

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120314

Docket: A-135-11

Citation: 2012 FCA 87

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

BETWEEN:

**CHIEF WALTER CONSTANT, ISAAC DANIELS, EDDIE HEAD,
OLIVER CONSTANT AND PETER SANDERSON, suing on
their own behalf and on behalf of all other members of the
James Smith Indian Band, all of whom reside on the James Smith Indian
Reserve No. 100 and the Cumberland Indian Reserve No. 100 "A",
in the Province of Saskatchewan**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard at Saskatoon, Saskatchewan, on March 12, 2012.

Judgment delivered at Winnipeg, Manitoba, on March 14, 2012.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

PELLETIER J.A.
STRATAS J.A.

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120314

Docket: A-135-11

Citation: 2012 FCA 87

**CORAM: PELLETTIER J.A.
DAWSON J.A.
STRATAS J.A.**

BETWEEN:

**CHIEF WALTER CONSTANT, ISAAC DANIELS, EDDIE HEAD,
OLIVER CONSTANT AND PETER SANDERSON, suing on
their own behalf and on behalf of all other members of the
James Smith Indian Band, all of whom reside on the James Smith Indian
Reserve No. 100 and the Cumberland Indian Reserve No. 100 "A",
in the Province of Saskatchewan**

Appellants

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from an order issued by Justice Hugessen (Judge) of the Federal Court on February 25, 2011 in Federal Court file T-3032-91. The order provided:

UPON the Interim Notice of Status Review issued on July 24th, 2009;

THIS COURT ORDERS THAT the plaintiffs having failed to show cause why the proceeding should not be dismissed for delay, the action is dismissed without costs.

[2] The facts giving rise to the order may be briefly summarized. In 1991, an action was commenced by the appellants in the Federal Court in which declarations were sought relating to the surrender of certain land to the Crown in 1897 and the subsequent sale of the land. On December 8, 1998, the Judge was designated as the case management judge in the action.

[3] During the period from February 5, 1999, to January 10, 2008, the Judge granted a number of orders on consent, staying this action. The last stay expired on January 10, 2009. Thereafter, the appellants neither sought a further stay nor advised the Court of the status of the proceeding.

[4] On July 24, 2009, the Judge issued a notice of status review which required the appellants to show cause why the action should not be dismissed for delay. The appellants responded by letter dated September 23, 2009, advising that the plaintiffs wanted to proceed with the action “but are facing challenges with regard to funding legal fees”. The appellants advised that they were seeking the defendant’s consent to an order staying the action for six months while the appellants “deal with these funding issues”.

[5] On September 30, 2009, the Judge issued an order staying the action until March 30, 2010. Upon the expiration of the stay the appellants took no steps to move the action forward, made no request for a further stay, and did not report to the Court as to the status of the action.

[6] On September 8, 2010, the Judge issued a direction requiring the appellants to make representations to the Court by no later than October 8, 2010, failing which an order would issue dismissing the action for delay.

[7] On September 24, 2010, the appellants' counsel responded that his clients "have struggled to find the funding necessary for legal fees necessary to allow the action to proceed at this time. They are looking into proceeding in the new Tribunal process". The appellants sought the respondent's consent to a further stay of one year. The respondent took no position with respect to this request.

[8] On October 15, 2010, the Judge stayed the action until January 15, 2011, at which time the appellants were required to report on the status of the proceedings.

[9] On February 11, 2011, the appellants' counsel wrote advising that his clients "advised that they do not see any possibility at this time in raising the funds needed to advance the court case and have instructed me to seek an extended stay during which time they will continue to pursue funds". At the same time, counsel wrote to the respondent requesting its position on an extended stay. The respondent took no position with respect to this request.

[10] On February 25, 2011, the Judge issued the order now under appeal by which the action was dismissed for delay.

[11] The order under appeal is a discretionary order. Generally, this Court can only interfere with a Judge's exercise of discretion if it determines that the Judge gave insufficient weight to relevant factors or proceeded on a wrong principle of law, or if it is satisfied that the Judge seriously misapprehended the facts, or where an obvious injustice would otherwise result (*Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, 370 N.R. 336, at paragraph 15).

[12] In the present case, however, the order under appeal was made by a case management judge who had managed the action since 1998. This Court has stated that case management judges must be given latitude to manage cases. In the result, this Court will only interfere with an order issued by a case management judge acting in that capacity in the clearest case of a misuse of judicial discretion (*Sawridge Band v. Canada*, 2001 FCA 338, 283 N.R. 107 at paragraph 11).

[13] On the record before us I see no such error which would warrant our intervention.

[14] As noted above, the Judge issued a notice of status review on July 24, 2009, which required the appellants to show cause why action should not be dismissed for delay. On September 8, 2010, the appellants were again required to show why the action should not be dismissed for delay. The order which then issued stayed the action for three months and required the appellants to report to the Court about the status of the action when the stay expired. On these facts there is no merit in the appellants' argument that the status review commenced on July 24, 2009 had been completed.

[15] Nor is there any merit to the appellants' submission that the Judge failed to give reasons for his order. As the order states, it issued because the appellants had failed to demonstrate why the action should not be dismissed for delay.

[16] On status review a plaintiff is required to explain two things. First, a plaintiff must explain the reasons why the case has not move forward more quickly and show that the reasons given justify the delay. Second, a plaintiff must explain the steps the plaintiff proposes to move the action forward (*Stoney Band v. Canada*, 2005 FCA 15, 329 N.R. 201 at paragraphs 34 to 37).

[17] The appellants did not propose any steps to move the action forward. Indeed, they acknowledged that they did "not see any possibility at this time in raising the funds needed to advance the court case". On the basis of this admission, the Judge was plainly entitled to make the order appealed from and I see no misuse of the Judge's discretion.

[18] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"

J.A.

"I agree.

J.D. Denis Pelletier J.A."

"I agree.

David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-135-11

**APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED FEBRUARY 25, 2011,
DOCKET NO. T-3032-91**

STYLE OF CAUSE: CHIEF WALTER CONSTANT ET
AL. V. HER MAJESTY THE
QUEEN

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: March 12, 2012

REASONS FOR JUDGMENT BY: Dawson J.A.

CONCURRED IN BY: Pelletier J.A.
Stratas J.A.

DATED: March 14, 2012

APPEARANCES:

William A. Selnes FOR THE APPELLANTS

Alex Kaufman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Kapoor Selnes & Klimm FOR THE APPELLANTS
Melfort, Saskatchewan

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada