Federal Court Cour fédérale

Date: 20160330

Docket: T-1073-15

Citation: 2016 FC 358

Ottawa, Ontario, March 30, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SAM TWINN AND ISAAC TWINN

Applicants

and

**SAWRIDGE FIRST NATION,
SAWRIDGE FIRST NATION FORMERLY KNOWN AS THE SAWRIDGE INDIAN BAND,
ROLAND TWINN, ACTING ON HIS OWN BEHALF AND IN HIS CAPACITY AS CHIEF OF THE SAWRIDGE FIRST NATION, AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA**

Respondents

ORDER AND REASONS

[1] There are two motions before the Court. The first is the applicants' motion, made pursuant to Rule 8 of the *Federal Courts Rules*, SOR/98-106, for an order extending the time for

the filing of this application for judicial review. The second is the applicants' motion, made pursuant to Rules 317 and 318, for a better and more complete certified record.

[2] It became evident during the course of oral submissions that the first question to be decided is what decision is actually under review and whether that decision can be the subject of a judicial review application in this Court.

[3] The applicants' Notice of Application states the following regarding the decision sought to be reviewed:

> This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985 c. 41 (1st Supp.) (the "Act") as amended, of Dennis Callihoo (being the Chief Electoral Officer ("CEO")) decisions made on or about February 17, 2015 (the "Decision") concerning Sawridge First Nation's (the "Nation") 2015 general election which decision was appealed by Sam Twinn and Isaac Twinn (the "Applicants") on April 13, 2015 to the Sawridge first Nation Special General Assembly which in turn dismissed the appeal on May 30, 2015.

[4] The applicants are members of the Sawridge First Nation which has a written Constitution dated August 24, 2009, [the Constitution] and Elections Act as amended to October 26, 2013, [the Elections Act]. Pursuant to its Election Act, the Band Council appointed Dennis Callihoo as the Chief Electoral Officer [CEO] for the February 17, 2015, general election for the positions of Chief and Council. Sam Twinn was an unsuccessful candidate for Chief.

[5] The Application for Judicial Review contains numerous allegations regarding the conduct of the CEO in the election. It is alleged that during the period December 3, 2014, to February 17, 2015, the CEO made several procedural and substantive decisions that affected the election,

that the CEO acted without or beyond his jurisdiction, among other things, in the manner in which he compiled the list of electors, rejected ballots, and in failing to permit candidates to contact electors. It is further alleged that in carrying out his duties, he failed to observe the principles of natural justice and procedural fairness.

[6] The Application for Judicial Review also alleges that parts of the Election Act (sections 16-21) dealing with the preparation of the electors list, "[fail] to comply with the law respecting elections in Canada pursuant to the Constitution Act, 1867, Treaty 8, common law and the Constitution Act, 1982 [section 35] and the Charter of Rights and Freedoms [sections 3 and 15]." It is further alleged that the process used to compile the list of electors "systematically violates standards of procedural fairness and natural justice and/or common law and fundamental rights, freedoms and guarantees afforded all human beings."

[7] Article 11 of the Constitution provides a process for appealing election results where there are reasonable grounds to believe that there was "(a) a corrupt practice in connection with the election; or (b) a contravention of this Constitution, or any law of the First Nation that might have affected the result of the election." An appeal in such circumstances lies first to the CEO, then to the Elders Commission, and finally to a Special or Regular General Assembly of the members called for that purpose. The applicants followed that procedure, exhausting all of the appeals (unsuccessfully) prior to commencing this application on June 26, 2015.

[8] The applicants say that they require an extension of time to file this application because the decision of the CEO they wish to review was made on or about February 17, 2015. They

submit that it was only because the Constitution required that they use the appeal processes provided in it that they filed this application outside the 30-day limit. The respondents submit that the application, properly read, seeks review of the last decision, that of the Special General Assembly dated May 30, 2015, and thus no extension is required. Moreover they submit that the "doctrine of exhaustion" dictates that the applicants cannot ignore the decision of the Special General Assembly and seek judicial review of the earlier CEO decision. They submit that the only decision properly subject to judicial review is the decision on the final appeal.

[9] I am unable to agree with the respondents that the Notice of Application, properly read, seeks review of the appeal decision made on May 30, 2015. In my view, its language is clear and unambiguous. It seeks review of the decision of the CEO. The respondents' understanding may have arisen because the description of the decision in the Notice of Application indicates (unnecessarily) that the decision of the CEO had been appealed. However, that does not mean that the applicants are seeking to review the appeal decision.

[10] This leads to the question of whether the applicants are permitted at law to seek review of the initial decision and not the final appeal decision in light of the exhaustion of remedies doctrine.

[11] The doctrine of exhaustion provides that absent extraordinary circumstances, parties must exhaust their rights and remedies under the administrative process before pursuing any recourse to the Courts. The reason for this is explained in Brown and Evans, *Judicial Review of*

Administrative Action in Canada (Toronto: Carswell, 2009) (loose-leaf revision 2015-3) at para 3:2100, as follows:

> An applicant's failure to pursue a statutory remedy will usually bar relief in judicial review proceedings if the other remedy is considered to be an adequate alternative to judicial review. [references omitted]

[12] What is relevant to note is that a finding that there is an adequate alternative remedy bars relief; it does not bar the launching of an application for review. There may be circumstances where an administrative scheme that provides for decision-making and appeal does exclude judicial review, but this occurs only when the plain language indicates that to be so. An example is *Pringle v Fraser*, [1972] SCR 821, where the Supreme Court held that there was no judicial review of a deportation order made by a Special Inquiry Officer under the *Immigration Act* because, in providing the Immigration Appeal Board with "sole and exclusive jurisdiction" to hear and determine all questions of fact or law, Parliament had ousted the supervisory jurisdiction of the court. In a similar manner, section 18.5 of the *Federal Courts Act* provides that there is no judicial review available in Federal Court of decisions made where an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council, or the Treasury Board.

[13] There is no language in the Constitution or in the Elections Act that provides that the Special General Assembly has such sole and exclusive authority, nor is an appeal to the Federal Court provided. Accordingly, there is no bar to an application to review the decision of the CEO. This result does not prevent the respondents from taking the position at the hearing on the

merits that there was an adequate alternative remedy available to the applicants, such that the court ought not to grant any of the relief sought.

[14] In my view, the law is as stated by the British Columbia Court of Appeal in *Jones v British Columbia (Workers' Compensation Board)*, 2003 BCCA 598 at paras 40-41, where, in response to a decision of a reviewing judge that he had no jurisdiction to quash the decision of the Workers' Compensation Board panel as the applicant had appealed it (unsuccessfully) to the Appeal Division, the Court of Appeal wrote:

> In my respectful opinion this manifests an error of principle invalidating the exercise of the reviewing judge's discretion. The error lies in treating the internal processes as exhaustive of Mr. Jones' rights, effectively putting him at the end of the road instead of seeing them as necessary steps preliminary to judicial review. *Harelkin*, *supra* [*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.)], was a case where a student appealing his failing marks was denied natural justice at an intermediate stage of the University of Saskatchewan's internal review process. He had an opportunity to appeal to the Senate of the university which would have cured the defect but he went to court instead. It was decided that the senate appeal was an adequate alternative remedy which he should have exhausted. The case does not say that an aggrieved party cannot pursue judicial review after he has exhausted the internal remedies, nor can such a view be implied since the majority in *Harelkin* held that the doctrine applies even when the defect is plainly jurisdictional. Mr. Justice Dickson, as he then was, in dissent would have given a direct route to judicial review on such questions.
>
> The primary rationale for the rule is that the need for judicial intervention may become unnecessary if the problems are cleared up internally with greater speed and efficiency and at less cost. But if they are not, neither reason nor authority supports the view that an aggrieved party is stuck with an unsatisfactory result after exhausting internal remedies and cannot ask the court to judicially review the decision. [emphasis added]

[15] For these reasons, I hold that the applicants may seek judicial review of the decision of the CEO. Given that the decision under review was made more than 30 days before this application was filed, an extension of time is required.

[16] In *Canada (Attorney General) v Hennelly* (1999), 244 NR 399 (FCA) the Federal Court of Appeal set out that to obtain an extension an applicant must establish (1) a continuing intention to pursue the application, (2) that the application has some merit, (3) that no prejudice arises from the delay, and (4) that a reasonable explanation for the delay exists.

[17] In oral submissions, the respondents argued that the applicants could not have had any intention to pursue the application for judicial review within the 30-day period because they were seeking to have the decision appealed. This is a far too narrow view of what must be examined when an extension of time is sought. As the Federal Court of Appeal stated in *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41, the underlying consideration is to ensure that justice is done between the parties.

[18] Here, all appeals were exhausted on May 30, 2015, and this application was filed soon thereafter on June 26, 2015. Given the possibility that the issues raised by the applicants may have been resolved to their satisfaction in the appeal process, and given the delays that process entailed, I find that it would have been premature for them to file this application while the appeal was under way. Moreover, I find that this application was filed in a timely manner following the final appeal.

[19] The issues raised in this application are not frivolous – they appear to be serious matters that will affect the election process undertaken in 2015 and future elections. I am satisfied that the interests of justice require that the extension sought be granted.

[20] Lastly, the applicants seek a better record from the CEO. The relevant record would include all correspondence receive by or sent by the CEO from the date of his appointment. Much of the record has already been produced; however, the applicants specifically seek "materials which relate to decision-making factors in connection with everyone he was seeking a "recommendation" from regarding service by e-mail as set out in his December 5th, 2014 e-mail to Catherine Twinn." It may be, as conceded by the applicants, that there is no such further material; however, the respondents have provided no such assurance to the Court. Accordingly, an order will issue that such materials, if they exist, are to be provided within 10 days of this decision and included in the record.

ORDER

THIS COURT ORDERS that:

1. The applicants are granted an extension of time such that the application herein has been filed within time in accordance with the *Federal Court Rules*;

2. The respondents shall, within 10 days of the date hereof, file a supplementary record including all "materials which relate to decision-making factors in connection with everyone he was seeking a "recommendation" from regarding service by e-mail as set out in his December 5th, 2014 e-mail to Catherine Twinn" or, if no such additional documents exist, they shall so advise the applicants in writing; and

3. Costs are in the cause.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1073-15
STYLE OF CAUSE:	SAM TWIN AND ISAAC TWINN v SAWRIDGE FIRST NATION ET AL
PLACE OF HEARING:	EDMONTON, ALBERTA
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