

Date: 20070917

Docket: A-131-07

Citation: 2007 FCA 288

**CORAM: LÉTOURNEAU J.A.
SHARLOW J.A.
TRUDEL J.A.**

BETWEEN:

**CHIPPEWAS OF RAMA MNJIKANING
FIRST NATION BAND COUNCIL**

Appellant

and

JAMES COTTRELL

Respondent

Heard at Toronto, Ontario, on September 13, 2007.

Judgment delivered at Ottawa, Ontario, on September 17, 2007.

REASONS FOR JUDGMENT BY:

TRUDEL J.A.

CONCURRED IN BY:

**LÉTOURNEAU J.A.
SHARLOW J.A.**

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an appeal from the Order of Justice Phelan of the Federal Court, which granted Mr. Cottrell's motion to extend the time to commence a judicial review application against the Band Council.

[2] The Notice of Motion is dated February 20, 2007, some 80 plus days after the expiry of the statutory deadline for commencing judicial review of the impugned Band's decision.

[3] Mr. Cottrell is a status Indian who resided in a rental property on the Band's reserve. His home is a single-family house leased to him, which he is entitled to own after 15 years of rental payments.

[4] Mr. Cottrell and the Band Council entered into a lease effective April 1, 1994. In section 12, the lease provides the Band with a discretionary right of termination under certain circumstances, amongst which the incapacity of the tenant to live independently.

[5] A simple calculation shows that he was in his 12th year of rental when evicted on November 1, 2006 without prior notice, although family members had allegedly been consulted. Since 2005, Mr. Cottrell has suffered from a severe and rare neurological condition (Chronic Inflammatory Demyelinating Polyneuropathy) which presents itself as progressive weakness in his arms and legs.

[6] Following a 911 call for assistance to recharge his wheelchair and get back into it, Mr. Cottrell was taken to the hospital against his wishes. It was at the hospital that Ms. Sawyer, the Band Health Officer, served Mr. Cottrell with the notice of eviction and told him that he had effectively been evicted.

[7] Mr. Cottrell immediately advised Ms. Sawyer that he intended to seek legal assistance to contest the eviction.

[8] Mr. Cottrell retained counsel at the Community Legal Clinic. What ensued was a series of communications between lawyers, communications between his counsel and a clinical psychologist, gathering of documentation, but no legal action.

[9] As stated previously, Justice Phelan granted the motion. He was of the opinion that there was a continuing intention by the applicant to pursue his application and that there was an arguable case.

[10] As well, Justice Phelan agreed with the Band that some specific members might suffer some prejudice or inconvenience by virtue of this pending judicial review, as there is a waiting list for housing on the reserve. However, Justice Phelan stated that this prejudice was premised on the basis that the Band was entitled to evict Mr. Cottrell and that, in balancing prejudice, the loss of any opportunity to challenge the Band's eviction in the Federal Court outweighs the temporary nature of the Band's prejudice, "if any".

[11] Finally, Justice Phelan was of the opinion that the applicant had a reasonable explanation for the delay: the applicant was undergoing a capacity assessment, which would have made it imprudent for counsel to proceed until Mr. Cottrell's mental capacity issue was settled in a final manner.

[12] It is most infrequent that this Court will interfere with the discretion exercised by a motions judge on an application to extend time: *Jakutavicious v. Canada (Attorney General)* 2004 FCA 289. In such an application, there are certain factors to be considered, but the underlying consideration is whether, in the circumstances at bar, to do justice between the parties calls for the grant or the denial of the extension: *Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263 (FCA).

[13] This Court may substitute its discretion for that of the Motions Judge if he or she gave insufficient weight to all the relevant considerations. In addition, the Court may intervene if the Motions Judge's conclusion was predicated upon an incorrect determination with respect to a question of law, or a palpable and overriding error of fact: *Chinese Business Chamber of Canada v. Canada*, 2006 FCA 178 at paragraph 4.

[14] I am of the opinion that this Court should not interfere with Justice Phelan's discretionary decision.

[15] Given the record, it was open to Justice Phelan to find (a) that the applicant had a continuing intention to pursue the application, (b) that there was a reasonable explanation for the delay and (c) that Mr. Cottrell's case is arguable meaning that it has a reasonable chance of success: *Leblanc v. National Bank of Canada*, [1994] 1 F.C. 81; *APV Canada Inc. v. Canada (M.N.R.)*, 2001 FCT 737.

[16] The Band's position that this matter is outside the jurisdiction of the Federal Court because it involves the private law right of the First Nation to terminate a lease is an arguable case in view of

the facts of this case. The eviction is made under section 12 of the Lease, which refers to Mr. Cottrell's mental and physical capacity to live on his own and the discretion of the First Nation to relocate him. Whether, in the circumstances of this case, that clause takes the matter out of the realm of private law is an arguable issue, given *Gamblin v. Norway House Cree Nation (Band Council)*, 2002 FCA 385 and *Obichon v. Heart Lake First Nation No. 176*, [1988] F.C.J. No. 307.

[17] Therefore, I find that the Band failed to demonstrate errors on the part of Justice Phelan requiring this Court's intervention.

[18] I propose to dismiss the appeal with costs.

“Johanne Trudel”

J.A.

“I agree
Gilles Létourneau J.A.”

“I agree
K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-131-07

APPEAL FROM AN ORDER OF JUSTICE PHELAN DATED MARCH 8, 2007

STYLE OF CAUSE: CHIPPEWAS OF RAMA
MNJIKANING FIRST NATION
BAND COUNCIL v. JAMES
COTTRELL

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: September 13, 2007

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
SHARLOW J.A.

DATED: September 17, 2007

APPEARANCES:

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