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Federal Court Reports
Sawridge Band v. Canada (C.A.) [1997] 3 F.C. 580

A-779-95

A-807-95

CORAM: THE CHIEF JUSTICE

STRAYER J.A.

LINDEN J.A.

B E T W E E N:

WALTER PATRICK TWINN suing on his own behalf and

on behalf of all other members of the Sawridge Band;

WAYNE ROAN, suing on his own behalf and

on behalf of all other members of the Ermineskin Band; and

BRUCE STARLIGHT, suing on his own behalf and

on behalf of all other members of the Sarcee Band, now

known as the Tsuu T'ina First Nation;

Appellants

(Plaintiff)

" and "

HER MAJESTY THE QUEEN

Respondent

(Defendant)

" and "

NATIVE COUNCIL OF CANADA

NATIVE COUNCIL OF CANADA (ALBERTA)

NON-STATUS INDIAN ASSOCIATION OF ALBERTA

HORSE LAKE INDIAN BAND

NATIVE WOMEN'S ASSOCIATION OF CANADA

Interveners

HEARD at Edmonton, Alberta on June 2 and 3, 1997

JUDGMENT delivered from the Bench at Edmonton, Alberta on June 3, 1997

REASONS FOR JUDGMENT BY THE COURT

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REASONS FOR JUDGMENT

BY THE COURT

Introduction

On June 3, 1997 this Court, having heard argument on the first ground of appeal that there was a reasonable apprehension of bias on the part of the trial judge, was obliged to dispose of that ground before hearing the remainder of the argument. As a result the Court allowed the appeal on that ground, for reasons to follow. These are those reasons. As will be apparent, they do not address the substance of the judge's decision.

Facts

This appeal involves an action commenced in 1986 for declarations that certain sections of the *Indian Act*[1] are invalid. These sections were added by an amendment in 1985.[2] Briefly put, this legislation, while conferring on Indian bands the right to control their own band lists, obliged bands to include in their membership certain persons who became entitled to Indian status by virtue of the 1985 legislation. Such persons included: women who had become disentitled to Indian status through marriage to non-Indian men and the children of such women; those who had lost status because their mother and paternal grandmother were non-Indian and had gained Indian status through marriage to an Indian; and those who had lost status on the basis that they were illegitimate offspring of an Indian woman and a non-Indian man. Bands assuming control of their band lists would be obliged to accept all these people as members. Such bands would also be allowed, if they chose, to accept certain other categories of persons previously excluded from Indian status.

The plaintiffs, appellants in this appeal, are members of three Indian bands in Alberta. They sought the declarations of invalidity on two bases.

The first basis was that these provisions abridge existing aboriginal or treaty rights of the plaintiffs, guaranteed by section 35 of the *Constitution Act, 1982*[3] as amended by the *Constitution Amendment Proclamation, 1983*[4] which provides as follows:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

The plaintiffs contended that among their aboriginal rights, as confirmed by treaty, is the right of each band to control its own membership, and that the 1985 legislation infringes upon that right.

Further, they contended at trial that the action of Parliament in requiring them to accept, as members of their band, certain people previously disentitled, is a denial of their "freedom of association" as guaranteed by

paragraph 2(d) of the *Canadian Charter of Rights and Freedoms*.[5] This ground was not pursued on appeal.

The trial of this action occupied some seventy-five days commencing September 20, 1993 and ending April 25, 1994. Reasons were issued on July 6, 1995. The three trial interveners, namely the Native Council of Canada, the Native Council of Canada (Alberta), and the Non-Status Indian Association of Alberta, participated actively at trial in the examination and cross-examination of witnesses. The trial judge dismissed the action for the declarations and awarded costs to be paid by the plaintiffs to the defendant and to the interveners, on a lump sum basis fixed by him. He directed that the payments in respect of the interveners costs should be made to the Receiver General of Canada on the basis that these interventions were funded under the Test Case Funding Program of the Department of Indian and Northern Affairs.

The plaintiffs appealed this judgment. The two appeals A-779-95 and A-807-95 filed in respect of this matter (the former on behalf of the Ermineskin Band and the latter on behalf of the Sawridge Band and the Sarcee Band, now known as the Tsuu T'ina First Nation) were ordered joined for the hearing of the appeal. These reasons apply to both appeals.

As noted earlier, the first ground of appeal raised by the appellants Sawridge and Sarcee bands was that the record disclosed the basis for a reasonable apprehension of bias on the part of the trial judge against the appellants. This position was supported at the hearing by counsel for the Ermineskin Band. At the outset the Court drew to the attention of counsel for the Sawridge and Sarcee bands the decision of the Supreme Court of Canada in *Newfoundland Telephone Company Limited v. Board of Commissioners of Public Utilities*[6] in which it was stated by Cory J., writing for the Court, that if a reasonable apprehension of bias is found to exist on the part of a tribunal its decision must be treated as void. While counsel for the Sawridge and Sarcee Bands submitted that this Court could nevertheless hear the appeal and substitute its own conclusions of fact and law for those of the trial judge, counsel for the other appellant agreed with the Court's view that if a reasonable apprehension of bias were found the appeal must be allowed and a new trial ordered. Counsel for the respondent also agreed with this position.

Counsel for all of the appellants then proceeded to present to the Court, from the trial record, comments or conduct during the trial by the trial judge, and passages in his reasons, to support their assertion of a reasonable apprehension of bias. We will highlight some of these comments and passages later. Counsel on behalf of the respondent, after hearing the argument of the appellants and after taking instructions, made no submissions on this issue. Counsel for the Native Council of Canada (Alberta) made a number of submissions in opposition to those of the appellants. He submitted that the trial judge was motivated by several legitimate purposes: to allow "everyone to have a say on everything", not to conceal his reactions to evidence or submissions, to allow vigorous cross-examination on both sides, and to ensure by his questioning that a balanced version of the evidence was presented. In particular, he asserted that it would be unreasonable to interpret the trial judge's comments as critical of aboriginal peoples in general: indeed the reality was, in counsel's view, that this was more a dispute between various elements of the aboriginal community whose interests differ. He believed that the judge was legitimately exercising a discretion in his conduct of the trial and in particular in reference to ordering an R.C.M.P. investigation of alleged wrongful communication with a witness. In general, he observed that the trial judge's "colourful language" should not be taken as an indication of bias.

The Court was obliged to dispose of this ground of appeal before proceeding. In allowing the appeal on this basis, with reasons to be delivered later, the Court indicated that it had concluded that there was material in the record upon which a reasonable apprehension of bias could be found.

Analysis

It is first important to underline that no actual bias has been alleged on the part of the trial judge, nor does

this Court find such bias.

It should also be observed that, when faced with an appeal based in part on reasonable apprehension of bias in the trial judge, an appellate court must approach such assertions with great caution. It is not uncommon for unsuccessful litigants, in reflecting on their loss, to attribute it to bias or an appearance of bias on the part of the trial judge. An appeal court, without very good justification, must not use the route of apprehended bias to nullify decisions of a trial judge which it could not otherwise review. A wide margin of discretion must be left to a trial judge in his conduct of a case, and his procedural decisions should not be interfered with unless there is a clear error of principle. Findings of fact should not be set aside in the absence of "palpable and overriding" error. It must further be kept in mind that in a trial of this length, many comments will be made in a variety of contexts which, when isolated, may appear to be tendentious. Some judges will engage in socratic dialogue which may seem to the uninitiated to reveal a predisposition.

It must also be observed in respect of this case that there were few if any instances brought to our attention where counsel made any objection during the trial, on the basis of apprehended bias, to the judge's interventions or his conduct of the case. It is also fair to observe, however, that many of the complaints of apparent bias are based on the mode of expression of the judge's reasons when considered against the background of the trial. The reasons were not, of course, available to counsel for comment prior to judgment.

According to the jurisprudence, a reasonable apprehension of bias may be said to exist where there is a reasonable apprehension "that the judge might not act in an entirely impartial manner . . . .".[7] What is required is not a "possible" apprehension but a "reasonable" apprehension; that is, the opinion that a reasonably well informed person, viewing the matter realistically and practically, might form of the situation.[8]

Using this test and reading many of the judge's interventions in context we do not suppose that a reasonable observer would have understood the learned trial judge to harbour negative views about aboriginal people as such. Indeed, as noted earlier, the dispute before him involved in reality conflicting claims among various segments of the aboriginal community to control or to claim membership in Indian bands. Critical comments must also be read in association with his many expressions of respect for Indian witnesses and culture.

We do think, however, that a reasonable observer would have formed the impression that the trial judge was strongly opposed to a special regime for some or all aboriginal peoples different from the system of rights and responsibilities applying to other Canadians. If this apprehension were formed, it could have led such an observer to think that the trial judge was thereby influenced in his conclusion that no aboriginal right had existed for the plaintiff bands to control their own membership or if it had, the right had been extinguished prior to the adoption of section 35 of the *Constitution Act, 1982*.

Such an oberver might well have reflected on the fact that, ever since the adoption of the *Constitution Act, 1867*, section 91[24] thereof has given Parliament the power and responsibility to make special laws for Indians in distinction from other persons. This power and responsibility, of necessity, has always required some criteria for defining Indians in order to distinguish them from other Canadians as subjects of legislation. He would further recall that other constitutional documents, treaties and court decisions have distinguished between aboriginal peoples and others, and section 35 of the *Constitution Act, 1982* has now guaranteed existing aboriginal rights as rights pertaining to Indians, Inuit, and Métis. The existence of special status for aboriginal peoples is, therefore, enshrined in our constitution. It was not for the trial judge to dispute this aspect of Canada's constitutional law.

Regrettably, there are a number of passages in the trial transcript and in the judge's reasons which convey a very negative view of aboriginal rights or special status for all or some aboriginal peoples.

A cause for reasonable apprehension of bias is perhaps most vividly raised by the judge's use of terms such

as "racism" and "apartheid" in association with references to any claims " at least, legally-supported claims " to distinctiveness or exclusiveness on the part of Indians. For example, while Mr. Roan, a Cree, was testifying on behalf of the Ermineskin Band concerning the traditions and attitudes of the Cree, the trial judge observed:

> There is another way of looking at what he is saying. He can be advocating racism and apartheid, as well as what he is saying from his testimony. And I just want to say that that's another way of looking at it. It's not a very happy way, but it's another way of looking at what Mr. Roan's testimony has been all about.

Later during examination of the same witness he expressed satisfaction that the witness was speaking only of such restraints on intermarriage as would amount to incest. He observed of the witness:

> . . . . But today he's expressed what is, may I say, if I can take judicial notice of it, almost everyone's view, except perhaps some of the Nazis and haters in the country, and that is that racial intermating usually produces very beautiful, superior people, not inferior people. That's even known in animal husbandry, for heaven's sake.[9]

At one point, the trial judge questioned how having a separate justice system for Indians would be different from apartheid in South Africa.[10] In discussion with an expert witness called by the plaintiffs, he seemed to regard aboriginal communities which could exclude others as "the segregation of people on a racial basis into racial enclaves with racist laws . . . it is apartheid".[11] He returned to this theme with another expert, although the latter explained the difference between apartheid " where the majority was confined in its movements " and our system of areas reserved for the exclusive use of a minority who may leave there at any time.[12] When counsel for one of the interveners was discussing historical material in the report of another expert concerning the post-contact interaction between whites and native groups, the trial judge observed:

> That would be a natural consequence -- if it weren't for the racist leaders and the Nazis, it would be a natural consequence of people living in the same country together.[13]

During argument some mention was made of a membership code that one band was considering, which would include some requirement of blood relationship for membership in the band. The trial judge speculated that it was because of such matters that the law requires the Minister to approve such codes. He went on to say:

> There must be some reason though for the minister having to approve. You know, some people, myself included, when I hear about racial purity and blood purity, I think of jackboots and Nazis, and so that may be one of the reasons why the Minister would be required to approve, so that such virulence wouldn't raise its head again.[14]

These and other similar references by the trial judge during the trial, if they might be viewed by some as simply rhetorical or "colourful" language or simply provocative, were unfortunately repeated in his considered reasons. He referred there to the case as "this dismally racist subject of litigation".[15] In reference to possible membership codes containing a "blood quantum" requirement for membership, he observed:

> "Blood quantum" is a highly fascist and racist notion, and puts its practitioners on the path of the Nazi Party led by the late, most unlamented Adolf Hitler.[16]

His reluctance to accept oral history was explained, in his reasons, in the context of his opposition to racism.

> That surely is the trouble with oral history. It just does not lie easily in the mouth of the folk who

> transmit oral history to relate that ***their*** ancestors were ever venal, criminal, cruel, mean-spirited, unjust, cowardly, perfidious, bigoted or indeed, aught but noble, brave, fair and generous, etc. etc.
>
> In no time at all historical stories, if ever accurate, soon become mortally skewed propaganda, without objective verity. Since the above mentioned pejorative characteristics, and more, are alas common to humanity they must have been verily evinced by everybody's ancestors, as they are by the present day descendants, but no one, including oral historians want to admit that. Each tribe or ethnicity in the whole human species raises its young to believe that they are "better" than everyone else. Hence, the wars which have blighted human history. So ancestor advocacy or ancestor worship is one of the most counter-productive, racist, hateful and backward-looking of all human characteristics, or religion, or what passes for thought. People are of course free to indulge in it - perhaps it is an aspect of human nature - but it is that aspect which renders oral history highly unreliable. So saying, the Court is most emphatically not mocking or belittling those who assert that, because their ancestors never developed writing, oral history is their only means of keeping their history alive. It would always be best to put the stories into writing at the earliest possible time in order to avoid some of the embellishments which render oral history so unreliable.[17]

In his reasons, the trial judge also used critical, pejorative language about the relevant constitutional and statutory provisions. He referred to section 35 of the *Constitution Act, 1982* as

> in effect an "Indian provision" in an otherwise largely anti-racist constitution . . . .[18]

That is, he regards section 35 as racist. At least twice, he expressed specific disapproval of subsection 35(2) because it includes in the definition of "aboriginal peoples of Canada" the "Métis peoples of Canada".[19] This view that persons with only partial aboriginal ancestry should not be regarded as aboriginals was, at best, irrelevant to the matters for decision, and its reiteration could certainly leave an impression that the trial judge further disapproved of section 35.

He also offered pejorative views of the *Indian Act*; the legislation which underwrites the special status of aboriginal peoples. During the trial, he observed:

> THE COURT: I say with some confidence "racist laws" because, so far as I know, the only statute of Canada which is not subject to the Canadian Human Rights Act is the Indian Act. That gives me some thought that perhaps it is indeed racist, even though that sounds pejorative.
>
> So if we are on the same track, if not by the lights of people in the 1870s, then by today's lights, segregating people by race into racial enclaves with racist laws sounds like that which South Africa is in the process of trying to abolish; apartheid, does it not, or what do you say about that?[20]

Counsel for the Horse Lake Band pointed to another source to suggest that this was not simply an isolated or tentative comment by the learned judge. While this case was under reserve, he had expressed the following view on the *Indian Act* in another case:

> Section 67 of the *Canadian Human Rights Act* runs thus:
>
> 67. Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.
>
> The need, if such there be, for such legislation is obvious. The *Indian Act* is racist. It countenances the segregation of people by race, into racist enclaves according to racially discriminatory laws. It makes financial dependents of those who pay no taxes as an eternal charge on those who are taxed to meet the expense of such dependency. The *Indian Act* fosters (along with the Aboriginal treaties) an

establishment of *apartheid* in Canada.[21]

It is reasonably apparent from the record that one reason the trial judge deplores the existence of a separate regime of any sort for Indians is that he feels it wrongly keeps them in a state of dependence. His views on such matters were offered in his reasons as follows:

> Peoples found to be in a more primitive (i.e. hunting) state of development than the others' state (i.e. industrial or post-industrial) are emphatically not inferior peoples. Their state of development might be likened by analogy to "adolescent" compared with the others' (non-Indians') "adult" state of development. But the law and treaties have protected Indians from "spreading their wings" as may non-Indian adolescents who do and always have made "improvident transactions" until a majority learned not to do so, but to conduct themselves prudently.
>
> *
>
> It is surely apparent that it is not eternal dependence with apartheid, but equal self-reliance, (including Canada's so-called "social safety net" for such as it is and will be) which promote the equal human dignity of all Canadians. It is difficult to understand why the Courts in recent years have promoted dependence. The so-called "honour of the Crown" is surely nothing more than a transparent semantic membrane for wrapping together Indian reserve apartheid and perpetual dependence on Canadian taxpayers. This melancholy situation, being authentically historic, does nothing to support the plaintiffs' claim to control their own membership as is already demonstrated herein. It has contributed to the depression and poverty of many Indians over time.[22]

The learned judge also deplored the corollary of such dependence, namely the burden as he perceived it on Canadian taxpayers.

> (The corrosive effects of a whole people's dependence on governmental hand-outs are illustrated by documents found in exhibit 41(18). The government's payments work another evil, too. They are an eternal charge on the country's taxpayers, even although the dolorous conditions of the last century lie dead in the past along with its glory, if any, which cannot be now restored.)[23]
>
> *
>
> Once again the dependants' eternally received pay-outs are linked to the treaty in Elder Jacobs' mind. If the band could still control its own membership, and if the Government were, as it is, obliged to make payments and confer all of today's further benefits on all members, then notionally, bands could bring the taxpayers to their knees by expanding membership exponentially, without the limits even of Bill C-31. That is, of course, most unlikely, but Elder Jacobs' testimony shows how revised or forgotten is the treaty's original *quid pro quo*. Whoever pays the piper calls the tune. The taxpayers are the eternal payers and the government, at least somewhat on their behalf, has since treaty-time called the tune of absolute, all-extinguishing control of band membership, and of who is an Indian entitled to the payments and other benefits. Elder Jacobs got it wrong, like so many others with their wished-for, or thoughtlessly accepted, historically incorrect revisions.[24]
>
> *
>
> . . . . Although the government appeared to be very short-sighted and improvident to make payments in eternity to treaty Indians, it was not so thick skulled as to permit the treaty Indians and friends to decide how many treaty-paid Indians would be admitted to status. The natural incidence of procreation presented enough risk to the taxpayers without vastly increasing it through Indian self-determined "naturalization".[25]

The judge perhaps best expresses his disapproval of special status for Indians in a passage which, it is fair to

observe, also emphasizes his respect for them as persons.

> There is an underlying, sometimes articulated premise in the jurisprudence and among certain cynical activists that the "pitiable Indians" were easy dupes for superior Euro-Canadians and needing protection which applied not only to 19th Century Indians, but also to contemporary Indians, born in the mid-20th Century. This Court finds nothing inferior, genetic, social or intellectual *inter alia* about those Indians who entered into the treaties, nor their descendants today. This Court rejects all stated or implied notions of any inferiority of Indians, whatever. That is why the Court leans against the alleged need, over a century later, of special State protection of Indians, which protection often appears to be excessive and degrading to Indians in comparison with all the other "visible" (and not so "visible") peoples who make up the tax-paying and general population of Canada.[26]

Among the many aspects of the record brought to our attention perhaps one other should be mentioned without going into detail. Contributing to the impression which a reasonable observer might have gained as to the judge's opposition to special status for Indians was his frequent comparison to the experience of different European societies when they have commingled, either historically or in modern times.[27]

Conclusions

We believe the foregoing would indeed create in the mind of a fair-minded and reasonably well-informed observer the belief that the trial judge held certain views during the trial, which were confirmed in his reasons, that aboriginal rights are "racist" and a form of "apartheid". Having ascribed these pejorative terms to a system which is recognized in the history, the common law, and the constitution of Canada, he might well be expected to give the narrowest possible interpretation to, or reject, any newly claimed aboriginal right asserted by the plaintiffs to have existed in 1982. He might also be taken to assume that this alleged right " the right of bands to control their own membership " would be used to promote racism and apartheid and should therefore not be recognized.

We are unable to characterize complaints by the appellants as to the general conduct of the trial as giving rise to such a reasonable apprehension of bias. The judge's unwillingness to grant the plaintiffs an adjournment at the beginning, and to make them pay a sum into Court because they were not prepared to begin, appears to us to have been within his discretion in the circumstances. His decision to order an R.C.M.P. investigation of a possible contact with a witness yet to be heard from was open to him even though it apparently caused bad publicity for the plaintiffs. Such a situation could have been fairly assessed by him as different from a situation where an earlier complaint was made to him as to the conduct of Crown counsel in speaking to a witness during intermission where counsel, as an officer of the Court, assured the Court that there was no impropriety. As we understand it, in connection with the matter investigated by the R.C.M.P., the judge accepted the explanation by counsel for the plaintiffs as to their role. But there was no counsel able to say to their direct knowledge whether one witness had contacted another witness contrary to the judge's order excluding witnesses. Thus it involved persons who were not officers of the Court and the judge could well have concluded that a police investigation was warranted. Similarly we are unwilling to find fault in the manner in which the judge allowed cross-examinations to be conducted by the Crown: such matters are very hard to assess without a complete review of the whole record and, given our other conclusions, we find it unnecessary to undertake such a review.

Nevertheless, for the reasons indicated earlier we found it necessary to set aside the judgment and order a new trial notwithstanding the great cost and inconvenience which this may cause. It is possible that this situation might have been avoided had counsel for the plaintiffs objected in a clear and timely manner to the trial judge's interventions, to make him aware of the unfortunate impression he seems to have given that he had some fixed views on the matters in dispute.

Needless to say, this disposition is in no way a finding that the conclusions of the judge on the facts and the law were incorrect. These matters remain for determination at the new trial if it proceeds.

Disposition

It is for these reasons that the Court held that the record disclosed a basis for finding a reasonable apprehension of bias, the appeal was allowed, and a new trial ordered with costs to the appellants both here and below and no costs to the interveners either here or below.

"Julius A. Isaac"

C.J.

"B.L. Strayer"

J.A.

"A.M. Linden"

J.A.

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1 R.S.C. 1985 c.I-5.

2 S.C. 1985, c.27, s.4.

3 *Canada Act, 1982 (U.K.)*, c.11.

4 SI/84-102.

5 *Supra* note 3.

6 [1992] 1 S.C.R. 623 at 645. See also *Phillips and Parry v. R.* [1997] S.C.J. No. 33 (March 20, 1997) at paras. 5-8.

7 *Blanchette v. C.I.S. Ltd.* [1973] S.C.R. 833 at 842-43.

8 See e.g. *Committee for Justice and Liberty et al v. National Energy Board et al* [1978] 1 S.C.R. 369 at 386, 394.

9 Transcript 8, at 839.

10 Transcript 36B, at 99.

11 Transcript 38, at 157-8.

12 Transcript 46B, at 40-2.

13 Transcript 73, at 38.

14 Transcript 73, at 60.

15 Reasons, at 30.

16 Reasons, at 117-18.

17 Reasons, at 82-3.

18 Reasons, at 23.

19 Reasons, at 21, 29.

20 Transcript 46B, at 38.

21 *C.H.R.C. v. D.I.A.N.D. et al* [1995] 3 C.N.L.R. 28 at 40.

22 Reasons, at 58-60.

23 Reasons, at 40-41.

24 Reasons, at 87-88.

25 Reasons, at 103-04.

26 Reasons, at 57.

27 See e.g. transcript 8, at 856-57; transcript 12, at 1520-1; transcript 44B, at 13-14.