Date: 20090421

Docket: A-154-08
A-112-08

Citation: 2009 FCA 123

CORAM: **RICHARD C.J.**
EVANS J.A.
SHARLOW J.A.

Docket: A-154-08

BETWEEN:

SAWRIDGE BAND

Appellant
(Plaintiff)

and

HER MAJESTY THE QUEEN

Respondent
(Defendant)

and

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Respondents
(Interveners)

Docket: A-112-08

AND BETWEEN:

TSUU T'INA FIRST NATION
(formerly the Sarcee Indian Band)

Appellant
(Plaintiff)

and

HER MAJESTY THE QUEEN

Respondent
(Defendant)

and

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Respondents
(Interveners)

Heard at Ottawa, Ontario, on April 20 and 21, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on April 21, 2009.

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 Ottawa, Ontario, on April 21, 2009)

SHARLOW J.A.

[1] These are appeals of the decision of Justice Russell to dismiss the appellants' action and to award costs totalling approximately $1.7 million in favour of the Crown and the other respondents (interveners at trial). That award includes a substantial amount as increased costs in excess of full indemnity. The reasons for dismissing the action are reported at 2008 FC 322. The reasons for the costs award are reported at 2008 FC 267. The appellants are seeking a retrial.

[2] Despite the thorough and lengthy written and oral submissions of counsel for the appellants, we can discern no error on the part of Justice Russell that warrants the intervention of this Court. We do not consider it necessary to discuss the grounds of appeal in detail. We will offer only the following comments.

[3] The dismissal of the action was the end of the retrial of an action commenced on January 15, 1986. The appellants were seeking an order declaring that certain amendments to the *Indian Act*, R.S.C. 1985, c. I-5, breached the appellants' rights under section 35 of the *Constitution Act, 1982*. The statutory amendments compelled the appellants, against their wishes, to add certain individuals to the list of band members. The appellants argue that the legislation is an invalid attempt to deprive them of their right to determine the membership of their own bands.

[4] The first trial began in September of 1993 and ended with a dismissal of the action on July 6, 1995 (*Sawridge Band v. Canada (T.D.)*, [1996] 1 F.C. 3). That decision was set aside by this Court on the basis of a reasonable apprehension of bias (*Sawridge Band v. Canada (C.A.*, [1997] 3. F.C. 580, application for leave to appeal dismissed December 1, 1997). A new trial was ordered. It began in January of 2007, after almost 10 years of procedural disputes and delays.

[5] The action was dismissed again because, on January 7, 2008, the appellants informed Justice Russell that they would not be calling further evidence. This was in response to Justice Russell's oral ruling on September 11, 2007 striking all of the appellants' past and future lay witnesses because of non-compliant will-says. There being no case for the Crown to answer, the action necessarily failed. The action was formally dismissed on March 7, 2008.

[6] In deciding to call no further evidence on the retrial, the appellants were not abandoning the cause that led them to begin the action in 1986. Rather, they chose to end the action when they did in order to challenge a series of rulings made by Justice Russell precluding the appellants from

eliciting any evidence from lay witnesses that had not been disclosed in the will-says for those witnesses, as well as the oral ruling on September 11, 2007. The appellants also argue that Justice Russell's conduct since his appointment as trial judge raises a reasonable apprehension of bias.

[7] It is not necessary to recount the lengthy procedural history of this matter, which is described in detail by Justice Russell. We note, however, that during the process of case management and after the discovery process had become hopeless, Justice Hugessen made an order requiring the appellants to produce will-say statements for all lay witnesses proposed to be called at trial. In June of 2004, Justice Russell found the appellants' first attempt at will-says to be inadequate and ordered new will-says (2004 FC 933). He found the second attempt also to be inadequate (2004 FC 1436) and ordered a third attempt (2004 FC 1653). None of these orders was appealed.

[8] In November of 2005 Justice Russell made an order permitting the appellants to call 24 of their 57 potential lay witnesses, but prohibiting them from calling the other 33 because of various failures to comply with the will-say orders (2005 FC 1476). The appellants' appeal of that order was dismissed (2006 FCA 228, application for leave to appeal dismissed, February 8, 2007).

[9] The 2006 interlocutory appeal settled a number of issues. One was that the will-says were intended to provide a substitute for oral discovery, which "the parties had shown themselves incapable of conducting in a productive and focused manner" (see paragraph 9 of the reasons of Justice Evans, speaking for the Court). Another was that it was within the discretion of Justice

Russell not to permit witnesses to be called because of the appellants' non-compliance with Court orders regarding the filing of will-says (see paragraph 13 of the reasons of Justice Evans).

[10] In oral argument, counsel for the appellants argued that, despite the long history of controversy about will-says and what would constitute a compliant will-say, they were not aware when they prepared the third set of will-says that the evidence they could elicit from a witness for whom a will-say had been served could not include anything not set out in the will-say. Our review of the record discloses that the appellants should have been aware by the commencement of the retrial that they could be precluded from adducing any evidence from a witness for whom no compliant will-say had been produced, and that they could also be limited to eliciting evidence disclosed in the will-say. If they were confused on those points, however, they did little to clarify the situation when they indicated to Justice Russell that, although they considered their will-says to be compliant with the standard he had set, their ability to make their case would be compromised if they were barred from eliciting any evidence from a witness that did not appear in the will-say for that witness.

[11] The appellants’ equivocation when asked if their will-says were compliant led Justice Russell to conclude that if the appellants could not adequately make their case based on what was stated in the will-says, the will-says must necessarily have been non-compliant. The appellants take issue with Justice Russell’s interpretation of their submissions and his reasoning. However, based on our review of the record, Justice Russell’s understanding of the appellants' position, as expressed many times in his reasons, was reasonably open to him.

[12] In our view, all of the orders and directions which the appellants now seek to challenge were discretionary decisions made by Justice Russell in furtherance of his obligation to control the trial process. He was required to discharge that obligation in circumstances that became increasingly difficult because of the appellants' apparent reluctance to accept that a trial judge may exclude relevant evidence on the basis that it was not properly disclosed in the discovery process or, as in this case, will-say statements that were intended to stand in the place of oral discoveries. A failure to make disclosures required by a court order may and occasionally does result in the exclusion of relevant evidence.

[13] Finally, without endorsing every statement made by Justice Russell in his voluminous reasons, we find no factual foundation in the record for the appellants' argument that there was a reasonable apprehension of bias on the part of Justice Russell. On the contrary, we agree with the other panel of this Court in the 2006 interlocutory appeal that, given the circumstances facing him, Justice Russell displayed an appropriate mix of "patience, flexibility, firmness, ingenuity, and an overall sense of fairness to all parties" (paragraph 22, per Justice Evans).

[14] We express no opinion on the comments of Justice Russell to the effect that he remains seized of matters relating to the possibility of proceedings against appellants' former counsel for contempt of court or professional disciplinary proceedings. No ground of appeal can arise in relation to those matters unless and until Justice Russell makes an order or renders judgment.

[15] The Crown and other respondents have argued that this appeal is based largely on debates that were decided against the appellants in prior proceedings, some going so far as to say that the appeal itself is abusive. While there is some force in this argument, on balance we have concluded that, after the action was dismissed, it was open to the appellants to appeal the decision of Justice Russell to strike the evidence of the witnesses. While we have concluded that there is no merit in that appeal, it does not follow that the appeal itself is an abuse of process.

[16] As to the appellants' appeal of the costs awarded at trial, we are not persuaded that Justice Russell erred in law or failed to exercise his discretion judicially when he awarded increased costs as he did. In particular, having considered the entire history of the retrial, we can detect no palpable and overriding error in Justice Russell's findings of misconduct on the part of the appellants.

[17] This appeal will be dismissed with costs to the Crown and each of the other respondents (interveners at trial) on the ordinary scale (that is, the mid-range of Column III of Tariff B of the *Federal Courts Rules*). These reasons will be placed in Court file A-154-08 and a copy will be placed in Court file A-112-08.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-154-08 & A-112-08
(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED MARCH 7, 2008, FEDERAL COURT DOCKET NUMBER T-66-86)	
STYLE OF CAUSE:	SAWRIDGE BAND v. HER MAJESTY THE QUEEN et al. (A-154-08) TSUU T'INA FIRST NATION v. HER MAJESTY THE QUEEN et al. (A-112-08)
PLACE OF HEARING:	Ottawa, Ontario
DATES OF HEARING:	April 20 and 21, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	(RICHARD C.J., EVANS J.A. and SHARLOW J.A.)
DELIVERED FROM THE BENCH BY:	Sharlow J.A.

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