

Federal Court  
of Appeal



Cour d'appel  
fédérale

**Date: 20100617**

**Docket: A-637-08**

**Citation: 2010 FCA 165**

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

**BETWEEN:**

**ANDREW MARK BUFFALO also known as ANDREW MARK FREEMAN  
suing on his own behalf and on behalf of all persons who became members  
of the SAMSON CREE NATION on or after June 29, 1987**

**Appellant**

**and**

**CHIEF and COUNCIL of the SAMSON CREE NATION and the  
SAMSON CREE NATION and HER MAJESTY THE QUEEN as  
represented by the MINISTER OF INDIAN AFFAIRS  
AND NORTHERN DEVELOPMENT**

**Respondents**

Heard at Edmonton, Alberta, on June 15, 2010.

Judgment delivered at Calgary, Alberta, on June 17, 2010.

**REASONS FOR JUDGMENT BY:**

**STRATAS J.A.**

**CONCURRED IN BY:**

**EVANS J.A.  
PELLETIER J.A.**

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**Respondents**

**REASONS FOR JUDGMENT**

**STRATAS J.A.**

[1] This is an appeal from an order of Justice Mactavish of the Federal Court: 2008 FC 1308.

She dismissed the appellant's motion to certify a proposed class proceeding.

[2] In careful and thorough reasons, the motions judge found that the appellant had not met a number of the requirements for certification as a class proceeding. These requirements are set out in Rule 334.16 of the *Federal Courts Rules*, SOR/98-106. This Rule reads as follows:

*Conditions*

**334.16** (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

- (a) the pleadings disclose a reasonable cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
- (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
- (e) there is a representative plaintiff or applicant who
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
  - (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and

*Conditions*

**334.16** (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies:

- a) les actes de procédure révèlent une cause d'action valable;
- b) il existe un groupe identifiable formé d'au moins deux personnes;
- c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
- d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
- e) il existe un représentant demandeur qui:
  - (i) représenterait de façon équitable et adéquate les intérêts du groupe,
  - (ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,
  - (iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

*Matters to be considered*

*Facteurs pris en compte*

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

(d) other means of resolving the claims are less practical or less efficient; and

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

*Subclasses*

*Sous-groupe*

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe

interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

(a) would fairly and adequately represent the interests of the subclass;

(b) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

(c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other subclass members; and

(d) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui :

a) représenterait de façon équitable et adéquate les intérêts du sous-groupe;

b) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;

d) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[3] Failure to meet any of these requirements is fatal to certification. The motions judge found that the appellant had not met a number of them.

[4] The first requirement that the appellant did not satisfy was the identification of issues of fact or law common to all of the class members: Rule 334.16(1)(c). The appellant had only stated that “on questions of fact, the members of the proposed class are all members of Samson” and “on questions of law, they are all governed by the same federal statutory regime and they are all owed the same fiduciary obligations”: the motions judge’s reasons at paragraph 86. The motions judge observed (at paragraph 89) that “[t]o be appropriate for certification in a class action, common

issues require precise definition for inclusion in the certifying order, and are usually framed in the form of questions to be answered in the course of the litigation.” This, she found, the appellant had not done.

[5] The second unsatisfied requirement was that “a class proceeding [be] the preferable procedure for the just and efficient resolution of the common questions of law or fact”: Rule 334.16(1)(d). In determining this, the motions judge properly had regard to the matters set out in Rule 334.16(2). In particular, she examined Rule 334.16(2)(a) and the question of whether “the questions of law or fact common to the class members predominate over any questions affecting only individual members.” She found (at paragraph 103) that the task of assessing this was “virtually impossible” because of the failure of the appellant to identify any common issues of fact or law requiring resolution through the class proceeding. The respondents, however, had identified several issues that would require individualized assessment. Given the appellant’s failure and the respondents’ submissions, she was driven to the conclusion (at paragraph 131) that “the individual issues clearly predominate.”

[6] The third unsatisfied requirement was the appellant’s failure to prepare an acceptable litigation plan, as required by Rule 334.16(1)(e)(ii). The motions judge (at paragraph 146) rejected the appellant’s assurances that any such plan would be reached through the case management process or that the *Federal Court Rules* would provide “a template” for the litigation plan. In her view, the litigation plan must be comprised of much more: it must “demonstrate that the plaintiff and his counsel have thought the process through, and that they grasp its complexities” (at

paragraph 148). Summarizing the jurisprudence (at paragraph 151), she developed a helpful, non-exhaustive list of matters to be addressed in a litigation plan, and she found that the appellant addressed none of these.

[7] Finally, given the appellant's failure to identify any common issues of fact or law and to give due consideration to the proper description of the proposed class, she questioned the appellant's ability to "fairly and adequately represent the interests of the class," as required by Rule 334.16(1)(e)(i). Therefore, the motions judge concluded that the requirement that there be a suitable representative plaintiff had not been made out in this case.

[8] On all of these matters, we substantially agree with the motions judge's analysis and conclusions. She identified the correct legal principles that must be brought to bear under Rule 334.16. She relied upon well-accepted class action authorities, particularly authorities from British Columbia and Ontario, where the class proceedings rules are similar to Rule 334.16. In examining and applying the principles in those authorities, she was also fully cognizant of the purposes underlying class proceedings, discussed by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, and *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69.

[9] The motions judge then applied these principles to the facts in a reasonable way, reaching appropriate conclusions, and expressing them in detailed, cogent reasons.

[10] In oral submissions, counsel for the appellant (not counsel on the original motion) submitted that the motions judge should have granted an adjournment to the appellant in order to allow the appellant to improve the quality of his motion, review the deficiencies in it, and meet the certification requirements. The appellant conceded, however, that he did not ask the motions judge for an adjournment. He also submitted that the motions judge knew that there were some common issues and should have gone further and identified these, even though the appellant had not.

[11] The essential submission here is that the motions judge was obligated to help further. In support of this, the appellant cited the purpose of class proceedings, which includes facilitating access to justice. He also observed that courts in class proceedings play a more active and flexible role than they do in many other types of litigation. They regularly exercise their discretion to give relief different from that sought in a notice of motion for certification, such as by changing the definition of the common issues.

[12] I accept that in certification motions, and in the post-certification period, courts can be quite active and flexible because of the complex and dynamic nature of class proceedings: for example, they must always remain open to amendments to such matters as the class definition, the common issues and the representative plaintiff's litigation plan, and they can play a key role in case management.



[13] However, the role of courts in these areas, active and flexible though it may be, does not extend to an obligation to grant adjournments, even when not sought, in order to permit those seeking certification to cooper up their motion or to help them meet the substantive certification requirements under Rule 334.16. The burden of satisfying the certification requirements is solely upon those seeking certification and a motions judge, of course, must remain a neutral arbiter of whether those requirements have been met.

[14] In this case, the motions judge found that the appellant had not discharged this burden. It is for those seeking certification under Rule 334.16, not the motions judge, to grapple with the substance of the matter and to meet the substantive certification requirements under Rule 334.16, including the requirement that they be capable of “adequately represent[ing] the interests of the class.” This, the appellant, did not do.

[15] Before leaving this issue, I note that the motions judge did exercise her discretion in favour of considerable flexibility toward the appellant, even though the appellant had not offered much to satisfy the certification requirements. For example, more than once during the hearing, the motions judge allowed the appellant to change the class definition, even during the appellant’s reply submissions. Further, despite rejecting the final class definition offered by the appellant, she was able to develop a class definition, based on the evidence before her (at paragraphs 71 to 74). Finally, she considered whether she should allow the appellant to refile a litigation plan (at paragraph 153). In the circumstances, the appellant was afforded every opportunity to establish the certification requirements, but fell short.

[16] In summary, the motion judge found that the appellant had not met a number of the requirements for certification under Rule 334.16 and so she dismissed the motion for certification. I see no reviewable error on her part and, indeed, I substantially agree with her analysis and conclusions. On the facts before her, she was not obliged to adjourn the certification hearing on her own motion or further assist the appellant.

[17] Therefore, I would dismiss the appeal. In accordance with Rule 334.39 and consistent with the motion judge's decision not to award costs, I would order no costs of the appeal.

“David Stratas”

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J.A.

“I agree  
John M. Evans”

“I agree  
J. D. Denis Pelletier”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-637-08

**APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED NOVEMBER 24, 2008**

**STYLE OF CAUSE:** Andrew Mark Buffalo also known as Andrew Mark Freeman suing on his own behalf and on behalf of all persons who became members of the Samson Cree Nation on or after June 29, 1987 v. Chief and Council of the Samson Cree Nation and the Samson Cree Nation and Her Majesty the Queen as represented by the Minister of Indian Affairs and Northern Development

**PLACE OF HEARING:** Edmonton, Alberta

**DATE OF HEARING:** June 15, 2010

**REASONS FOR JUDGMENT BY:** Stratas J.A.

**CONCURRED IN BY:** Evans J.A.  
Pelletier J.A.

**DATED:** June 17, 2010

**APPEARANCES:**

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