a central role in aboriginal economies and cultures. ...

[extensive citations omitted]

[29] Whether or not, on the facts of this matter, there exists a specific Indian interest or interests that would give rise to a fiduciary duty will only be determined if this litigation is allowed to proceed to final determination. But that is not the end of the matter. I return to Justice Binnie's reference to the need to uphold the "honour of the Crown".

[30] There is much case law on the fiduciary principle as it relates to relations between the Crown and First Nations but as recently as 1987, in a family law context rather than an aboriginal law context, Justice Wilson, in dissent, wrote in *Frame v. Smith*[5] at page 135:

...there has been a reluctance throughout the common law world to affirm the existence of and give content to a general fiduciary principle which can be applied in appropriate circumstances. Sir Anthony Mason ("Themes and Prospects" in P. Finn, ed., Essays in Equity (1985), at p. 246) is probably correct when he says that "the fiduciary relationship is a concept in search of a principle".

While it might be fair to say that the concept of the fiduciary relationship between the Crown and First Nations is now significantly better defined then it was in 1987, a brief search of authorities on the concept "honour of the Crown" might indicate that it indeed remains a "concept in search of a principle".

[31] Two authorities, not cited before me, I find to be helpful on the facts of this matter.

[32] In a paper entitled "The Honour of the Crown"[6], David M. Arnot, then Treaty Commissioner of Saskatchewan, wrote:

Our Supreme Court has recently resurrected the notion of "the honour of the Crown" in substance, if not the exact terminology. The Court's unanimous rebuke of government privilege in Guerin v. the Queen... is really the milestone in restoring a system of law in Canada based on principles rather than persons. In what is labelled the "fiduciary duty" of the Crown, the Supreme Court restored the ancient concept of holding ministers to a standard of fair dealing that stands above and outside the black-letter law. Ministers must think of what lends credibility and honour to the country, rather than what they can justify technically under the laws of the day.
[citation omitted]

[33] In a Case Comment on *R. v. Marshall*[7], W. H. Hurlburt, LL.D. (Hon.) Q.C., of the Alberta Bar, wrote at paragraph [26]:

The actual effect of what the Supreme Court of Canada has done with the notion of the "honour of the Crown" is to hold that the Crown stood in a confidential relationship with aboriginal groups and that the confidentiality of the relationship imposed on the Crown a duty to adhere to standards of conduct higher than those which are imposed by ordinary commercial morality. It would, in my submission, be better to put it that way. A relational analysis can yield the desired result (the imposition of a higher standard of conduct on the Crown) without giving as the source of the higher duty an undefinable abstract notion stated in almost mystical terms. It would be better to state the proposition directly than to explain it by bringing in a concept of "the honour of the Crown".

[34] Against the foregoing, I turn to a brief review of the conduct of the Crown in this matter.

[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.

[37] I conclude that the actions of the Defendant on the undisputed facts of this matter are simply not consistent with the "honour of the Crown" in its dealings with First Nations such as the Plaintiff herein and with that phrase being interpreted in light of the foregoing authorities and without turning to an examination of whether a fiduciary duty exists, that examination, as I have previously stated, being more appropriate to a later day.

[38] In the particular circumstances of this matter, I am satisfied that the conduct of the Defendant is a relevant, and indeed, a determinative factor on this status review. That conduct mitigates against an outcome on the status review that would work in favour of the Defendant and potentially encourage future equivalent conduct.

d) An afterthought

[39] Earlier in these reasons, I noted that counsel for the Plaintiff, impliedly at least, suggested this Court was in part responsible for the long period of inaction on this matter because, when the *Federal Court Rules, 1998* were enacted and this Court became vested with the authority to implement status reviews of its own motion, and indeed undertook an intensive program of status reviews, it lost sight of this action and did not implement a status review in relation to it. I reject this criticism. The *Federal Court Rules, 1998*, while they create an obligation to conduct status reviews,[8] and here it cannot be questioned that that obligation was not fulfilled in a timely manner, do not relieve a plaintiff of his, her or its, in the words of *Baroud, supra*, "...primary responsibility for the carriage of a case...". The plaintiffs here were simply not entitled to rely on the failure by this Court to commence a status review to justify or excuse its own inaction.

CONCLUSION

[40] Based upon the foregoing, this appeal by way of motion from the decision of Prothonotary Tabib dismissing this action for delay will be allowed. This action should be continued as a specially managed proceeding. Counsel for the Plaintiff and the Defendant should, without delay, and preferably in full consultation with one another, make submissions to the Court as to a schedule of further steps required to ensure that this action comes to trial within a reasonable delay.

COSTS

[41] There will be no order as to costs.

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J. F.C.

Ottawa, Ontario

January 29, 2004

FEDERAL COURT OF CANADA

Names of Counsel and Solicitors of Record

**DOCKET:** T-1627-88

**STYLE OF CAUSE:** STONEY BAND

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

**PLACE OF HEARING:** CALGARY, ALBERTA

**DATE OF HEARING:** NOVEMBER 13, 2003

**REASONS FOR ORDER BY:** GIBSON, J.

DATED: JANUARY 29, 2004

**APPEARANCES BY:**

| | |
|---|---|
| Mark Maxwell | For the Plaintiff |
| Jolaine Antonio | For the Defendant |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Rae and Company<br>Barristers & Solicitors<br>2910, 715-5th Avenue S.W.<br>Calgary, Alberta , T2P 2X6 | For the Plaintiff |
| Department of Justice<br>510, 606-4th Street<br>Calgary, Alberta, T2P 1T1 | For the Defendant |

[1] SOR/98-106.

[2] 1998 CanLII 8819 (F.C.), (1998), 160 F.T.R. 91 (F.C.T.D.).

[3] [2003] F.C.J. No. 1925 (Q.L.) (F.C.A.).

[4] 2002 SCC 79 (CanLII), [2002] 4 S.C.R. 245.

[5] 1987 CanLII 74 (S.C.C.), [1987] 2 S.C.R. 99.

[6] (1996), 60 Sask. L. Rev. 339.

[7] *R. v. Marshall*, 1999 CanLII 665 (S.C.C.), [1999] 3 S.C.R. 456; the Case Comment appears at (2000) 38 Alta. L. Rev. (No. 2) 563-577.

[8] See Rule 380.