Federal Court  Cour fédérale

Date: 20180109

Docket: T-629-17

Citation: 2018 FC 11

Ottawa, Ontario, January 9, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

BIRCH NARROWS DENE NATION, AS REPRESENTED BY CHIEF JONATHAN SYLVESTRE, BUFFALO RIVER DENE NATION, AS REPRESENTED BY CHIEF EILEEN MORRISON, CANOE LAKE CREE FIRST NATION, AS REPRESENTED BY CHIEF FRANCIS IRON, CLEARWATER RIVER DENE NATION, AS REPRESENTED BY CHIEF TEDDY CLARKE, ENGLISH RIVER FIRST NATION, AS REPRESENTED BY CHIEF LAWRENCE MCINTYRE, FLYING DUST FIRST NATION, AS REPRESENTED BY CHIEF JEREMY NORMAN, MINISTIKWAN FIRST NATION, AS REPRESENTED BY CHIEF LESLIE CROOKEDNECK, MAKWA SAHGAIEHCAN FIRST NATION, AS REPRESENTED BY CHIEF RICHARD BEN

Applicants

and

HER MAJESTY THE QUEEN INRIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA, CHRIS RAINER-DIRECTOR GENERAL INDIGENOUS AND NORTHERN AFFAIRS CANADA-EDUCATION BRANCH, ODETTE JOHNSTON, JEROME CARDIN-TREMBLAY, KIRBY KORCHINSKI, CAROLYN LEHRER

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] On March 30, 2017, Indigenous and Northern Affairs Canada [the Respondent] met with the Meadow Lake Tribal Council [the Applicant] to discuss their proposal for Transformation Initiative funding (a program that provides funds for qualifying First Nations School Boards and requires those School Boards to be incorporated legal entities). During negotiations, the Respondent took the position that a majority of elected Chiefs and Councillors could not sit on the Applicant's Board of Directors as a way to ensure day-to-day control is separate from political interference. Accordingly, the Respondent ceased negotiations when the Applicant refused to amend their Bylaws which allowed a majority of Chiefs and Councillors to sit on the Board of Directors.

[2] After both parties refused to change their negotiation positions, the Applicant applied for judicial review of three matters that occurred during the March 30, 2017 discussion: first, the Respondent's rejection of the proposed Bylaws; second, the Respondent's refusal to allow the majority of elected directors of the proposed School Board to consist of Chiefs and Councillors; and lastly, the Respondent's refusal to continue negotiations unless the Applicant changed the proposed Bylaws.

[3] According to Rule 302 of the *Federal Court Rules,* SOR/98-106, an application for judicial review is generally limited to one matter. After a discussion regarding Rule 302, the one

matter the Applicant asked this Court to judicially review is the Respondent's prohibition of a majority of elected officials sitting on the Board of Directors.

[4] At the start of the hearing, the Court provided the Applicant and Respondent with an opportunity to consider an alternative dispute resolution but the Applicant chose to proceed with the hearing.

[5] Because the impasse in negotiations lacks justiciability, I will dismiss this application for the reasons that follow.

II. Background

[6] In 2011, the Standing Senate Committee on Aboriginal Peoples released a report which discussed First Nations education [the 2011 Senate Report]. The 2011 Senate Report includes submissions from witnesses and experts providing information, ideas, and concerns about improving First Nations education systems. When Bill C-33 (developed to reform existing First Nations education through the *First Nation Control of First Nation Education Act*) was put on hold in May 2014, the Respondent began to explore other ways to reform First Nations education.

[7] As part of their exploration into reform, the Respondent began discussions with interested First Nations. One interested party was the Applicant's tribal council, which is made up of nine First Nation Members. Numerous discussions between the Applicant and Respondent took place.

[8] In February 2016, the Respondent received a new mandate called the Transformation Initiative. The purpose of the Transformation Initiative is to fund new education agreements that lead to First Nation School Boards. The Transformative Initiative is intended to create stable funding (which is hoped will lead to desirable outcomes such as improved teacher recruitment and retention). The Transformation Initiative criteria are unpublished and partly informed by the 2011 Senate Report. According to the affidavit of Odette Johnston, Director of Regional Partnerships Directorate, Education Branch, Education and Social Development Programs and Partnership Sector for the Respondent, "[o]ne of the required criteria of the Transformation Initiative is that First Nation education authorities be incorporated bodies with independent governance that separates day-to-day operations and decision-making from political organizations."

[9] After further discussions, a progress report dated July 6, 2016 was issued. This progress report discussed School Board structures and said "participating communities would appoint a non-office holding member of their community as their School Board representative."

[10] The Applicant and Respondent continued discussions about establishing an education authority called the Meadow Lake First Nation Education Authority Inc. The Respondent sent an email to the Applicant on July 28, 2016 advising:

> … a First Nation Education Authority/School Board would be 'an incorporated legal entity and governed by a Board of Directors comprised of members of communities that are part of the Education Authority/School Board, with mechanisms that maintain accountability to their communities.'

[11] On August 24, 2016, the Applicant mandated a group to negotiate with the Respondent. This group, (the Education Transfer Working Group [ETWG]), is composed of four Chiefs from the Meadow Lake Tribal Council: Chief Lawrence McIntyre, Chief Jonathan Sylvestre, Chief Francis Iron, and Chief Richard Ben. In addition, three education consultants and the Senior Director of Education for Meadow Lake Tribal Council also work for the ETWG.

[12] Throughout the fall of 2016, the discussions, including discussions about corporate structure, continued.

[13] On December 1, 2016, the Respondent sent an email regarding governance structure (a topic further discussed during meetings on December 8 and 9, 2016). Among other matters that were addressed, this email stated:

> There are no parameters for whom the member communities choose to represent them on the Board, i.e. Chief, Councillor, Education Director, Parent, etc. However, should the Board of Directors be comprised of a majority, or entirely, of Chiefs and/or Councillors, the school board/education authority will be required to provide legal and/or financial advice as to how this entity will meet the reporting criteria as directed by the Canadian Institute of Chartered Accountants.

[14] Based on these discussions, on December 19, 2016 the Applicant submitted a draft education authority proposal, including its proposed Articles of Incorporation and Bylaws setting out a 10 member Board of Directors. The Bylaws stipulated that only Chiefs could fill two positions on the Board of Directors: the Chairperson of the Board and Vice-Chairperson of the Board. According to these proposed Bylaws, the remaining positions could be filled by a number of different people including, but not limited to Chiefs and Councillors.

[15] The Applicants later submitted a draft governance model to the Respondent during meetings that took place on January 16 and 17, 2017. After reviewing these documents, the Respondent concluded that the draft structure tethered control and advised the Applicant that "Chiefs and/or Councillors of the First Nation Applicants could not form a majority on the Board of Directors, in the event that a majority of First Nation Applicants chose to have a Chief or Councillor represent them on the Board of Directors."

[16] The Respondent communicated these concerns a number of times: during meetings on February 9 and 10, 2017; in an email dated March 10, 2017; and during a conference call on March 24, 2017. According to the Applicant, at the February 9, 2017 meeting the Respondent also said the decision that Chiefs or Councillors could not form a majority on the Board of Directors was based on an "expert report or studies indicating that corporations with a majority of Chiefs on the Board of Directors had been unsuccessful."

[17] On March 30, 2017, another meeting took place. At this meeting, the Respondent said they would not approve the Applicant's Transformation Initiative proposal because its Bylaws allowed a majority of Chiefs or Councillors to sit on the Board of Directors. The Respondent said it could not continue negotiations as this governance structure did not meet their policy to have separation between day-to-day operations and political organizations (a policy based on the 2011 Senate Report). The Respondent's position was that in order to access funds from the Transformation Initiative program, the Applicant had to change this proposed governance structure so that the majority of board members could not be elected Chief and Councillors.

[18] The Applicant refused to change their proposed governance structure and filed for judicial review of this decision on April 28, 2017. The Applicant asked the Court to quash the Respondent's decision to disallow a majority of Chiefs and or Councillors on the Board of Directors of the proposed Meadow Lake First Nation Education Authority Inc. The Applicant also asked that the Court order the Respondent to accept the proposal which would allow representatives on the proposed yet unincorporated School Board to be composed of any of the following: Chiefs, Councillors, Parents, Educational Experts, or First Nation Community Members—meaning that the Applicant asks this Court to order that a majority of the Board of Directors may consist of elected Chiefs and Councillors.

III. Issues

[19] The first two issues were submitted by the Applicant and the last by the Respondent at paragraph 55 of their submissions:

A. Whether the Respondent erred in law, or acted contrary to law in deciding to prohibit the Applicant's Chiefs and/or Councillors from forming a majority on the Board of Directors of the proposed Meadow Lake First Nation Education Authority contrary to the Applicant's rights under section 128(3) of the *Canada Not-for-profit Corporations Act*, SC 2009, c 23 or section 93(3) of the *Non-Profit Corporations Act, 1995*, SS 1995, c N-4.2.

B. Whether the Respondent acted beyond their jurisdiction in deciding to prohibit Chiefs and/or Councillors from forming a majority on the Board of Directors of the proposed Meadow Lake First Nation Education Authority Inc. contrary to the Applicant's rights under section 128(3) of the *Canada Not-for-profit Corporation Act*, SC 2009, c 23, or the *Non-Profit Corporations Act, 1995*, SS 1995, c N-4.2.

C. Whether the Respondent based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it pursuant to 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7.

A. *Jurisdiction or Justiciability Issue*

[20] Before I can judicially review the merits, there are threshold questions to answer. I must first determine if the matter is justiciable and if the Federal Court has jurisdiction under the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*]. I asked the parties to provide argument on this issue before reserving and hearing the parties' argument on the merits.

B. *Relevant Provisions*

Federal Courts Act, RSC, 1985, c F-7

Definitions	**Définitions**
2(1) In this Act,	2 (1) Les définitions qui suivent s'appliquent à la présente loi.
federal board, commission or other tribunal means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;	**office fédéral** Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la *Loi constitutionnelle de 1867*.

…

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

…

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is

…

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

…

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la

sought.	demande.
…	…

[21] According to section 18.1 of the *Federal Courts Act*, the Federal Court's judicial review jurisdiction is limited to the review of decisions made by a federal board, commission, or other tribunal. To determine whether a decision maker acted as a federal board, commission, or other tribunal, the Federal Court of Appeal [FCA] set out a two-step enquiry in *Anisman v Canada Boarder Services Agency*, 2010 FCA 52 at paras 29-30 [*Anisman*]:

- First a court determines "what jurisdiction or power the body or person seeks to exercise."
- Second, a court must determine "what is the source or the origin of the jurisdiction or power which the body or persons seeks to exercise."

[22] The FCA recently reaffirmed and applied the *Anisman* test in *Pokue v Innu Nation*, 2014 FCA 271 at para 11.

[23] The Applicant submits that the Respondent acted as a federal board, commission, or tribunal as required by section 18.1 of the *Federal Courts Act*, and relies on *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 for the proposition that the meaning of federal board, commission, or other tribunal is broad in definition. In regards to step 1 of the *Anisman* test, the Applicant argues the Respondent exercised jurisdiction over education or schools in relation to Indians. In regards to step 2 of the *Anisman* test, the Applicant argues the Respondent obtained this authority over schools pursuant to the *Indian Act*, RSC 1985, c I-5 at sections 114-122. In

particular, the Applicant says the Respondent exercised their authority under section 114(2) to "establish, operate, and maintain schools for Indian children."

[24] The Federal Court's judicial review jurisdiction is also limited to "matters" which satisfy section 18.1 of the *Federal Courts Act* (*Air Canada v Toronto Port Authority*, 2011 FCA 347 at paras 28-30, 42). The Applicant has argued that the failed negotiation is a "matter" within the meaning of section 18.1. In support of their argument, the Applicant relies on *May v CBC/Radio Canada*, 2011 FCA 130 [*May*] and *Krause v Canada*, [1999] 2 FC 476 (FCA). In *May* the FCA held that "the word "matter" embraces more than a mere decision or order of a federal body, but applies to anything in respect of which relief may be sought" (at para 10).

[25] The Applicant submits that, while policies themselves are not judicially reviewable, an application of a policy is a judicially reviewable matter. Therefore, the Applicant argues this Court can determine whether this matter, which they describe as an application of policy, is reasonable.

[26] I agree, as do the parties, that this Court can judicially review the application of a policy provided section 18.1 of the *Federal Courts Act* is satisfied (*Timberwest Forest Corp v Canada*, 2007 FC 148 at para 92, aff'd 2007 FCA 389). But I do not agree that the decision this Court was asked to judicially review in this case is the application of a policy. I see the matter I am asked to judicially review as a negotiation at an impasse. Each party took a position that resulted in the stoppage of the negotiation. At the moment, neither party will move from their respective positions.

[27] Whether the Court should exercise its jurisdiction and judicially review the impasse in negotiations is a question of justiciability. Not all matters are justiciable. For instance, the FCA dealt with justiciability in *Hupacasath First Nation v Minister of Foreign Affairs Canada,* 2015 FCA 4 at paras 59-70 [*Hupacasath*]. In *Hupacasath*, Canada had entered into a foreign investment promotion and protection agreement with the People's Republic of China. While dealing with whether the Federal Court should judicially review Canada's decisions to enter into the international agreement and treaties, Justice Stratas confirmed that the exceptions of what is not justiciable is very narrow:

> 62 Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. **Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.**
>
> 63 Whether the question before the Court is justiciable bears no relation to the source of the government power[.]
>
> …
>
> 66 … **In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis.** In those rare cases, **assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers.** For example, it is hard to conceive of a court reviewing in wartime a general's strategic decision to deploy military forces in a particular way.
>
> [Emphasis added].

[28] The Applicant has disguised this judicial review as a legal dispute when in actuality it is a political dispute. That it is a political dispute is evident by the parties' negotiation positions. For

instance, the Respondent's position, based on senate hearings, is that the Board of Directors is to be completely separate from politics and thus cannot have political (elected) officials fill a majority on the Board. The Applicant's negotiation position is that the Respondent should allow elected Chiefs and Councillors to form a majority of the Board's composition. Since the Respondent's mandate is that the School Board corporation must be free from political interference, their further position is that the Applicant's proposal (which allows the possibility of a majority of Chiefs and Councillors to sit on the Board) is unacceptable.

[29] The Applicant says the Respondent's decision to stop negotiations is unreasonable since it is an unreasonable application of policy to prohibit Chiefs and Councillors to sit on the Board. The Applicant also says it is unreasonable for the Respondent not to accept the proposal as it is written because the Applicant's proposal does separate day-to-day operations.

[30] I find this application for judicial review fits within the exception in *Hupacasath* as it is "so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government." Before me is one of the rare cases where "exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis." Again, this "matter" before me is an impasse in negotiations that may still be resolved (or may not be).

[31] And furthermore, the matter is inappropriate for the judicial review process because the judiciary has not been given access to all the information available to the political actors

regarding their respective political positions within the negotiation. The Court has no supervisory role over the political aspects of the negotiation entered into by the parties. In addition, the remedy sought by the Applicant can only be obtained by political evaluation and actions to resolve it one way or the other.

[32] Not accepting jurisdiction to hear this matter is an appropriate use of judicial restraint. There is not a sufficient legal component to make it justiciable. The impasse in the negotiations is not an issue to be tried or resolved by the judicial process.

[33] I do not need to go through the exercise and application of whether the matter is within the jurisdiction of the Federal Court as the matter is not a judiciable matter and this Court will not exercise its jurisdiction.

[34] The application for judicial review is dismissed.

[35] Neither party sought costs and so none are awarded.

JUDGMENT IN T-629-17

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed.

2. No costs are awarded.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-629-17
STYLE OF CAUSE:	BIRCH NARROWS DENE NATION ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF INDIGENOUS AND NORTHERN AFFAIRS CANADA
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APPEARANCES:

Carl M. Nahachewsky	FOR THE APPLICANT
Karen Jones	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nahachewsky Law Office Prince Albert, Saskatchewan	FOR THE APPLICANT
Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENTS