



Kingfisher v. Canada, 2002 FCA 221 (CanLII)

Date: 2002-05-27
Docket: A-541-01
Parallel citations: (2002), [2003] 1 C.N.L.R. 54 • (2002), 226 F.T.R. 94
URL: <http://www.canlii.org/en/ca/fca/doc/2002/2002fca221/2002fca221.html>
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Date: 20020527

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CORAM: DÉCARY J.A.

ROTHSTEIN J.A.

MALONE J.A.

BETWEEN:

GEORGE KINGFISHER, BEN WEENIE, LESLIE ANGUS,

LARRY CHICKNESS, LOLA OKEEWEEHOW and

DONALD HIGGINS for themselves and on behalf

of the Descendants of the Chief Chipeewayan Band

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on May 27, 2002.

Judgment delivered from the Bench at Calgary, Alberta, on May 27, 2002.

REASONS FOR JUDGMENT OF THE COURT BY:

DÉCARY J.A.

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REASONS FOR JUDGMENT

(Delivered from the Bench at Calgary, Alberta

on May 27, 2002.)

DÉCARY J.A.

The appellants, describing themselves as "descendants of members of the Band of Chief Chipeewayan", brought an action "on behalf of themselves and on behalf of all other persons who are descendants of members of the Band" against Her Majesty the Queen. The action alleges, essentially, the breach of a fiduciary duty owed to members of the Band resulting from the making of Order in Council P.C. 1155/1897 by which, on May 11, 1897, the lands comprising Stony Knoll Indian Reserve No. 107 were relinquished by the Department of Indian Affairs.

Under the terms of Treaty No. 6, dated August 23, 1876, the Crown had undertaken to determine and set apart a reserve for the Band. The Reserve was surveyed in 1879 and eventually confirmed in 1889. However, the Band never settled on the Reserve. On May 11, 1897, by Order in Council P.C. 1155/1897, the administration of the lands comprising the Reserve was transferred to the Department of the Interior, and the Reserve ceased to exist as a reserve. The plaintiffs, essentially, claim compensation in respect of the Reserve.

In order to succeed, the appellants had first to establish that they had standing, i.e. that they were descendants of members of the Band. The Trial Judge, after a careful analysis of the evidence submitted by both parties, including oral history evidence adduced by and on behalf of the plaintiffs regarding their ancestry, made the following finding:

[87] Based on the foregoing, I conclude that, on the evidence before the Court, none of the plaintiffs has established that he or she is a descendant in an unbroken line of a member of the Young Chipeewayan Band. In some cases, an unbroken line of ascendancy from a plaintiff to a member of the Band is simply not established. In one case, a line of ascendancy is broken by a voluntary withdrawal from Treaty or by reason of a female

antecedent of the plaintiff being "taken off" the Treaty list by operation of law. In other cases, female persons in a line of ascendancy ceased to be members of the Band by operation of law alone. In each case, the result is that, if a line of ascendancy was established, at some point in that line it is broken by reason of the fact that a member of the Band became a member of another band, or ceased to be a status Indian, and thus the plaintiff in question traced his or her line through another band or through a person not a status Indian and in each case the plaintiff's right to claim in this action was extinguished.

He dismissed the action [2001 FCT 858 \(CanLII\)](#), (2001 FCT 858).

Some plaintiffs, therefore, were found not to be descendants at all of a member of the Band. Others were found to be descendants of persons who had been at some point in time members of the Band, but who no longer were. These findings of fact are unassailable: they are supported by the evidence and no palpable and overriding error has been shown (see *Housen v. Nikolaisen*, [2002 SCC 33 \(CanLII\)](#), 2002 SCC 33; *Canwell Enviro-Industries Ltd. et al v. Baker Petrolite Corporation*, [2002 FCA 158 \(CanLII\)](#), 2002 FCA 158 at para. 47 ff).

Counsel for the appellants argues that the Trial Judge erred in law when he required that the line of descendancy be an unbroken one. As the argument goes, the provisions of the *Indian Act* whereby members of a band ceased to be members of the band in some circumstances, including marriage, could not operate to deny standing to the appellants because the Treaty made no reference to an unbroken line. In other words the Treaty should be read without reference to the *Indian Act*.

We see no merit in this argument. The *Indian Act* was in force at the time. The Treaty is with an Indian band. An Indian band is the creature of statute, the *Indian Act*. Clearly, when referring to "bands" and to allocation of "reserves", the representative of the Crown, Lieutenant Gov. Morris was referring to these words as they were defined in the *Indian Act*. The breach of trust alleged in the Statement of Claim related to collective rights belonging to a given band with respect to a reserve (see *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* (C.A.) [2001 FCA 67 \(CanLII\)](#), [2001] 4 F.C. 451, at para. 16 to 18). We have some doubt that the appellants can assert the rights they claim on an individual basis at all when there is no relevant band in existence. However, we need not express an opinion on that issue. In the present case, it is sufficient to say that such rights may not be asserted by the appellants unless they have established that their ancestors were members of the Chipeewyan Band within the meaning of the *Indian Act*, or, where they have established that their ancestors were members of that band at one time, unless they have also established that their ancestors did not cease to be members by virtue of any provision of the *Indian Act*. The Trial Judge found that the appellants had not met that onus and we see no reason to interfere with his conclusion.

As the appeal can be disposed of on this ground alone, we will pass no comment on the other conclusions reached by the Trial Judge.

The appeal will be dismissed with costs.

"Robert Décary"

J.A.

FEDERAL COURT OF CANADA

FEDERAL COURT OF APPEAL

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REASONS FOR JUDGMENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-541-01

STYLE OF CAUSE: GEORGE KINGFISHER, BEN WEENIE,

LESLIE ANGUS, LARRY CHICKNESS,

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PLACE OF HEARING: Calgary, Alberta

DATE OF HEARING: May 27, 2002

REASONS FOR JUDGMENT OF THE COURT (Décary, Rothstein, Malone JJ.A.)

RENDERED FROM THE BENCH BY: Décary, J.A.

DATED: May 27, 2002

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APPEARANCES:

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