

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140117

Docket: A-114-13

Citation: 2014 FCA 7

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

BETWEEN:

**PEGUIS FIRST NATION and CHIEF GLENN
HUDSON, acting on behalf of the Chief and Council
of PEGUIS FIRST NATION**

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Winnipeg, Manitoba, on January 15, 2014.

Judgment delivered at Ottawa, Ontario, on January 17, 2014.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**PELLETIER J.A.
STRATAS J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal from an order of the Federal Court which dismissed an application for judicial review brought by the Peguis First Nation and Chief Glenn Hudson, together acting on behalf of the Chief and Council of the Peguis First Nation. The application for judicial review challenged what was said to be a decision of the respondent “to not consult or adequately consult with the [...] Peguis First Nation [...] regarding the Kapyong [Barracks in Winnipeg, Manitoba] or

not to transfer such lands pursuant to the Treaty Entitlement Agreement [...] of the [Peguis First Nation] and to refuse to acknowledge the rights of the [Peguis First Nation] under its [Treaty Entitlement Agreement] as well as Canada's failure to follow the Reasons for Judgment and Judgment of the Honourable Justice Hughes" [rendered in *Long Plain First Nation v. Canada (Attorney General)*, 2012 FC 1474, 424 F.T.R. 52].

[2] For reasons reported at 2013 FC 276, [2013] F.C.J. No. 293, a judge of the Federal Court struck out the notice of application and then dismissed the application for judicial review. In the Judge's view, the application was fatally flawed so that it could not succeed. The fatal flaw in the application was that there was no decision, action or failure on the part of the respondent in the 45 day period between the release of Justice Hughes' decision and the date the notice of application was filed that could form the foundation of a successful application for judicial review.

[3] A decision by a judge to strike an application for judicial review is a discretionary decision. Thus, this Court may intervene only if satisfied that the Judge proceeded on a wrong principle of law, gave insufficient weight to relevant factors, 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).

[4] Applying this standard of review, I have not been persuaded that the Judge committed any error that warrants intervention by this Court. The Judge cited and applied the correct test at law for striking a notice of application. She made no error in finding that:

- The Judgment of the Federal Court rendered in *Long Plain First Nation* enjoined Canada from disposing of Kapyong Barracks until the judgment was either set aside or Canada properly consulted with all of the First Nations ultimately found to be entitled to consultation.
- The Federal Court judgment was under appeal.
- The two First Nations the Federal Court found were not owed any duty of consultation had filed cross-appeals.
- As a result, no decision had been made by Canada not to consult or transfer Kapyong Barracks because it was not possible or reasonable to do so within the 45 day period referred to above.
- The order requested by Peguis First Nation would conflict with, or effectively amend the judgment in *Long Plain First Nation*.
- Any alleged failure to comply with the judgment of the Federal Court was an enforcement issue and not the proper subject matter of a fresh application for judicial review.

[5] In my view, these findings supported the Judge's decision to strike the notice of application.

[6] 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-114-13

STYLE OF CAUSE: PEGUIS FIRST NATION ET AL. v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: JANUARY 15, 2014

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: PELLETIER J.A.
STRATAS J.A.

DATED: JANUARY 17, 2014

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