**Date: 20070914**

**Docket: T-971-06**

**Citation: 2007 FC 920**

**Ottawa, Ontario, September 14, 2007**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**CHIEF DENTON GEORGE, ROSS ALLARY, ELVIS HENRY, AUDREY ISAAC, GERALD KENNY, PETRA BELANGER AND LILA GEORGE, ON BEHALF OF THE OCHAPOWACE FIRST NATION (INDIAN BAND NO. 71) AND CHIEF MURRAY IRONCHILD, M. BRENDA KAISWATUM, JOHN ROCKTHUNDER, WILLIAM LAVALLEE, NELSON WATETCH, DELBERT KAISWATUM, VALERIE IRONCHILD, JASON WESAQUATE, ALPHONSE OBEY, HAROLD KAISWATUM, WAYNE PRATT, DENNIS WESAQUATE AND KEITH FRANCIS ON BEHALF OF THE PIAPOT FIRST NATION (INDIAN BAND NO. 75), BEING MEMBER FIRST NATIONS OF THE QU'APPELLE VALLEY INDIAN DEVELOPMENT AUTHORITY (QVIDA)**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA<br>AND<br>THE ROYAL CANADIAN MOUNTED POLICE**

**Respondents**

## REASONS FOR ORDER AND ORDER

[1] This is a judicial review of the Royal Canadian Mounted Police (the RCMP) decision not to lay trespass or other charges against the Prairie Farm Rehabilitation Administration (the PFRA) and the Saskatchewan Watershed Authority (the SWA) in relation to their activities on, and affecting,

the First Nations' reserve lands. While the issue of police discretion has been canvassed time and again by this Court and other courts of the country, this application squarely raises for the first time the potential impact of treaty and aboriginal rights on that discretion.

[2] After having carefully reviewed the extensive record filed by the applicants and weighed the respective arguments of both parties, I have come to the conclusion that this application for judicial review must be dismissed. The following are my reasons for coming to that decision.

**FACTS**

[3] The Piapot, Chacachas and Kakisiwew bands were Treaty 4 signatory First Nations. Pursuant to that Treaty, a survey of lands to be held back for all three of these First Nations was conducted, and reserves were created in the 1880's for the three First Nations occupying frontage on both sides of the Qu'Appelle Valley, in the southern part of Saskatchewan.

[4] The PFRA was developed as a result of the severe drought that plagued the Prairie provinces during the 1930's. It is a branch of Agriculture and Agri-Food Canada and its programs focus on ensuring the sustainable use of the Prairie's soil and water resources. The SWA was established by the Saskatchewan Government in 2002 to assist in provincial water management. As a result, the SWA is responsible for the allocation of ground and surface water inventory and the administration and control of all provincial water infrastructures.

[5] In the 1940's, the PFRA built dams and water control structures in the Southern Saskatchewan Qu'Appelle Valley. While the respondents concede that there was increased water

encroachment onto a number of Reserve Lands as a result of these structures, there is much disagreement on the extent of these damages, on the consultation that took place with the First Nations before these structures were constructed, on the compensation agreed on and paid, on the contamination and pollution of the Qu'Appelle River that would have occurred because of the flooding, on the alleged admission of unlawful conduct by the Crown and on the negotiations that took place to secure First Nations' consent for the flooding of their lands, on the actual trespass by individual members of PFRA and on the question as to whether water is still encroaching on reserve land and whether this encroachment constitutes a trespass under the Band By-laws, Criminal Code or common law.

[6] These issues are addressed at length in the two affidavits filed in support of the application for judicial review, one by Mr. Ross Allary, a councillor of the Ochapowace First Nation, and the other by Mr. William Lavallee, a councillor of the Piapot First Nation, both of whom have been involved as representatives of their Nations on the Qu'Appelle Valley Indian Development Authority (QVIDA). Both affidavits are dated May 17, 2006 and are identical in every respect except where the affiants make reference to their respective Bands. These affidavits are supported by a massive amount of exhibits, which make up most of the eight volumes of the applicants' Motion Record.

[7] Counsel for the respondents has strenuously opposed the admissibility of these affidavits and exhibits on several grounds. Indeed, it appears that this issue was raised by the respondents during a case management call, but Mr. Justice Hugessen quite properly ruled that questions

regarding the admissibility of affidavit evidence should be raised at the hearing of the judicial review application.

[8] Before going any further with the recital of the facts, I must pause and assess this preliminary objection of the respondents as it will obviously be of some bearing on the background information that can be taken into consideration in ruling on this application for judicial review.

[9] I agree with counsel for the respondents that much of the material included in the applicants' supporting affidavits cannot be considered by this Court and must be excluded as there is no evidence that they were before the decision maker at the time when the decision was made. It is trite law that in a judicial review application, the only material that should be considered is the material that was before the decision maker: see, for example, *Lemiecha v. Canada (M.E.I.)* (1993), 72 F.T.R. 49, at para. 4; *Moktari v. Canada (M.C.I.)* (2001), 200 F.T.R. 25, at para 34; *Toussaint v. Canada* (1993), 160 N.R. 396 (F.C.A.) at para 5. The only exceptions to this rule have been made in instances where the evidence was introduced to support an argument going to procedural fairness or jurisdiction (as in *McConnell v. Canada*, 2004 FC 817 at para 68, upheld at 2005 FCA 389), or where the material is considered general background information that would assist the Court (see, for ex., *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 [*Chopra*] at para 9).

[10] The rationale for that rule is well known. To allow additional material to be introduced at judicial review that was not before the decision maker would in effect transform the judicial review hearing into a trial *de novo*. The purpose of a judicial review application is not to determine whether the decision of a tribunal was correct in absolute terms but rather to determine whether its decision

was correct on the basis of the record before it: *Chopra*, at para 5; *Canadian Tire Corp. v. Canadian Bicycle Manufacturers Assn.*, 2006 FCA 56 at para 13.

[11] The applicants contended that they have provided the information they "believe" was within the knowledge of the RCMP when the decision not to lay charges was made, and that it is up to the respondents to prove the information in question was not taken into account by the RCMP when it made its decision. In the absence of any information in affidavit form from the RCMP to the effect that they did not have the information filed, and in light of the many meetings that took place between the RCMP and the applicants where the information contained in the affidavits were discussed, it is the applicants' submission that the material appended to the affidavits was available to the RCMP.

[12] The applicants' thesis, which for all intents and purposes places the onus on the respondents to prove that the disputed information was not taken into account by the RCMP when it made its decision, quite simply does not hold water. The onus clearly falls on the applicants to provide admissible evidence to prove the federal board, commission or other tribunal acted in a manner amounting to an established ground for review under section 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the *Act*). Unless an affiant clearly states that such and such document was communicated to the decision maker, this Court cannot speculate as to what was before the board or tribunal when it came to its decision. Applicants' counsel cannot, through oral submissions, assert beyond what is in the affidavits that all the documents were provided to the RCMP. Counsel cannot provide evidence that is not before the Court, nor speculate beyond what is attested to in the affidavits.

[13] On the basis of these principles, I am satisfied that the following information was before the decision maker. First of all, both affiants testify at paragraph 108 of their respective affidavits that the QVIDA First Nations and their legal counsel met with representatives of the RCMP and provided the RCMP representatives with an information package regarding the basis for requesting an RCMP investigation and the underlying charges. This information package is appended to the affidavits at Exhibit “CU2” and is therefore clearly part of the record.

[14] Similarly, the affiants also make reference to a number of correspondence exchanges between the RCMP and their legal counsel and discuss a number of meetings between the applicants and the RCMP. These references are made at paragraphs 61, 83, 103, 104 and 106 to 112 of their respective affidavits. The information contained in those paragraphs as well as the exhibited copies of the correspondence, meeting minutes and meeting attendance sheets are equally part of the record, as they could arguably have been before, or at least within the knowledge of, the decision maker.

[15] Finally, the affiants indicate at paragraphs 83 and 104 of their affidavits that the RCMP were provided with a copy of the report authored by EBA Engineering Consultants Ltd., which reviewed the historical water quality of the Qu’Appelle River Basin. Accordingly, this report would have been before the decision maker.

[16] The respondents are also prepared to accept, rightly so in my view, that paragraphs 1 to 5 of the affidavits should also be accepted to the extent that they lend background information in relation to the applicants’ claims of aboriginal and/or treaty rights in relation to the RCMP. In the same vein,

they also recognize that paragraphs 112 and 113 of the affidavits are admissible with respect to the issue of procedural fairness as they relate to the previous involvement of a Department of Justice counsel.

[17] Of course, it is worth emphasizing that this whole debate on the admissibility of the affidavits and of the material appended could have been avoided had there been a request pursuant to Rule 317 of the *Federal Court Rules*, SOR/98-106 (the *Rules*) to obtain the material relevant to the application that was in the possession of the decision maker. This Rule was enacted precisely to obviate the difficulties of determining what was before the administrative authority at the time it reached its decision.

[18] Counsel for the applicants tried to suggest that he could only have requested material he did not already have. On that reading of the Rule, an applicant will bring forward the information in his or her hands and would be prevented from asking the tribunal to provide information that the applicant already has.

[19] Such a construction of Rule 317 of the *Rules* would subvert, in my humble opinion, the very purpose of that Rule. The requirement to produce under Rules 317 and 318 of the *Rules* is intended to ensure that the record that was before the tribunal when it made its decision or order is before the Court on judicial review. Obviously, a party should not request material that is already in its possession. That being said, the prudent course of action would be to request from a tribunal or other decision maker the relevant material that is in its possession if there is any prospect of a debate as to what was before the tribunal when it made its decision. Bearing in mind that the applicant has

the burden of establishing, by affidavit or otherwise, what was before the decision maker, the failure to make a request under Rule 317 of the *Rules* can only work to the applicant's disadvantage. The Federal Court of Appeal decision in *The Queen v. Merchant (2000) Ltd.*, 2001 FCA 301 stands for that proposition. While the facts were somewhat different in that the applicant was contending there was no material before the Minister reasonably capable of supporting his conclusion, it does not detract but indeed reiterates that it falls upon the applicant to show what information was before the decision maker. Writing for a unanimous Court, Justice Sexton said (at paragraph 10 of his reasons):

> [10] Merchant, as the Applicant for judicial review of the Minister's decision, had the burden of establishing that the Minister did not have such evidence when he exercised his discretion to issue a Requirement. Rule 317 of the *Federal Court Rules* permits a party to request material relevant to an application that is in the possession of a tribunal whose order is the subject matter of an application. Merchant neither asked for this material nor invoked the provisions of Rule 317. Therefore, no serious complaint can be made by Merchant that the basis of the Minister's decision is not before this Court. Because the basis of the Minister's decision is not before this Court, Merchant is unable to show that the discretion was improperly exercised.

[20] The respondents also raise a second objection to the admissibility of the affidavits submitted by the applicants. They contend that they are replete with statements made on information and belief, with hearsay and with opinions not based on personal knowledge. This, in their view, is contrary to Rule 81 of the *Rules*, which sets out that affidavits shall be confined to facts within the personal knowledge of the deponent.

[21] It is well established that on a judicial review application, an affidavit must be limited to a statement of facts. It must not contain opinions, points of view or arguments by the affiant. The principle, which has its source in the common law rule of hearsay, can be explained by the fact that

it must be possible to cross-examine the affiant. Its expression can now be found in Rule 81 of the *Rules*: *Bastide v. Canada Post Corp.*, 2005 FC 1410; *Ly* v. *Canada (M.C.I.)*, 2003 FC 1184; *Akomah v. Canada (M.C.I.)*, 2002 FCT 99; *Canadian Tire Corp. v. P.S. Partsource Inc.*, 2001 FCA 8.

[22] When looking carefully at the affidavits filed by the applicants, it is true that a lot of their content is based on hearsay and information the affiants could not have personal knowledge of. But in all fairness, this is also true of Mr. Woodvine's affidavit, submitted by the respondents. Mr. Woodvine, a senior hydrologist with the PFRA, does not say what the basis of his ability to swear the affidavit is, attests to a number of things he could not have had personal knowledge of, and recognizes explicitly in several places that his knowledge is based on information and belief. While I am not prepared to exclude all of that evidence, if only because much of the information provided is of a factual nature, its second hand nature does nevertheless cast a shadow on its weight.

[23] Equally problematic is the fact that most of the documents submitted by the applicants as exhibits to their affidavits are provided without any explanation as to where these documents were obtained, the authority or roles of the individuals who have authored or received them or the basis upon which the applicants are relying upon the information in those documents. It is commonly accepted that a document is not rendered relevant or admissible simply because it is attached to an affidavit. The affidavit evidence must prove the document before it can be admitted or alternatively submit it on information and belief with the source of that document or the person whom the document was received being established in the affidavit: *Inhesion Industrial Co. v. Anglo Canadian Mercantile Co.* (2000), 6 C.P.R. (4th) 362 (F.C.). I am mindful of the facts that courts

must adapt the rules of evidence to take into account the special nature of aboriginal claims and the evidentiary difficulties in proving them, as directed by the Supreme Court of Canada in cases like *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 [*Mitchell*] and *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*]. But this does not mandate the blanket admissibility of such evidence, especially when it does not relate to ancestral practices in the context of a land claim.

[24] Counsel for the applicants and for the respondents have battled out this admissibility issue with a few more arguments, but I do not intend to dwell on them any more. At the end of the day, the critical issue is the relevance of the evidence submitted by both parties. I agree with counsel for the respondents that much of the information contained in the affidavits submitted by the applicants is not directly germane to the issues before the Court in the present judicial review application. It relates to reserve boundaries, frontage, water contamination and damages resulting from flooding. While this evidence may be put forward in support of an aboriginal land dispute claim or a claim for damages resulting from flooding, it does not bear much relevance to a judicial review application of a decision made by the RCMP not to lay charges for trespass.

[25] For all of the foregoing reasons, I shall not give too much weight to the affidavits and the appended material filed by the applicants, except as they relate to the issues raised in this application for judicial review. I stop short of excluding altogether all the information that does not relate to the RCMP involvement or to the role of the Department of Justice counsel, as requested by the respondents, as I am prepared to accept that the affidavits do contain some interesting background historical information. The value of that information is nevertheless severely restricted and subject to caution, for the various reasons mentioned in the preceding paragraphs.

[26] This parenthesis with respect to the admissibility of the affidavit evidence being closed, what then is left in terms of established facts relevant to the issues raised in this application for judicial review? In June of 1986, QVIDA submitted a claim asserting that Canada had breached its lawful obligations under Canada's Specific Claims Policy by failing to comply with the provisions of the *Indian Act*, R.S.C. 1985, c. I-5 (the *Indian Act*) when it allowed PFRA to build control structures along the rivers and lakes of the Qu'Appelle Valley in the 1940's, which resulted in permanent flooding and alienation of their lands. In 1992, the Department of Indian and Northern Affairs Development (the DIAND) closed that claim due to a lack of activity on the file.

[27] In 1994, QVIDA asked the Indian Claims Commission (the ICC) conduct an inquiry into the wrongful flooding of First Nation lands. As a result of that inquiry, the ICC found that the use and occupation of the reserve land for flooding could not be authorized under the *Indian Act* and that it had occurred without Band consent. Canada validated the QVIDA Flood Claim based on the recommendation of the ICC, and a Protocol Accord was signed in August of 2000 to be used for the flood claim negotiations. But in 2003, negotiations broke down when the First Nations indicated that they would no longer allow the operation of the structures without annual compensation being paid. In the following months, a number of the First Nations broke away from the formal negotiation group and continued negotiations on their own accord. The respondents claim that the structure located on the Ochapowace First Nation lands has not operated since that time and that the Piapot First Nation has no structure that impacts it directly.

[28] From that point forward, the QVIDA negotiation group consisted of three Bands, two of which are the applicant First Nations of Piapot and Ochapowace. In 2005, it appears that

negotiations resumed with this QVIDA negotiation group involving INAC, PFRA and SWA, but have yet to result in a resolution.

[29] In March and May of 2005, the applicants Piapot First Nation and Ochapowace First Nation passed Band Council By-laws that create offences of trespass for the interference of the use of reserve land, including the flooding of land from external sources. The applicants alleged that the activities of the PFRA and the SWA are in contravention of these By-laws and of the Criminal Code.

[30] The RCMP were first involved in the dispute between QVIDA First Nations and Canada and Saskatchewan on September 6, 2002, when Supt. McFadyen met with representatives of QVIDA to hear about their complaints that PFRA employees attempted to access the Echo, Crooked and Round Lake structures. In a letter dated October 15, 2002, Supt. McFadyen advised QVIDA First Nations that PFRA was not entitled to enter onto the lands and that PFRA would comply with the First Nations' direction not to trespass.

[31] Following the release of the EBA report in September, according to which there were significant problems with the water quality in the Qu'Appelle River Basin, a copy was provided to the RCMP and they were requested to confirm that PFRA would continue to not attempt access to First Nation lands without permission. On October 1, 2003, Supt. McFadyen confirmed that the RCMP's position regarding PFRA's trespass to First Nations lands remained the same, that PFRA was not entitled to enter the lands without consent, and indicated that the role of the RCMP is to prevent or respond to a breach of the peace between the parties, including property damage.

[32] On March 5 and April 23, 2004, QVIDA First Nations and their counsel met with the RCMP to discuss legal mechanisms to stop alleged further trespasses. On May 6, 2004, Supt. McFayden recommended a strategy that the First Nations should follow in case of trespass: approach the trespassers, request that they leave, and give them time to vacate. If they return or do not leave, "charges will then be appropriate, and subject removed" (Exhibit CS2 of the Affidavit of Ross Allary).

[33] In July 2005, the First Nations again met with representatives of the RCMP and requested an investigation into certain trespasses and other unlawful activity by PFRA. An information package was provided for that meeting to the RCMP, which includes a copy of the By-laws adopted by the First Nations, correspondence between the DIANA with respect to these By-laws, excerpts of an unidentified *Annotated Indian Act*, and various graphs and statistics relating to water management from the SWA. It is interesting to note that in the comments provided by the DIAND to the Chiefs and Councils with respect to the By-laws, their inapplicability to actions which occur outside of the reserve boundaries was explicitly raised (Applicant's Record, vol. VII, at pp. 2443 and 2446).

[34] The outcome of the investigation requested in July 2005 was discussed in a further meeting that took place on March 30, 2006. That meeting was attended by representatives of the RCMP and of the QVIDA. Following that meeting, Sgt. Ré sent a letter to the First Nations on April 18, 2006, advising them that, based on the information provided, the RCMP would not be proceeding with charges.

[35] A follow-up meeting was held the next day between the First Nations and the RCMP; the trespass investigation was discussed and the First Nations objected to the decision not to lay charges. A letter dated May 8, 2006 from QVIDA counsel to Sgt. Ré itemized the First Nations objections to the decision not to lay charges. On May 17, 2006, Insp. Lerat corresponded with QVIDA counsel and informed him that, on the basis of Sgt. Ré's investigation and advice from Chris Lafleur, Senior Counsel for the Department of Justice (Prairie Region), the RCMP had decided not to lay charges for trespass or other unlawful activity.

**THE IMPUGNED DECISION**

[36] While the decision that is the subject of the present application for judicial review is, formally speaking, that of Insp. Lerat which was communicated to counsel for the applicants on May 17, 2006, it is helpful to reproduce the previous letter of Sgt. Ré dated April 18, 2006. While a meeting took place between these two letters, as explained in the previous paragraph, it nevertheless provides helpful background into the decision not to lay charges. Indeed, the shorter letter of May 18 appears to be merely a confirmation of the previous letter.

[37] The letter from Sgt. Ré to Mr. Peigan, negotiator for the QVIDA, reads as follows:

> On April 13th, 2006, Mr. Matthew Peigan attended the Regina Commercial Crime Section office and provided a statement to an investigator regarding allegations of trespassing by representatives from the Prairie Farm Rehabilitation Administration (PFRA) and Saskatchewan Watershed Authority (SWA). The evidence obtained from Mr. Peigan on behalf of QVIDA and other sources have been reviewed in conjunction with a legal opinion received from the Department of Justice (Canada).

Based on all the information gathered to this date we arrive at the following conclusions:

1) Piapot First Nation, Sakimay First Nation and Ochapowace First Nation developed each a set of bylaws which came into force during the summer of 2005. Letters used as "Notice of Violation" were sent by the three First Nations to PFRA and SWA alleging trespass by increase of waters upon the Piapot FN, Sakimay FN and Ochapowace FN. The Bylaws drafted by the three First Nations cannot be enforced due to the following:

- Bylaws passed under Section 81 of the Indian Act are limited to the geographical confines of the reserve.
- The definition of trespass used in the three Bylaws expands on the common law principle of trespass (one person's entering upon another's land without lawful justification). To refute the charge, the alleged trespasser would have to establish a lawful justification for being on the First Nation (If a civil servant carries out his/her duties on the First Nation, he/she is there for a lawful purpose pursuant to federal/provincial authority which supersedes the Bylaws i.e. Section 9(1) of The Prairie Farm Rehabilitation Act and Section 6(1) of The Saskatchewan Water Corporation Act).
- The Bylaws are outside the authority of the Indian Act because the general principles of common law trespass contemplate trespass by persons, not by inanimate things like water.

2) Consideration was also given to a possible charge of mischief pursuant to Section 430(1) of the Criminal Code if someone damaged First Nation's land by flooding. Again the aspects of legal justification and colour of right are covered as an exception in Section 429(2) of the Criminal Code. In view of the provisions included in The Prairie Farm Rehabilitation Act and The Saskatchewan Water Corporation Act, a prosecution under Section 430(1) cannot be pursued.

Based on the information gathered through our investigation, the R.C.M.P. cannot proceed with charges in the matter.

[38] As for the letter sent by Insp. Lerat to counsel for the applicants on May 17, 2006, the salient part of it simply states:

> […]
> Sgt. Richard Ré, the investigator in this matter has completed this investigation and it has been determined that there is insufficient evidence to proceed with any charges related to Statutes of Canada, Province of Saskatchewan, or the By-law Enacted by the three First Nations. The sensitivity of these matters has not gone unnoticed, therefore consultation has taken place with Mr. Chris LaFleur, Senior Counsel for Dept. of Justice / Prairie Region in Saskatoon. Mr. LaFleur has also drawn the same conclusions that there is no validity to pursuing charges for trespassing under the by-law.
>
> It is the RCMP's responsibility to investigate any matters relating to statute offences. This does not preclude you or your organization from pursuing this matter on a civil basis.
> […]

**THE ISSUES**

[39] This application for judicial review essentially raises two fundamental issues: 1) Should the exercise of prosecutorial discretion by the RCMP be the subject of a judicial review, and if so, what is the appropriate standard upon which to review its decision not to lay charges? 2) If the decision of the RCMP is reviewable, have the applicants provided any evidence to meet the appropriate standard of review?

**ANALYSIS**

**1) Is judicial review available to control the exercise of prosecutorial discretion?**

[40] There is no doubt that police and prosecutorial discretion is one of the cornerstones of our criminal justice system, allowing the enforcement of our criminal laws to adapt to individual circumstances and to the complexities of real life. This cardinal principle has been recognized time and again by our courts, and the Supreme Court of Canada has confirmed that such discretion is not

inconsistent with the principles of fundamental justice entrenched in section 7 of the *Canadian Charter of Rights and Freedoms*. As Justice La Forest (speaking for the Court) wrote in *R. v. Beare*, [1988] 2 S.C.R. 387 at p. 410-411:

> The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.
>
> The Criminal Code provides no guidelines for the exercise of discretion in any of these areas. The day to day operation of law enforcement and the criminal justice system nonetheless depends upon the exercise of that discretion.

[41] This discretion permeates the entire criminal process, from the initial investigation stage through to the conclusion of the trial, with the result that two persons having seemingly committed the same offence may well be treated differently: *R. v. Poirier*, [1989] M.J. No. 379 (Man. Prov. Ct.) (QL), quoted with approval L'Heureux-Dubé, J. (for a unanimous court) in *R. v. T. (V.)*, [1992] 1 S.C.R. 749 [*R. v. T. (V.)*]. Courts have been loath to intervene, except in the most exceptional circumstances, lest they be perceived to blur the line between the executive and the judicial functions.

[42] There are a number of rationales for not interfering with prosecutorial discretion, some of a theoretical nature and some others more practical. As just mentioned, separation of powers has often been invoked in support of the view that courts should not meddle with the administration of

criminal law. This concern was most explicitly stated by Viscount Dilhorne in *Director of Public Prosecutions v. Humphrys*, [1976] 2 All ER 497 (HL) at p. 511:

> A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.

[43] This rationale, explicitly endorsed by the Supreme Court of Canada in *R. v. T.(V.)* at para 17, is supplemented by other, more practical considerations. As noted by the Supreme Court, if administrative law principles were to be imported into the prosecutorial environment of the criminal law, judges would be called upon to review an innumerable number of decisions, including the decision to charge or not to charge, to prosecute or not to prosecute, to direct further investigation or not to direct further investigation or to withdraw or not withdraw a particular charge, which could in turn lead to the complete paralysis of the administration of the criminal law. Since the decision to investigate, to bring charges, to prosecute, to plea bargain or to appeal hinges upon a myriad of factors, judicial oversight of those decisions would also imply the review of masses of documents, and eventually reveal the Crown's policies and goals in the allocation of its resources and its overall enforcement priorities. Not only would this be at odds with the most basic premises of our constitutional arrangements, but it would also lead to a very inefficient administration of justice. The Supreme Court has dwelt at length on these various issues in *R. v. Power*, [1994] 1 S.C.R. 601 [*Power*]. After quoting from her previous decision in *R.* v. *T. (V.)*, Justice L'Heureux-Dubé went on to write, at p. 626-627:

> The judicial review of prosecutorial discretion may also involve disclosure by the Crown of precise details about the process by which it decides to charge, to prosecute and to take other actions. Such a procedure could generate masses of documents to review and

> could eventually reveal the Crown's confidential strategies and preoccupations. For example, the confidential nature of the charging process serves important institutional functions, including rehabilitative goals and the goal of increasing general deterrence. The latter is met only by preventing the public from knowing which crimes will be given emphasis in enforcement. […]
>
> Indeed, confidentiality permits prosecutors to employ flexible and multifaceted enforcement policies, while disclosure promotes inflexible and static policies which are not necessarily desirable.
>
> Moreover, should judicial review of prosecutorial discretion be allowed, courts would also be asked to consider the validity of various rationales advanced for each and every decision, involving the analysis of policies, practices and procedure of the Attorney General. The court would then have to "second-guess" the prosecutor's judgment in a variety of cases to determine whether the reasons advanced for the exercise of his or her judgment are a subterfuge. […]
>
> Such a situation would be conducive to a very inefficient administration of justice. Furthermore, the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it. Judicial review of prosecutorial discretion, which would enable courts to evaluate whether or not a prosecutor's discretion was correctly exercised, would destroy the very system of justice it was intended to protect. […]

[44] This long review of the cases is no doubt more than sufficient to put to rest any notion that prosecutorial discretion should be subjected to judicial review like any other administrative decisions. It is true that the decision by the police to lay a charge does not come, strictly speaking, within the core elements of prosecutorial discretion, as defined by the Supreme Court in *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372. In that case, the Court enumerated the key elements of prosecutorial discretion as being the discretion whether to bring the prosecution of a charge laid by police, the discretion to enter a stay of proceedings in either a private or public prosecution, the discretion to accept a guilty plea to a lesser charge, and the discretion to withdraw from criminal

proceedings altogether. The Court was quick, however, to mention that there are other discretionary decisions, thought not related to the office of the Attorney General.

[45] There is no doubt in my mind that the decision to lay a charge by a police officer must also be free from judicial interference, for the exact same reasons that Crown attorneys must be treated with deference when exercising their discretion. After all, the laying of a charge is but the first step in setting in motion the judicial process. I find comfort for that view not only in the Supreme Court decisions already quoted, but also in a most recent judgment of the Ontario Court of Appeal in *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790 (QL). In that case, Justice Laskin (for the Court) put on par police and the Crown when it came time to assess their behaviour:

> 113. Our courts have long recognized that the effectiveness of our justice system depends on the police's operational discretion in investigating and enforcing violations of the law and the Crown's discretion in prosecuting these violations. Apart from instances of flagrant impropriety or civil actions for malicious prosecution, courts should not interfere with either police or prosecutorial discretion.

[46] Numerous decisions of this Court have applied the concept of prosecutorial discretion and, in keeping with the decisions of the Supreme Court of Canada, have refused to embark on a judicial review of an exercise of that discretion. These decisions recognize that courts should limit rather than extend their supervisory role over police discretion. This is particularly the case when the decision sought to be reviewed is purely discretionary and the statute does not provide any directions or limitations as to when, how and to what extent that discretion should be exercised: see, for ex., *Zhang v. Canada (Attorney General)*, 2006 FC 276, upheld at 2007 FCA 201; *Winn v. Canada (Attorney General)* (1994), 84 F.T.R. 115; *O'Malley v. Canada*, [1997] F.C.J. No. 1259

(F.C.) (QL); *Stucky v. Canada (Attorney General)*, 2004 FC 1769; *Labrador Métis Nation v. Canada (Attorney General)*, 2005 FC 939.

[47] It should be clear by now that the discretion enjoyed by the Crown and the police in the enforcement of the criminal law is nevertheless not absolute. The Supreme Court has made it clear, in all those decisions already referred to, that judges should intervene in cases of flagrant impropriety or malicious prosecution. But the threshold to demonstrate that kind of improper behaviour will be very high. In leaving open that possibility in *Power*, Justice L'Heureux-Dubé made no mystery of the tall order that awaits those who seek the intervention of the courts in the following terms (at p. 615-616):

> […] courts have a residual discretion to remedy an abuse of the court's process but only in the "clearest of cases", which, in my view, amounts to conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention.
>
> To conclude that the situation "is tainted to such a degree" and that it amounts to one of the "clearest of cases", as the abuse of process has been characterized by the jurisprudence, requires overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interests of justice. […] Where there is conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed, then, and only then, should courts intervene to prevent an abuse of process which could bring the administration of justice into disrepute. Cases of this nature will be extremely rare.

[48] These comments have later been taken up to mean that something more than patent unreasonableness was required. In *Kostuch v. Alberta (Attorney General)*, [1995] A.J. No. 866 (QL), the Alberta Court of Appeal ruled that flagrant impropriety can only be established by proof

of misconduct bordering on corruption, violation of the law, bias against or for a particular individual or offence. See also *R. v. Theissen*, 2002 MBQB 149.

[49] Enough has been said of police and prosecutorial discretion already, and there is no need to belabor the point any more. Before coming to a conclusion on the basis of these principles, however, a word must be said about the recent decision of the Supreme Court in *R. v. Beaudry*, 2007 SCC 5. Relying on that decision, counsel for the applicants forcefully argued at the hearing that the appropriate test to determine whether police discretion was properly exercised was twofold, and required both a subjective and objective analysis.

[50] After having carefully considered that decision, I am of the view that it does not significantly alter the law governing prosecutorial and police discretion. Quite to the contrary, the Court reiterated that discretion was crucial in the administration of criminal justice. In that case, a police officer was charged with obstructing justice for deliberately failing to gather the evidence needed to lay criminal charges against another police officer. Despite having reasonable grounds to believe this other police officer had been operating a motor vehicle while intoxicated, Beaudry decided not to request a breathalyzer and not to prepare an impaired driving report, using his discretion to deal with the case otherwise than through prosecution.

[51] First of all, the facts underlying that decision are quite different from those of which I am seized in this application for judicial review. Beaudry was charged of obstructing justice not because he had not laid charges against another police officer (which, in any event, he could not have done in Quebec without the intervention of a Crown prosecutor), but because he had failed to

collect the evidence necessary for the Crown prosecutor to exercise his discretion to prosecute or not, despite the fact that he had reasonable grounds to believe an offence had been committed. This is quite different from the situation here, where the RCMP did investigate and meet with the applicants before deciding not to lay charges.

[52] Secondly, the Court once again explicitly recognized a police officer's discretion not to engage the judicial process, even if he has reasonable grounds to believe an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge. The only *caveat* is that police officers must justify their decisions rationally, that is, both subjectively and objectively. The discretion will be subjectively justified if it has been exercised honestly and transparently, and was not based on favouritism, or on cultural, social or racial stereotypes. As to the objective assessment, it will be based on a determination of what a police officer acting reasonably would do in the same situation.

[53] I fail to see how this requirement that decisions be capable to be justified rationally differs from the "flagrant impropriety" test. There is certainly no indication in the decision, which dealt first and foremost with a prosecution for obstructing justice, suggesting that the Court intended to lower the bar for judicial intervention when the exercise of police discretion is called into question. Indeed, counsel for the applicant himself submitted that the objective justification requirement will take into account the same considerations that are addressed by the flagrant impropriety test. To be fair, he also argued that the only way to establish transparency and honesty, in the context of the subjective justification, was to provide the reasons for the decision. But there is no hint that the

Court was prepared to go that far, and the compelling reasons not to go that route have already been canvassed earlier in these reasons.

[54] In light of the foregoing, I am therefore of the opinion that courts should be extremely reluctant to review an exercise of police or prosecutorial discretion, and should only do so in the clearest of cases, where flagrant impropriety can be demonstrated. In the present case, I am unable to find such an improper exercise of discretion in the decision of the RCMP not to lay charges. But before explaining briefly why the arguments raised by the applicants have failed to convince me, I need raise another concern pertaining to the jurisdiction of this Court to entertain an application for judicial review of such a decision.

[55] In a decision released May 29, 2007, my colleague Justice Tremblay-Lamer addressed the issue of the jurisdiction of this Court to entertain an application for judicial review in the course of a criminal investigation by the RCMP. That investigation was conducted to determine whether the applicant contravened s. 131 of the *Criminal Code*, R.S.C. 1985, c. C-46 and s. 12 of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1, during her appearance before the Public Accounts Committee. After having stressed that the Federal Court has no inherent jurisdiction, she focused on the first leg of the test set out in *ITO - Int'l Terminal Operators v. Miida Electronics,* [1986] 1 S.C.R. 752 at p. 766 to determine whether it has jurisdiction in a particular instance. As will be remembered, the first condition to be met is that there must be a statutory grant of jurisdiction by the federal Parliament. That means, in that specific case, that the applicant had to establish an express or implied grant of jurisdiction which authorizes the Federal Court to quash and declare invalid a criminal investigation.

[56] The only possible source of jurisdiction was section 18.1 of the *Act*, which confers jurisdiction to review decisions made by "a federal board, commission or other tribunal", as these entities are defined in section 2 of the same *Act*. After reviewing the legislation and the case law on the subject, Justice Tremblay-Lamer came to the conclusion that the decision to initiate a criminal investigation cannot be properly characterized as a decision by a "federal board, commission or other tribunal". In her view, police officers are independent from the Crown when conducting criminal investigations, and their powers have their foundation in the common law. Being independent of the control of the executive, they cannot be assimilated to a "federal board, commission or other tribunal". I fully agree with this most compelling analysis of my colleague.

[57] In the result, this application for judicial review could be dismissed on the sole ground that this Court does not have the jurisdiction to entertain it. But as already mentioned, even if I were to proceed on the assumption that a decision not to lay charges by the RCMP can properly be the subject to an application pursuant to section 18.1 if the *Act*, I can find nothing in the conduct of the RCMP officers involved in the investigation that meets the flagrant impropriety test mentioned earlier.

**2) Have the applicants provided any evidence of flagrant impropriety?**

[58] The applicants have based their allegations of impropriety on a number of assertions. They argued that the RCMP did not take into account their Aboriginal rights, Treaty rights and the fiduciary duty owed to the First Nations. They also claimed that the legal counsel who attended a meeting involving the First Nations and the potential accused placed himself in a conflict of interest position when he was later consulted by a RCMP Inspector in relation to the decision to decline to

lay charges. After having carefully reviewed the evidence submitted by the applicants, I find that it does not bear out their allegations and certainly does not indicate any behaviour or conduct even coming close to the level of flagrant impropriety.

[59] I have been unable to find any specific mention of assistance being provided by the RCMP in Treaty 4. There is simply no authority to support the view that there is an established or even a potential treaty right of First Nations to assistance from the RCMP. The applicants have pointed to the text of Treaty 4 where First Nations chiefs promised to maintain peace and good order within the First Nation, between their First Nation and other First Nations, and between their First Nation and other subjects of the Queen. They argue that this amounts to an obligation on both the First Nations and the Crown to maintain peace and good order and the instrument to do so is the RCMP.

[60] Even recognizing that words in a treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction (*R. v. Badger*, [1996] 1 S.C.R. 771 at para 54), I fail to see how this mutual policing requirement could translate into an undertaking from the RCMP to exercise its police discretion in such a way so as to favour the applicants or provide them with some police priority. I agree with the respondents that such a broad and general statement cannot be interpreted as impacting the most intricate details of day to day policing such as the decision by police to decline the laying of charges. Not only would that be totally inappropriate, but there is absolutely no evidence that this was the understanding between the parties at the time the Treaty 4 was entered into. Apart from an argumentative paragraph in both affidavits submitted by the applicants (the text of which is identical in every respect) asserting a treaty promise to assistance from the "red coats", there is absolutely no support for that alleged right.

[61] As for an alleged aboriginal right to assistance owed by the RCMP to the applicants, it is unclear from the applicants' material what the exact basis for this right is and where it can be found. The elements of proof of aboriginal rights were set out by the Supreme Court in *Van der Peet* and the tests were recently summarized by the Supreme Court in *Mitchell*, where the Court stated:

> 12. […] Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

As already mentioned in relation to the alleged treaty right, there is simply no evidence providing a foundation based on these factors to support such a right to assistance from the RCMP.

[62] Finally, the applicants allege further that the RCMP, as an organ of the Crown, owe a fiduciary duty toward First Nations people which would require them to act in the best interests of the First Nations. They go as far as saying (at para 59 of their factum) that, "[e]ven if the RCMP found evidence of unlawful conduct but decided within the scope of their discretion that laying charges against the Crown would be somehow 'inappropriate', the fiduciary duty owed to the First Nations requires the RCMP to give more respect to the First Nations' position".

[63] There are several problems with that proposition. First of all, the established fiduciary duty owed by the Crown to First Nations people is not extended to the RCMP as the RCMP is not, as previously discussed, an organ of the Crown. An RCMP officer investigating a crime and acting under his or her police discretion in the course of a criminal investigation occupies a public office and is not acting as a government agent. The status of the RCMP officer in the course of a criminal investigation is independent of the control of the executive. An RCMP officer is not subject to political discretion and is not to be considered a servant or agent of the Crown while engaged in a criminal investigation.

[64] Moreover, fiduciary duties are generally understood to arise in the context of private law duties and obligations. As Dickson J. said in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at p. 385, "[i]t should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship". The criminal process is not the preserve of any one individual, aboriginal or otherwise. The fundamental consideration in any decision regarding prosecution of criminal offences is the public interest. While it is not entirely clear to me what the applicants mean when they claim that First Nations' position should be given "more respect", it certainly cannot be equated to any kind of preferential treatment when comes the time to decide whether charges should be laid in a specific instance. As Justice Binnie wrote in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 at para 96:

> When exercising ordinary government powers in matters involving disputes between Indians and non-Indians, the Crown was (and is) obliged to have regard to the interest of all affected parties, not just the Indian interest. The Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting […]

[65] In other words, short of any evidence of flagrant impropriety in coming to its conclusion not to lay charge, the RCMP can not be faulted for its conduct. In fact, the RCMP investigated the allegations made by the applicants, and provided them with ample opportunity to present their concerns, allegations and supporting material. Members of the RCMP met with members of the applicants' Bands on numerous occasions. Well aware of the sensitivity of the issues, a legal opinion was sought from the Department of Justice. Indeed, the reasons for not laying charges are fleshed out in Sgt. Ré's letter of April 18, 2005; these reasons, far from being flimsy, appear to be cogent and principled. There is no proof of bias against the applicants or even of systemic discrimination in the treatment of First Nations allegations of unlawful conduct. Accordingly, I can find no evidence of impropriety in the decision reached by the RCMP not to proceed with charges in relation to the allegations made by the applicants.

[66] Finally, the applicants alleged that the RCMP acted improperly when the officer making the decision whether to lay charges sought legal advice from the office of the Attorney General of Canada because that counsel had already provided legal representation to the PFRA. I can see no merit in this submission, as there is no shred of evidence that the legal counsel in question placed himself in a conflict of interest position.

[67] The only evidence in support of the applicants' allegation of impropriety is an attendance sheet for the January 19, 2006 meeting that indicates Mr. Lafleur, the Justice counsel, attended the meeting, and the correspondence from the RCMP Inspector (reproduced at para 39 of these reasons) indicating to the applicants that consultation took place with Mr. Lafleur and that he drew the same conclusions that there is no validity in pursuing charges for trespassing.

[68] On the other hand, Mr. Woodvine testifies in his affidavit that Mr. Lafleur attended the negotiation meeting as legal counsel for the Regional Office of the DIAND, and that his role was to provide assistance to all parties in the implementation of any settlement reached. He also attested that at no time did Mr. Lafleur provide legal advice to the PFRA on a solicitor/client basis. Throughout the negotiations, the PFRA apparently obtained its legal advice from counsel of the Department of Justice other than Mr. Lafleur.

[69] Even if I were to disregard this evidence and accepted that Mr. Lafleur did not merely act as a neutral counsel for all parties but was providing advice to the entire federal negotiating team, as the applicants would have me believe, I still cannot find any basis for concluding that he was in a conflict of interest situation and that the RCMP acted improperly in consulting him. It is well established that the Department of Justice and the legal counsel through whom it acts have a dual mandate. This mandate derives from the dual role of the Minister of Justice, who also happens to be the Attorney General of Canada.

[70] In support of the Minister of Justice, the Department of Justice is responsible for providing policy and program advice and direction through the development of the legal content of bills, regulations and guidelines. In support of the Attorney General, the Department of Justice is responsible for prosecuting federal offences across Canada, litigating civil cases and for providing legal advice to federal law enforcement agencies and other government departments. The recent creation of the Office of the Director of Public Prosecution as part of the *Federal Accountability Act,* S.C. 2006, c. 9, s. 121, removing the Federal Prosecution Service from the Department of

Justice, will if anything strengthen the independence of Crown prosecutors but there is no evidence to suggest it was designed to prevent a Department of Justice counsel to provide legal advice to a prosecutor. In any event, I can find nothing in Mr. Lafleur's previous involvement in the negotiations between QVIDA, PFRA, SWA and the DIAND that could have barred him from providing advice to the RCMP, and there is certainly no evidence that his conduct smacks of bias, let alone of flagrant impropriety.

[71] For all of the foregoing reasons, I would dismiss this application for judicial review.

**ORDER**

**THIS COURT ORDERS that** :

- The application for judicial review is dismissed.

"Yves de Montigny"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-971-06 |
| **STYLE OF CAUSE:** | **CHIEF DENTON GEORGE ET AL**<br>**v.**<br>**ATTORNEY GENERAL OF CANADA ET AL** |
| **PLACE OF HEARING:** | REGINA, Saskatchewan |
| **DATE OF HEARING:** | May 15 & 16 2007 |
| **REASONS FOR ORDER AND ORDER BY:** | JUSTICE DE MONTIGNY |
| **DATED:** | September 14th 2007 |

**APPEARANCES:**

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| Mr. Chris Bernier | FOR THE RESPONDENTS |

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