Federal Court  Cour fédérale

Date: 20220616

Docket: T-137-22

Citation: 2022 FC 911

Ottawa, Ontario, June 16, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DAKOTA PLAINS WAHPETON OYATE as represented by EVANGELINE TOWLE in her capacity as Hereditary Chief of Dakota Plains Wahpeton Oyate, CRAIG BLACKSMITH and ALVIN SMOKE in their capacity as representative Dakota Plains Wahpeton Oyate Council Members

Applicants

and

DONALD RAYMOND SMOKE

Respondent

ORDER AND REASONS

I. Overview

[1] On January 25, 2022, the Applicants filed a Notice of Application seeking judicial review "in respect of which entity or person have the legal authority to govern the Dakota Plains

Wahpeton Oyate". The Notice of Application identifies two Band Council Resolutions ("BCR") for review: one BCR made on September 27, 2021 (the "September BCR") and another BCR made on December 16, 2021 (the "December 16 BCR"). The September BCR appoints the Respondent, Donald Raymond Smoke, as the Hereditary Chief of Dakota Plains First Nation ("Dakota Plains"). The December 16 BCR removes the Applicant, Evangeline Towle, as the signing authority for Dakota Plains.

[2] In support of their Application, the Applicants served the following affidavits on the Respondent on February 24, 2022: the Affidavit of Evangeline Towle, the Affidavit of Craig Blacksmith, the Affidavit of Jason Towle, the Affidavit of Chandelle Smoke-Towle, the Affidavit of Alvin Smoke, and the Affidavit of Katherine Whitecloud (the "Impugned Affidavits").

[3] The Respondent brings a motion in writing under Rule 369 of the *Federal Court Rules*, SOR/98-106 (the "*Rules*") requesting that the Court strike the Applicants' Notice of Application in its entirety, or, in the alternative, strike portions of the Notice of Application and the Impugned Affidavits. The grounds for this motion are that the Notice of Application: a) is *ultra vires* the Court's jurisdiction, and b) was filed outside the 30-day limitation period under section 18.1(2) of the *Federal Courts Act*, RSC, 1985, c. F-7 (the "*Federal Courts Act*").

[4] The Applicants oppose the motion to strike, submitting that there is no fatal flaw in the Notice of Application that would merit the striking of the Application in its entirety, or portions thereof. Alternatively, if this Court determines that the Respondent has raised a debatable issue,

the Applicants submit that the motion should be dismissed and deferred to the Applications Judge for determination.

II. Issues

[5] This motion to strike raises the following issues:

A. *Whether the Applicants' Notice of Application should be struck in its entirety.*

B. *Whether portions of the Applicants' Notice of Application and the associated relief sought should be struck.*

C. *Whether portions of the Applicants' affidavits should be struck.*

III. Analysis

A. *Whether the Applicants' Notice of Application should be struck in its entirety.*

[6] The threshold for striking a notice of application for judicial review is very high. There must be "[…] a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application" (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at para 47 ("*JP Morgan*"); see also *Robert Aquilini Successor Trust v Canada (Attorney General)*, 2021 CanLII 46435 (FC) at para 18 ("*Robert Aquilini*"); *Louie v Ts'kw'aylaxw First Nation*, 2018 CanLII 116818 (FC) at para 10). An "obvious fatal flaw" cannot be found where the issues at stake are debatable (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 (CanLII) at para 130 ("*David Suzuki*"). At

paragraph 66 of *JP Morgan*, the Federal Court of Appeal held that the following would qualify as a fatal flaw warranting the striking out of a Notice of Application:

> a) If the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
>
> b) If the Federal Court is not able to deal with the administrative law claim by virtue of the *Federal Courts Act* or some other legal principle; or
>
> c) If the Federal Court cannot grant the relief sought in the notice of application.

[7] As recently affirmed by this Court in *Robert Aquilini*,

> [20] The Notice of Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: *Prairies Tubulars (2015) Inc. v Canada (Border Services Agency),* 2018 FC 991 at para 26 [*Prairies Tubulars*].
>
> [21] The Court must also read the Notice of Application "holistically and practically without fastening onto matters of form" in order to gain "'a realistic appreciation' of the application's 'essential character'": *JP Morgan*, above at para. 50.

(1) **The jurisdiction of the Federal Court to hear this judicial review.**

[8] The Respondent argues that the Applicants' Notice of Application fails to name a "federal board, commission or other tribunal" (as defined in section 2(1) of the *Federal Courts Act*) as a respondent in respect of the decisions they seek to judicial review – the September BCR and the December 16 BCR. As such, the Respondent argues that the Application is *ultra vires*

the Court's jurisdiction because Donald Raymond Smoke, in his personal capacity, does not constitute a "federal board, commission or other tribunal".

[9] The Respondent notes that both the September BCR and the December BCR are signed by Chief and Council. The September BCR bears three signatures in addition to the signature of Donald Raymond Smoke. The December 16 BCR bears the signature of nine council members in addition to the signature of Chief Donald Smoke. The relief sought in the Notice of Application requests that this Court grant relief only as against the Respondent, Donald Raymond Smoke. The Respondent further submits that, as the Applicants' application for judicial review is *ultra vires* this Honourable Court's jurisdiction *ab initio*, any request for leave to amend and/or add respondents to rectify the fatal flaw in the Notice of Application must be denied.

[10] The Respondent distinguishes this case from this Court's decisions in *Marcel Colomb First Nation v Colomb*, 2016 FC 1270 ("*Marcel Colomb*"), *Da'naxda'xw First Nation v Peters*, 2021 FC 360 ("*Da'naxda'xw*") and *Ojibway Nation of Saugeen v Derose*, 2022 FC 531 ("*Saugeen*") as none of these decisions named a single individual as the respondent, either in their personal capacity or as one of a number of members of a federal board. In fact, the Applicants failed to name any of the three decision makers of the September BCR and instead only name the Respondent, who effectively is the subject of the September BCR but not the decision-maker. The Respondent maintains that the September BCR is in fact the discrete and identifiable decision at issue.

[11] The Applicants submit that the Federal Court does in fact have jurisdiction over this matter. The Federal Court has exclusive original jurisdiction over decisions of a federal board, commission or other tribunal. At paragraph 33 of *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 ("*Gamblin*"), this Court cites the finding in *Balfour v Norway House Cree Nation*, 2006 FC 213 at paragraph 20:

> [20] The jurisprudence has established that an Indian Band Council constitutes a "federal board, commission or other tribunal" pursuant to section 18 of the [*Federal Courts Act]* […] As such, the Federal Court of Appeal confirmed in *Salt River First Nation 195 (Council) v. Salt River First Nation 195* [2003] F.C.J. No. 1538, at paragraph 18, that this Court has jurisdiction to issue a writ of *quo warranto* or to grant declaratory relief against an Indian Band Council and its constituent members […] [Emphasis in original].

[12] Subsection 2(1) of the *Indian Act*, RSC 1985, c I-5 (the "*Indian Act*") defines a "council of the band" as including: "(d) in the case of any other band, the council chosen according to the custom of the band, or, if there is no council, the chief of the band chosen according to the custom of the band". The Applicants note that the Notice of Application addresses the issues of which entity or persons have the legal authority to govern Dakota Plains, in respect of the September BCR and the December 16 BCR. In *Marcel Colomb,* this Court was asked to determine a similar issue to that which is raised in the present case and found that there "can be no doubt that the Federal Court has the jurisdiction to deal with […] the central and fundamental issue in this dispute […] [w]hich of FCC or MCC are the legitimate Chief and Council of MCFN?" (at para 153).

[13] The Applicants maintain that the Notice of Application correctly and clearly sets out that the Dakota Plains governance is a "council of the band" as defined in subsection 2(1) of the *Indian Act* and that the Respondent is a purported constituent member of such band council (the purported Hereditary Chief). The Applicants argue that the Respondent was not listed in his personal capacity for this judicial review. Rather, the Applicants did not name the Respondent in his purported capacity as Hereditary Chief of Dakota Plains because the Applicants do not recognize him as such and have asked the Court for a determination on this issue. The Applicants note that in *Marcel Colomb,* this Court took specific notice that "[a]lthough MCC are not named in the style of cause on that file as representing MCFN (for the obvious reasons that FCC did not recognize them as such) the position they take up […] is based upon their claim to be the legitimate Chief and Council of MCFN." (at para 33). Therefore, as in *Marcel Colomb,* this Court has found that failure to name the Respondent in a specific capacity is not fatal to the Application and does not mean that they are responding in their personal capacity. Rather, this Court has looked to the "position they take up" in the litigation to determine a respondent's capacity as a party.

[14] Furthermore, the Applicants submit that the Federal Court has jurisdiction to determine issues of Indigenous governance (see: *Da'naxda'xw*; *Marcel Colomb*; *Saugeen*) and to issue the relief sought in the Notice of Application, including writs in the nature of *quo warranto* (*Federal Courts Act,* subsections 18(1) and 18(3)). The Applicants assert that it can be shown that a) there exists no fatal flaw in the Application on the basis of jurisdiction; b) the matter is properly before this Court; c) the remedies sought are within the jurisdiction of this Court to grant; and d) the Notice of Application is therefore not an abuse of this Court's process. As such, the Notice of

Application should not be struck and this matter should proceed as filed and be appropriately decided by the Applications Judge after the parties have had a full opportunity to present evidence and argument (*Robert Aquilini* at para 64).

[15] I agree with the Applicants' position that the jurisprudence clearly shows that the Court has jurisdiction over this matter. Indeed, while the Respondent is the sole person named in the Notice of Application, I can appreciate the Applicants' explanation that they did not name the Respondent in his capacity as the Hereditary Chief of Dakota Plains, because the Applicants do not recognize him as such. The disagreement over who is to govern Dakota Plains is precisely the issue before this Court. The Respondent in this matter is holding himself out to be the Hereditary Chief of Dakota Plains, according to custom. As noted by the Applicants, this Court's jurisprudence has established that a First Nation's band council constitutes a "federal board, commission or other tribunal" and this Court has jurisdiction over decisions made by a First Nation's band council (*Gamblin* at paras 29-63). This Court has also determined that decisions made pursuant to custom are reviewable in this Court. In *Thomas v One Arrow First Nation*, 2019 FC 1663 ("*One Arrow*"), my colleague Justice Grammond stated at paragraph 14:

> There can be no serious dispute that this Court has jurisdiction to review decisions made under a First Nation's election laws, including where these laws are said to be "customary." See, for example, *Canatonquin v Gabriel*, [1980] 2 FC 792 (CA); *Ratt v Matchewan*, 2010 FC 160 at paragraphs 96–106; *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at paragraphs 29–63.

(2) **The 30-day time limit prescribed by subsection 18.1(2) of the *Federal Courts Act*.**

[16] Subsection 18.1(2) of the Federal Courts Act requires that an applicant bring its application for judicial review within 30 days after the decision was first communicated. The Respondent submits that both the September BCR and the December 16 BCR were made over 30 days before the Notice of Application was filed on January 25, 2022. The Applicants have not included in the grounds of their Notice of Application when they first became aware of the September BCR or the December 16 BCR. The Applicants did not make any request for an extension of time to file. They also failed to explain the delay in the filing of their application for judicial review and failed to plead any grounds upon which this Court could rely on to exercise its discretion and grant such an extension of time.

[17] The Respondent argues that filing a Notice of Application within the time limitation prescribed is a threshold issue that the Applicants ought to have been required to address at the outset by seeking relief from the Court. Further, as there is an absence of grounds identified in the Notice of Application sufficient to support a request for such relief, the Respondent submits that there is no basis before the Court that could reasonably support such an order. On its face, the failure to comply with the time limitation constitutes a fatal flaw and as such, the Notice of Application ought to be struck. Additionally, the Respondent maintains that the September BCR and the December 16 BCR are two distinct, discrete decisions: they were made by different decision-makers, are not connected, and do not contain any similarities. As such, they cannot constitute “continuing acts” or a “course of conduct”.

[18] The Applicants submit that generally, issues of timeliness are to be addressed at the application stage, and not on a motion to strike (*David Suzuki* at para 155). The Applicants rely

on *David Suzuki* to argue that this Court has established that the word "matter" in subsection 18.1(1) of the *Federal Courts Act* is broader than "decision or order" in subsection 18.1(2). As such, the 30-day limitation period set out in subsection 18.1(2) does not apply where an applicant is seeking to review a "matter" which is not a "decision or order" (*David Suzuki* at para 156). A "matter" can include a policy or a course of conduct (*David Suzuki* at para 157). In *David Suzuki*, this Court found that although the application for judicial review in that matter targeted several decisions, each decision was part of a course of conduct challenged by the applicants and was a matter not subject to subsection 18.1(2). The Court summarizes the relevant jurisprudence at paragraph 173 of the decision:

> To summarize, the jurisprudence noted above highlights the following:
>
> - Issues of timeliness (i.e. the application of subsection 18.1(2)) are generally addressed at the application stage, and not on a motion to strike (*Hamilton-Wentworth*; see also *James Richardson* at para 14, *Airth* at para 13).
>
> - The 30-day limitation period in subsection 18.1(2) does not apply where the applicant is seeking to review a matter, which is not a decision or order (*Krause*, *CBC*).
>
> - A matter includes a policy or a course of conduct (*Airth*, *Sweet*, Moresby).
>
> - A course of conduct includes a "general decision, the implementation steps, or a combination of the two, where they combine to result in unlawful government action" (*Krause*, *Fisher*).
>
> - In the context of government decisions and actions, the focus is on whether there is a "closely connected course of allegedly unlawful government action" (*Fisher* at para 79).
>
> - A course of conduct may also include an ongoing practice (*CBC* at para 26).

- Both the Rule 302 and subsection 18.1(2) jurisprudence tend to use the term “course of conduct”, and both consider whether there are closely connected decisions.

- More than one decision may be reviewed in a single application – as an exception to Rule 302 – where it is a continuing act (*Mahmood, Truehope*) or, as it was characterized in *Khadr*, a continuing court of conduct. The factors to consider in determining whether there is a continuing act or course of conduct include: whether the decisions are closely connected; whether there are similarities or differences in the fact situations, including, the type of relief sought, the legal issues raised, the basis of the decision and decision-making bodies; whether it is difficult to pinpoint a single decision; and, based on the similarities and differences, whether separate reviews would be a waste of time and effort (*Mahmood, Truehope*).

[19] In *Saugeen*, this Court was asked to determine the lawful Chief and Headmen for the Ojibway Nation of Saugeen and found that the applications in that case pertained to a course of conduct that cannot be narrowed down to a discrete decision that would be the subject of judicial review (at para 25). The Applicants submit that it is clear on the face of their Application that the issues in this matter form a continuing course of conduct that go the heart of the governance dispute at issue, and that the relief sought is clearly set out and reviewable under the jurisdiction of this Court, as it was in *Saugeen*. Given this, the Applicants submit that they were not required by the *Rules* to request an extension of time to file their Application because the prescribed time limit of 30 days does not apply in this case.

[20] I agree with the Applicants’ position that the 30-day time limit prescribed by subsection 18.1(2) of the *Federal Courts Act* does not apply, as the matter at issue before this Court cannot be narrowed down to a specific decision. Rather, the matter consists of a governance dispute, which is a continuing course of conduct, as was the case in *Saugeen* (at para 25).

[21] Overall, I refuse the motion to strike the Notice of Application in its entirety. In *JP Morgan,* the Court highlighted the importance of reading the notice of application "with a view to understanding the real essence of the application" (at para 49). The Court goes on to note at paragraph 50, "The Court must gain "a realistic appreciation" of the application's "essential character" by reading it holistically and practically without fastening onto matters of form…" (internal citations omitted). Furthermore, where the issue raised by the moving party as the basis for dismissing the application is determined to be a debatable issue, the circumstances do not warrant dismissal of the application at a preliminary stage; rather, the issue should be determined by the Applications Judge (*Robert Aquilini* at para 19). I find that the issues raised in this matter are debatable, and the Respondent has not demonstrated an 'obvious fatal flaw' in the Notice of Application.

B. ***Whether portions of the Applicants' Notice of Application and the associated relief sought should be struck.***

[22] At paragraphs 38-40 of *JP Morgan,* the Federal Court of Appeal addresses the requirements of a notice of application for judicial review:

> [38] In a notice of application for judicial review, an applicant must set out a "precise" statement of the relief sought and a "complete" and "concise" statement of the grounds intended to be argued: Federal Courts Rules, SOR/98-106, Rules 301(d) and (e).
>
> [39] A "complete" statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought.
>
> [40] A "concise" statement of grounds must include the material facts necessary to show that the Court can and should grant the

> relief sought. It does not include the evidence by which those facts are to be proved.

[23] The Court stresses that before stating a ground, a party must have some evidence to support it and it is an abuse of process to initiate proceedings with unsupported allegations in the hope that something will later turn up (at paras 44-45).

(1) **Paragraph 1(a) of the Notice of Application and the associated relief sought**

[24] Paragraph 1(a) of the Notice of Application addresses the September BCR, which was signed by the Respondent and recognizes him as the Hereditary Chief of Dakota Plains, with the authority to govern Dakota Plains. The Respondent submits that paragraph 1(a) of the Notice of Application should be struck because it fails to identify on what grounds of review the Applicants are challenging the September BCR and fails to set out adequate grounds for the relief sought. The Respondent argues that the Notice of Application does not specifically identify the material facts supporting each of these grounds of review. The allegation that the Respondent is holding himself out as the Hereditary Chief of Dakota Plains relates to the Respondent's conduct after the September BCR was made and does not speak to the grounds to challenge the September BCR itself. None of the paragraphs from 3(h) to 3(q) identify what the Respondent's jurisdiction was, or how the Respondent acted beyond his jurisdiction and in a way that was contrary to law. The Respondent further submits that his appointment as Hereditary Chief complies with the purported band custom alleged by the Applicants in their Notice of Application, and no grounds for review are alleged in relation to said compliance.

[25] The Applicants contend that in relation to the governance dispute in issue, of which the September BCR forms part, their Notice of Application sets out a "precise" statement of the relief sought from paragraphs 2(a) to 2(n) and a "complete" and "concise" statement of the grounds intended to be argued from paragraphs 3(h) to 3(q). The Notice of Application at paragraph 3(r) notes that the Respondent "has acted without jurisdiction, acted beyond its jurisdiction, and acted in a way that was contrary to law", which the Applicants argue are recognized grounds for review by this Court pursuant to subsection 18.1(4) of the *Federal Courts Act*. As such, the Applicants submit that there is no "fatal flaw" which would merit striking paragraph 1(a) and the associated relief sought. Presuming the facts in the Notice of Application to be true (*Robert Aquilini* at para 22), the Respondent's mere disagreement with the articulation of the facts in the Application is not a fatal flaw nor grounds to strike the Notice of Application or portions thereof. The Applicants submit that this is an issue that the Respondent can and should raise at the hearing of the Application on its full merits and not on a motion to strike.

[26] I do not find that paragraph 1(a) of the Notice of Application and the associated relief sought should be struck. A notice of application is to be read as generously as possible, holistically and practically, without fastening onto matters of form in order to gain a realistic appreciation of the essential character of the application (*Robert Aquilini* at paras 20-21). Read generously, the Notice of Application addresses a governance dispute – for which the parties are in disagreement over underlying facts. I agree with the Applicants that this is an issue to be raised when the Application is heard on its full merits. I am also satisfied that the grounds of

review identified by the Applicants are recognized grounds under paragraph 18.1(4)(a) of the *Federal Courts Act*.

(2) Paragraph 1(b) of the Notice of Application and the associated reliefs sought

[27] The Respondent submits that the portions of the Notice of Application that relate to the requested review of the December 16 BCR ought to be struck. First, the Respondent argues that contrary to Rule 302 of the *Rules*, the Applicants seek to review two discreet decisions: the September BCR and the December 16 BCR. The Applicants ought to have sought relief from this Court to permit the review of both decisions and there is an absence of grounds in the Notice of Application to support a request for such relief. Accordingly, the Applicants' request for review of the December 16 BCR should be struck, along with the associated claims for relief at paragraphs 2(e)-(f) and 2(3)(s)-(w) of the Notice of Application.

[28] Second, the Respondent submits that, even though it was made by BCR, the December 16 BCR is not amenable to judicial review because it involves a private or commercial decision (*Maloney v Shubenacadie First Nation*, 2014 FC 129 at para 30). The December 16 BCR relates to the management of signing authorities of the Dakota Plains General Bank Account with Peace Hills Trust Company. The Respondent argues that this decision did not flow from any statutory authority or any power that is public in nature. The Respondent relies on *Peace Hills Truth Co. v Moccasin*, 2005 FC 1364, where this Court found that a BCR relating to a commercial loan agreement was purely a matter of private law, independent of public interest and therefore not amenable to judicial review (at paras 61-62).

[29] The Applicants submit that Rule 302 does not apply in this case and paragraph 1(b) of the Notice of Application should not be struck as it forms an integral part of the course of conduct in issue. The Applicants maintain that jurisprudence has established that Rule 302 does not apply where it can be shown that the subject matter of the judicial review is a matter at issue that forms part of a "continuous course of conduct" and justifies an exception to Rule 302 to permit judicial review of more than a single order where an applicant challenges continuing acts or a course of conduct (*Gagnon v Bell,* 2016 FC 1222 at para 35 ("*Gagnon*"); *David Suzuki* at para 164). Where various impugned decisions are closely related and stem from the same series of events, Rule 302 may not apply, and in the event that it does, this Court may exercise its discretion under Rule 55 and dispense with compliance with Rule 302.

[30] The Applicants argue that the present case is a governance dispute and concerns the Respondent's course of conduct in his purported capacity as the Hereditary Chief of Dakota Plains. The Applicants challenge the Respondent's lawful authority to hold such office and challenge his unlawful exercise of such office, akin to the issues considered in *Da'naxda'xw* and *Saugeen*. The Applicants submit that the matter of governance of Dakota Plains is not merely a matter of the composition of the council of the band, but also includes the protection of band funds for its government functioning and for the benefit of all Dakota Plains members (*Marcel Colomb* at para 127). It is in the best interest of all community members that all facets of the governance dispute be dealt with on this judicial review.

[31] The Applicants note that decisions of this Court have expanded on what may be considered a course of conduct. This Court has applied the jurisprudence in a manner that

permits a reviewing court to focus on the general decision, the implementation steps, or a combination of the two where the result is an unlawful government action vis-à-vis the applicant (*Saugeen, David Suzuki* at para 161). In *David Suzuki,* this Court notes: "the important point is not whether the policy itself or individual steps to implement it are challenged, but whether there is a closely connected course of allegedly unlawful government action that the applicant seeks to restrain" (at para 162).

[32] Second, the Applicants maintain that the December 16 BCR forms part of the impugned course of conduct and is a public law decision that is amenable to judicial review. The December 16 BCR was signed by the Respondent acting in his purported capacity as Hereditary Chief and directly relates to the signing authority for the Dakota Plains' general bank account – which holds public funds used in administering government functions. In *Marcel Colomb,* this Court found that since the contract at issue related to the use of public funds in administering government functions, it was not akin to a private law arrangement and was sufficiently public in nature to warrant being the subject of judicial review (at paras 123-124).

[33] I agree with the Applicants' arguments on both points. First, for the same reasons that I find the September BCR and the December 16 BCR form part of a continuing course of conduct, the December 16 BCR is not a discreet decision but rather part of the governance dispute at issue in this matter. The December 16 BCR was signed by the Respondent, purports to change the signing authority of the Dakota Plains First Nation bank account, and removed the Applicant, Evangeline Towle, as a signing authority. In my view, the signing authority is intricately related to the governance dispute at issue in this matter. Accordingly, I find that this is a case where

Rule 302 does not apply, as it can be shown that the subject matter of the judicial review is a matter at issue that forms part of a "continuous course of conduct" (*Gagnon* at para 35). As noted in *One Arrow* at paragraph 17:

> It is true that Rule 302 of the *Federal Courts Rules*, SOR/98-106, provides that an application for judicial review shall be made against a single decision. Nevertheless, an exception is made where the impugned decisions form part of a "continuous course of conduct:" *Parenteau v Badger*, 2016 FC 535 at paragraph 15. This is what happened here.

[34] Second, I agree that the December 16 BCR involves the administering of public funds for government functions. It is thus characterized as a public decision that can be considered by this Court. As noted by this Court in *Marcel Colomb* at paragraph 156,

> The status of this contract has a lot to do with the legitimacy of its termination by MCC. Should it turn out that MCC are not the legitimate Chief and Council of MCFN and never were, the legality of any acts and omissions of MCC will be an inevitable consideration for the Court. The contract simply cannot be disconnected from the central issue of this dispute. Nor can the Court's jurisdiction to review the termination of that contract.

(3) **The remedies sought**

[35] The Respondent takes issue with the Applicants' request for relief in the nature of *quo warranto* to declare Evangeline Towle the Chief of Dakota Plains and to recognize her as the interim Hereditary Chief. The Respondent submits that while paragraph 18(1)(a) of the *Federal Courts Act* permits the Court to issue writs of *quo warranto* when the authority by which a

public office is held is successfully challenged (*Da'naxda'xw* at para 174), it does not provide the Court with the power to appoint or confirm a person or entity as a lawful office holder.

[36] Furthermore, the Respondent takes issue with the Applicants' requests for interim relief at paragraphs 2(l)(1)(a), 2(l)(1)(b) and 2(l)(3) of their Notice of Application. The Respondent argues that the Applicants failed to plead sufficient grounds in their Notice of Application that would satisfy the three-part test from *RJR-MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311 when seeking an interlocutory injunction or a stay of proceedings. The Respondent submits that the Applicants a) have failed to demonstrate that there is a serious question to be tried; b) have not pled any grounds that they would suffer irreparable harm; and c) have provided no statement regarding the balance of convenience and which party would suffer greater harm from the granting or refusal of the interim relief.

[37] The Applicants contend that the substance of the relief sought from this Court in paragraph 2(d) of the Notice of Application is akin to that in *Saugeen* and *Da'naxda'xw,* and that the remedy of *quo warranto* is in fact available to this Court to grant. The Applicants submit that the substance of the request for relief is clear and obvious: they wish for this Court to declare Evangeline Towle the lawful Chief of Dakota Plains. As such, paragraph 2(d) does not merit being struck.

[38] With respect to their request for interim relief, the Applicants argue that it was not advanced on motion and is not fatal to the Application. Their choice not to advance the claim for interim relief and to aim for a resolution of the main Application does not cause prejudice to the

Respondent, and striking the identified paragraphs does not assist in clarifying the issues between the parties. It also does not assist with proceeding with the main Application in a timelier manner. As such, the Applicants submit that the paragraphs above do not merit being struck.

[39] With respect to the Respondent's reliance on *Da'naxda'xw,* I would note that the Court in *Da'naxda'xw* states the following in their discussion of *quo warranto*:

> [176] As a preliminary point, I note that *quo warranto* challenges the right of an individual office holder to hold that particular office. Accordingly, it is not clear to me that the Court can issue a writ of *quo warranto* declaring which council of the band is the lawful governing body. […]

[40] As noted by the Applicants, in *Saugeen,* this Court exercised its jurisdiction to name a lawful governing authority and therefore recognized that this remedy is available in matters of Indigenous governance (at para 91). While it remains to be determined if *quo warranto* is the appropriate relief in this situation, I find that it nonetheless remains an available remedy to this Court.

[41] With respect to the Applicants' request for injunctive relief, I agree with the Applicants that striking the aforementioned paragraphs would not result in clarifying the issues between the parties in this proceeding. In my view, the matters outlined in the Notice of Application ought to proceed to be heard on their merits.

C. ***Whether portions of the Applicants' affidavits should be struck***

[42] The Respondent submits that, in the event this Court is not prepared to strike the Notice of Application in its entirety, but strikes portions of it, the corresponding portions of the Impugned Affidavits ought to also be struck. Alternatively, the Respondent submits that this Court ought to strike the following impugned paragraphs and associated exhibits in the Impugned Affidavits:

a) Paragraphs 37, 39, 40, 46, 47, 48, 50, 51, 52, 53, 54, 55, 58, 59, 60, 61, 62, 63, 64 and associated exhibits of the Affidavit of Evangeline Towle, affirmed February 22, 2022;

b) Paragraphs 18, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 65, 66, 67, 68, 69, 70, 71, 72, 75, 77, 78, 79 and associated exhibits of the Affidavit of Craig Blacksmith, affirmed February 22, 2022;

c) Paragraphs 8, 9, 32 and associated exhibits of the Affidavit of Jason Towle, affirmed February 22, 2022;

d) Paragraphs 12, 16, 17, 22, 32, 42, 43, 45, 50, 51 and associated exhibits of the Affidavit of Chandelle Smoke-Towle, affirmed February 22, 2022;

e) Paragraphs 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and associated exhibits of the Affidavit of Alvin Smoke, affirmed February 22, 2022; and

f) Paragraphs 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36 and 37 of the Affidavit of Katherine Whitecloud, affirmed February 22, 2022.

[43] As a preliminary matter, this Court must determine whether to provide an advanced ruling on the within motion to strike out the impugned paragraphs and associated exhibits to the Impugned Affidavits, or whether the motion ought to be reserved for the consideration of the presiding judge hearing the Application. The Respondent notes that while in some circumstances, this task is best left to the Court hearing the application, there are instances where screening inadmissible evidence at a preliminary stage results in a more efficient use of the parties' and the Court's time and resources. In particular, when the affidavits are replete with inadmissible paragraphs, it may be fairer and more efficient to determine their admissibility in advance (*Hunt v Stassen*, 2019 ONSC 4466 at paras 11-13).

[44] Whether this Court provides an advance ruling on an evidentiary issue in a judicial review is a matter of discretion to be exercised on the basis of recognized factors, including: a) whether the advanced ruling would allow the hearing to proceed in a more timely and orderly fashion; and b) whether the result of the motion is relatively clear cut or obvious. If 'reasonable minds' might differ on the issue, then the ruling should be left to the body hearing the case (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 ("*Bernard*") at para 11).

[45] The Respondent submits that the volume of the impugned paragraphs is such that the Respondent would suffer prejudice if required to respond to and cross-examine the affiants. This would significantly impede the efficient and timely adjudication of this matter. The Respondent also submits that the result of the within motion is clear cut and obvious. The crux of the issue on this Notice of Application for judicial review is the validity of the September BCR, and that the Notice of Application fails to stand on its own in relation to the expanded scope alleged by

the Applicants. The Impugned Affidavits include several paragraphs pertaining to events that arose after the September BCR decision and are therefore irrelevant to the Notice of Application as a whole. Further, the Respondent argues that other paragraphs in the Impugned Affidavits contain no nexus to the grounds or relief sought, fail to provide the affiants' source of information and belief, are speculative and include opinion evidence.

[46] The Applicants submit that this Court has emphasized that motions to strike all or parts of affidavits are not to become routine, particularly where the question is one of relevancy (*Mayne Pharma (Canada) Inc. v Aventis Pharma Inc*., 2005 FCA 50 (CanLII) at para 13 ("*Mayne Pharma*"), citing *P.S. Part Source Inc. v Canadian Tire Corp.* 2001 FCA 8, [2001] FCJ No. 181 at para 18). The reasons for this being that applications for judicial review must quickly proceed on the merits, and the procedural impact of a motion to strike is to unduly delay a decision on the merits. The Applicants argue that the Respondent misrepresents the 'crux' of the Application by confining its scope to the issue of validity of the September BCR and suggesting that its judicial review should be conducted using only the material that was before the decision-maker during the decision-making process. The Applicants submit that in fact, the scope of the matter is far broader. As such, the Respondent's request to strike portions of the Applicants' affidavits must be dismissed.

[47] In my view, an advanced ruling to strike portions of the Impugned Affidavits is not merited in this case. The Respondent has not demonstrated that the evidence is obviously irrelevant or prejudicial (*Mayne Pharma* at para 13), and I find that "reasonable minds" might differ on the issue raised (*Bernard* at para 11). As such, I find that it is preferable to defer the

decision about the impugned paragraphs and associated exhibits in the Impugned Affidavits to the Court hearing the application on its merits. They are best placed to assess the Impugned Affidavits in the context of the application as a whole. This is particularly so given my view that the matter at issue does not involve one discreet decision (the September BCR), but instead addresses a course of conduct regarding the governance of Dakota Plains, similar to that reviewed in the case of *Saugeen*. In light of this conclusion, there is no need to address the Respondent's submissions regarding the substance of the Impugned Affidavits at this stage.

IV. Costs

[48] I see no reason to deviate from the general rule that costs should follow the event. I therefore order that costs be awarded to the Applicants on this motion in the amount of $1,000, inclusive of disbursements and taxes.

V. Conclusion

[49] For the reasons above, the Respondent's motion to strike the Notice of Application in its entirety is dismissed, as is the Respondent's alternative request that the Court strike portions of the Notice of Application. I also find that an advanced ruling to strike portions of the Impugned Affidavits is not merited in this case and must be deferred to the Applications Judge for determination.

ORDER in T-137-22

THIS COURT ORDERS that:

1. The motion to strike the Notice of Application is dismissed.

2. Costs payable to the Applicants by the Respondent in the amount $1,000 inclusive of disbursements and taxes.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-137-22
STYLE OF CAUSE:	DAKOTA PLAINS WAHPETON OYATE as represented by EVANGELINE TOWLE in her capacity as Hereditary Chief of Dakota Plains Wahpeton Oyate, CRAIG BLACKSMITH and ALVIN SMOKE in their capacity as representative Dakota Plains Wahpeton Oyate Council Members v DONALD RAYMOND SMOKE

MOTION IN WRITING UNDER RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	AHMED J.
DATED:	JUNE 16, 2022

WRITTEN SUBMISSIONS BY:

Jessica Barlow Markus Buchart	FOR THE APPLICANTS
Devon C. Mazur Amanda Cheys	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jerch Law Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANTS
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