

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120606

Docket: A-312-11

Citation: 2012 FCA 168

**CORAM: EVANS J.A.
SHARLOW J.A.
GAUTHIER J.A.**

BETWEEN:

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

Appellant

and

**RUDY BIRD YELLOWHEAD, member of the Paul Band and
member of the Sharphead Committee of the Paul Band, and a
descendant of the Sharphead Band, on behalf of himself and all other
descendants of the Sharphead Band**

Respondents

Heard at Edmonton, Alberta, on June 06, 2012.

Judgment delivered from the Bench at Edmonton, Alberta, on June 06, 2012.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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**REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Edmonton, Alberta, on June 6, 2012)**

SHARLOW J.A.

[1] The Crown is appealing the order of a case management judge of the Federal Court dismissing its motion to dismiss an action for delay.

[2] An order granting or denying a motion to dismiss an action for delay is a discretionary decision that must stand in the absence of an error of law or principle, or a failure to exercise the discretion judicially: see, for example, *Elders Grain Co. v. Ralph Misener (The)*, [2005] 3 F.C.R. 367 (F.C.A.), at paragraph 13. The issue is not whether this Court would have allowed the Crown's motion, but whether it was unreasonable for the judge to have dismissed it.

[3] The Crown argues that the order under appeal should be set aside because it is based on a number of factual errors. The judge did not give written reasons, but recited some facts in the order itself. The factual statements are cryptic, in some cases to the point of inaccuracy. However, having reviewed the material filed in the Federal Court on the motion to dismiss, we are not persuaded that the factual errors are sufficiently serious to warrant appellate intervention. Nor are we persuaded that the judge's decision was wrong in law, or that he failed to exercise his discretion judicially.

[4] For these reasons, the appeal will be dismissed, in the circumstances without costs.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-312-11

STYLE OF CAUSE: HER MAJESTY THE QUEEN IN RIGHT OF
THE CANADA AS REPRESENTED BY THE
DEPARTMENT OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT v. RUDY BIRD
YELLOWHEAD ET AL

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: June 6, 2012

**REASONS FOR JUDGMENT
OF THE COURT BY:** EVANS J.A.
SHARLOW J.A.
GAUTHIER J.A.

DELIVERED FROM THE BENCH BY: SHARLOW J.A.

APPEARANCES:

Mr. Kevin Kimmis FOR THE APPELLANT

Mr. Zachary Davis FOR THE RESPONDENT
Ms. Julie Corry

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