

Date: 20080212

Docket: T-1763-07

Citation: 2008 FC 178

Ottawa, Ontario, February 12, 2008

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ERMINESKIN INDIAN BAND AND NATION

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

[1] This is a motion to strike the affidavit of Donna Lewis sworn October 18, 2007 as part of a Reply Supplemental Motion Record.

[2] No leave was sought to file the Reply affidavit. The Defendant, Her Majesty, is correct in objecting that leave had not been obtained.

[3] The Plaintiff has, as part of its response to the motion, asked for leave to file the Reply affidavit on the grounds that it is necessary to deal with matters which the Plaintiff could not have anticipated. In particular, the Plaintiff alleges that the Defendant has changed positions as to the nature and treatment of the “split”, a payment regime.

[4] The Reply affidavit attached other affidavits used in related proceedings T-2953-93 and T-2022-89.

[5] It is evident, at this stage, that there may only be aspects of earlier proceedings which may have a bearing on the current action.

[6] In my view, there is at least some reasonable debate as to whether the Defendant has changed positions – a matter on which this Court cannot yet make a determination – therefore it is premature to reach a final conclusion on this issue. It does, however, help explain the Plaintiff’s perspective as to its inability to anticipate the needed evidence even if it is not a correct perspective.

[7] More importantly, I must consider whether the interests of justice would be served if the evidence is admitted. In my view, it would serve the interests of justice to permit the Reply affidavit.

[8] The evidence, it is suggested, will help the Court understand the history of the “split” in order to assist it in dealing with the current issue. At this stage it would seem to do that although one cannot help but be concerned that it could lead to confusion rather than clarity.

[9] The evidence does not catch the Defendant by surprise (it knows that evidence from earlier proceedings). The evidence arises early in this case and while it may, as the Defendant argues, be irrelevant and merely clutter the record, the Court is able to sort the “wheat from the chaff.”

[10] Therefore, the motion to strike is dismissed and the Plaintiff has leave to file the affidavit of Donna Lewis sworn October 18, 2007.

[11] While the Defendant has not succeeded in its motion, the Plaintiff failed to file a motion for leave until rightfully challenged. Each party shall bear its own costs.

ORDER

THIS COURT ORDERS that the motion to strike is dismissed and the Plaintiff has leave to file the affidavit of Donna Lewis sworn October 18, 2007. Each party shall bear its own costs.

“Michael L. Phelan”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1763-07

STYLE OF CAUSE: ERMINESKIN INDIAN BAND AND NATION
and
HER MAJESTY THE QUEEN

PLACE OF HEARING: Video-conference (Ottawa and Edmonton)

DATE OF HEARING: December 19, 2007

**REASONS FOR ORDER
AND ORDER:** Phelan J.

DATED: February 12, 2008

APPEARANCES:

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Ms. Sheila Read FOR THE DEFENDANT

Mr. Shaun Yung

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