

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120208

Docket: A-280-10

Citation: 2012 FCA 47

**CORAM: EVANS J.A.
PELLETIER J.A.
STRATAS J.A.**

BETWEEN:

**WALTER PATRICK TWINN, THE COUNCIL OF THE
SAWRIDGE BAND and THE SAWRIDGE BAND**

Appellants

and

ELIZABETH BERNADETTE POITRAS

Respondent

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by THE MINISTER OF INDIAN AFFAIRS
AND NORTHERN DEVELOPMENT**

Respondent

Heard at Ottawa, Ontario, on February 8, 2012.

Judgment delivered from the Bench at Ottawa, Ontario, on February 8, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

STRATAS J.A.

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120208

Docket: A-280-10

Citation: 2012 FCA 47

**CORAM: EVANS J.A.
PELLETIER J.A.
STRATAS J.A.**

BETWEEN:

**WALTER PATRICK TWINN, THE COUNCIL OF THE
SAWRIDGE BAND and THE SAWRIDGE BAND**

Appellants

and

ELIZABETH BERNADETTE POITRAS

Respondent

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by THE MINISTER OF INDIAN AFFAIRS
AND NORTHERN DEVELOPMENT**

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on February 8, 2012)

STRATAS J.A.

[1] This is an appeal against the Order dated July 27, 2010 made by a case management judge in the Federal Court (Justice Hugessen). The case management judge ordered that an issue central to an action (the “main action”) has become moot.

[2] The circumstances giving rise to the Order are as follows.

[3] Some time ago, the respondent, Ms. Poitras, started the main action against the appellant Band, claiming membership in it. The Band defended, in part, on the basis that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band.

[4] The main action was stayed pending the outcome of another action that the Federal Court regarded as being closely related (the “closely related action”). In the closely related action, the Band was challenging amendments to the *Indian Act*, advancing the same argument, namely that it had a right under section 35 of the *Constitution Act, 1982* to determine who was a member of the Band. That action had a long history, including a retrial. In the end result, the closely related action was dismissed: *Sawridge Band v. The Queen*, 2008 FC 322, aff’d 2009 FCA 123.

[5] With the dismissal of the closely related action, what was to become of the main action and the issue of Ms. Poitras' membership in the Band? To determine this, the Federal Court issued a notice of status review concerning the main action.

[6] As a result of the status review, a case management conference in the Federal Court was held. There, the issue of mootness was discussed, having been raised in the submissions filed.

[7] The case management judge's Order followed. The case management judge ordered that the issue of Ms. Poitras' membership in the Band was moot.

[8] In this Court, the appellants appeal that Order.

[9] The appellate standard of review applies. The appellants must show that the Order is vitiated either by legal error or by palpable and overriding error on some issue of fact or fact-based discretion. In reviewing the exercise of discretion in this case, it must also be borne in mind that this is an Order made by a case management judge who had managed the main action and the closely related action for many years and, as a result, possessed great familiarity with the factual issues and history of the matters: *Sawridge Band v. Canada*, 2001 FCA 338 at paragraph 11, [2002] 2 F.C. 346.

[10] In our view, the appellants have not shown any reversible error on the part of the case management judge that would warrant permitting the Band to relitigate the constitutional issues.

[11] There can be circumstances which can prompt the Court to exercise its discretion to allow relitigation, notwithstanding the doctrines of issue estoppel and abuse of process: *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

[12] But there is nothing in the record of this case showing that the appellants offered to the case management judge any such circumstances. Indeed, the record shows that the appellants deliberately decided, for reasons known to them, to close their case in the closely related action knowing they could have called more evidence and made further submissions. They knew that a dismissal would result after they closed their case. See *Sawridge Band v. Canada*, 2008 FC 322 at paragraphs 10-21 and 60.

[13] For the foregoing reasons, we shall dismiss the appeal and direct the parties to return to the current case management judge to bring the pleadings into line with the issues that remain in light of this Court's decision.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-280-10

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HUGESSEN
DATED JULY 22, 2010, DOCKET NO. T-2655-89**

STYLE OF CAUSE: Walter Patrick Twinn, The Council
Of The Sawridge Band and The
Sawridge Band v. Elizabeth
Bernadette Poitras and Her Majesty
the Queen in her Right of Canada as
Represented by The Minister of
Indian and Northern Development

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 8, 2012

REASONS FOR JUDGMENT OF THE COURT BY: Evans, Pelletier and Stratas JJ.A.

DELIVERED FROM THE BENCH BY: Stratas J.A.

APPEARANCES:

Philip P. Healey

FOR THE APPELLANT

Kevin Kimmis

FOR THE RESPONDENT, Her
Majesty the Queen in her Right of
Canada as Represented by The
Minister of Indian and Northern
Development

SOLICITORS OF RECORD:

Aird & Berlis LLP
Toronto, Ontario

Terrence P. Glancy
Edmonton, Alberta

Myles J. Kirvan
Deputy Attorney General of Canada

FOR THE APPELLANT

FOR THE RESPONDENT,
Elizabeth Bernadette Poitras

FOR THE RESPONDENT, Her
Majesty the Queen in her Right of
Canada as Represented by The
Minister of Indian and Northern
Development