Date: 20080828

Docket: T-462-08

Citation: 2008 FC 975

Toronto, Ontario, August 28, 2008

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

HARRY WAWATIE, TOBY DECOURSAY, JEANNINE MATCHEWAN AND LOUISA PAPATIE, IN THEIR CAPACITY AS MEMBERS OF THE ELDERS COUNCIL OF MITCHIKANIBIKOK INIK (also known as ALGONQUINS OF BARRIERE LAKE)

Applicants

and

MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

Respondent

REASONS FOR ORDER AND ORDER

[1] This case concerns an application for judicial review of a "decision" of the Minister of Indian Affairs and Northern Development ("the Minister") which the Applicants say effectively resolved a leadership dispute.

I. Background

[2] The Algonquins of Barrière Lake ("ABL") is a First Nation recognized as a Band under the *Indian Act*. The ABL selects its leaders by its customs which are codified in the Mitchikanibikok Anishinabe Onakinakewin ("MAO").

[3] The main spokesman for the Applicants is Harry Wawatie, who filed an affidavit in support of this Application. He is a former Chief of the ABL until his resignation in July, 2006.

[4] It appears that ABL conducted a leadership selection process in January 2008 which, it is alleged, purported to replace a prior Council. On January 31, 2008 the Chief of the newly elected Council, Casey Ratt, wrote to the Minister claiming that the selection process had been conducted in accordance with the MAO and naming the new members of the ABL Band Council.

[5] Harry Wawatie took issue with the selection process and wrote to the Minister on February 4, 2008 requesting that the Minister disregard the January 31, 2008 letter from Casey Ratt. It was Harry Wawatie's position that "there has been no new leadership selection process undertaken within Barrière Lake".

[6] In his letter Harry Wawatie described what, in his view, were the various errors in the selection process and alleged that the leadership selection process was not carried out in accordance

with the codified leadership selection customs set out in the MAO. Harry Wawatie advised the Minister that in his view the governing council of ABL continued to be the prior Council.

[7] No steps were taken by Harry Wawatie or the former Band Council to seek a leadership review in accordance with the MAO nor were any proceedings commenced in Court seeking a declaration that the Council selected during the January 2008 proceedings was properly selected pursuant to the provisions of the MAO.

[8] Rather than invoke the process set out in the MAO to challenge the selection process, the Applicants brought this proceeding seeking Judicial Review of the "decision or conduct of the Minister as communicated in the March 10, 2008 letter". That letter provides as follows:

> Over the past several days, the Department has received and assessed a significant amount of information regarding the conduct of a leadership selection/review process in Barrière Lake. Based upon all the information submitted, the Department will register the results of the leadership selection process held on January 30, 2008 into the Band Governance Management System. Therefore, I wish to inform you that effective immediately, the Department will conduct its relationship with [the Ratt Council].

[9] The Applicants concede that the Minister has no authority whatsoever to interfere in any way with the ABL custom leadership selection processes set out in the MAO or otherwise. Indeed, it is common ground that the Minister has no role to play with regard to the customary election

process of the ABL and that this election process belongs to the Band because it was created by the Band, is administered by the Band and exists independently from the *Indian Act.*

[10] Further, the Minister has no authority to interpret the Band's custom or to decide whether custom was followed and has no supervisory role with respect to the election process. The Minister cannot interfere with the results of the election and does not settle disputes with regard to ABL's customs.

[11] In the ordinary course a Band advises the Minister of election results. Upon receipt of these results, the Minister acknowledges the results and records the results in the Band Governance System and continues its relations with a Band via the newly elected Band Council.

[12] As the Minister is not a party to the custom election process and does not participate in the selection of the leadership of ABL, the Minster takes the position that disputes related to custom elections must be settled within the Band or the community. The Minister may endeavour to assist the Band to resolve disputes but it has no jurisdiction or authority to impose a Council on the Band.

II. Position of the Applicants

[13] The Applicants argue that the Minister reviewed materials received from the Ratt Council. A decision was then made that the Ratt Council should be entered on the Band Governance System. The Applicants argue that this amounts to a decision which is open to judicial review in this Court.

[14] They argue that the Minister is a federal board, commission or other tribunal within the meaning of Section 2 of the *Federal Courts Act* and thus, pursuant to s.18.1 (1), the Court has the jurisdiction to review this decision.

[15] Section 2 of the *Federal Courts Act* defines a "federal board, commission or other tribunal" as:

> Any body, person or persons, having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament…

Thus, any jurisdiction or powers possessed by the Minister with respect to the selection process within a Band must be conferred by statute being in this case the *Indian Act*. Custom election procedure is not governed by or subject to the *Indian Act.* It is an inherent power of a Band under the *Indian Act.* Unless otherwise ordered under Section 74, a Band maintains autonomy and control over its electoral process. Such is the case here. Any dispute regarding the election process is an internal matter of the ABL and should be resolved internally by the ABL.

[16] Thus, on this motion to strike the issue is whether the Minister exercised any discretionary power respecting the outcome of the electoral process within the ABL or whether the Minister engaged in a purely administrative act by mechanically recording the information which was provided on behalf of the ABL. If it is the former, then this motion to strike should be unsuccessful because it is not “bereft of any chance of success”. If it is the latter, then the motion to strike should be granted as there is no “decision” to judicially review and thus the Application is “bereft of any

chance of success". For the reasons that follow it is my view that as there is no "decision" the Application is bereft of any chance of success and must be struck out.

[17] Notably, no members of the Ratt Council or the new Band Chief are Respondents in this proceeding. This is so notwithstanding that the Notice of Application seeks a declaration that all of the acts of the new Council are null and void and of no effect.

III. Analysis

[18] The issue of whether the Minister makes a decision by recording the name of the Council members on the Band Government System constitutes a decision of a "board, commission or other tribunal" has been dealt with on prior occasions in this Court. In my view, those cases govern. The two most apposite cases are *Algonquins of Barrière Lake Band* v. *Canada (Attorney General)*, [1996] F.C.J. No. 175 and *Wood Mountain First Nation v. Canada (Attorney General)*, [2006] F.C.J. No. 1638.

[19] In the *Barrière Lake Band* case Justice McGillis observed:

> **5** In support of her motion to withdraw the originating notice of motion, counsel for the applicants has submitted that the decision of the Department to recognize the legitimacy of the Interim Band Council has rendered her application moot. Counsel for the Attorney General of Canada has opposed the application on the basis that the ministerial decision was purely administrative in nature and was made solely for the purpose of permitting the Minister to discharge his duties to the Band. He therefore submitted that the question of the

> legality of the selection of the Interim Band Council according to custom has not been determined. Accordingly, the relief sought in the originating notice of motion has not been rendered moot. Counsel for the remaining respondents, except for Mr. Papatie, supported the position advanced by counsel for the Attorney General of Canada. Mr. Papatie represented himself at the hearing and consented to the proposed withdrawal of the originating notice of motion.
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> **6** Following my review of the submissions of counsel and the documentation in this matter, I have concluded that the application to withdraw the originating notice of motion must be dismissed. In my opinion, the question of the legality of the selection of the Interim Band Council according to custom remains to be determined. In the circumstances, it would not be appropriate to permit the originating notice of motion to be withdrawn.

[20] In essence, in that case the Applicants, the Interim Band Council of the ABL, sought to withdraw their originating Notice of Motion on the ground that it was moot. The interim Band Council was recognized by the Minister and registered accordingly subsequent to the issuance of the originating Notice of Motion. Council for the Interim Band Council of the ABL took the position that the recognition of the interim Band Council by the Minister disposed of the originating Notice of Motion by effectively resolving the leadership issue and rendered the proceeding moot. Counsel for the Attorney General opposed the dismissal of the proceeding on the ground that the decision was purely administrative in nature and made solely for the purpose of permitting the Minister to discharge his duties to the ABL. It was the Attorney General's position that the question of legality of the selection of the Interim Band Council according to custom had not been determined and it was therefore not proper to dismiss the proceeding on the basis of mootness. As noted, Justice McGillis determined that the question of the legality of the selection of the Interim Band Council had not been determined. What flows from this decision is that the act of the Minister in registering

the Interim Band Council in the Band Governance System was not a determination or decision on the propriety of the selection process.

[21] The *Wood Mountain* case concerned an Application for Judicial Review in respect of a letter from a representative of the Minister in which the receipt of results of a custom election purportedly held by the Wood Mountain Lakota Nation was acknowledged. As in this case, the Applicants sought to judicially review the Minister's act in registering the result in the Band Governance System. Again, as with the ABL, the Wood Mountain First Nation conducts its elections under Band custom. The Minister received a Band Council resolution purportedly adopted by the Band Council and the electoral officer's report of the results of an election. In response, a representative of the Minister recorded the results of the election. In their Application, the Applicants sought production of extensive materials relating to the alleged decision of the Minister to record the results of the election. The Respondents objected to producing the material on the ground that the Minister was not a tribunal within the meaning of the *Federal Courts Act* and that no reviewable decision was made by the Minister or on his behalf. Justice Strayer concluded that the action taken by the Minister of recording the result of the election was not reviewable as it was not the action of a "federal board, commission or other tribunal" as defined in Section 2 of the *Federal Courts Act*. Justice Strayer observed:

> [8] This Court has held that the reference to band custom elections in the definition of "council of the band" in section 2 of the Act does not create the authority for custom elections but simply defines them for its own purposes: see *Bone v. Sioux Valley Indian Band No. 290 Council*, 107 F.T.R. 133, at paras. 31-32. Thus such elections are not held under the authority of an Act of

> Parliament. Counsel for the Applicants did not draw to my attention any provision in the Act which gives to INAC the authority to decide who has won such an election. It was held by Justice Paul Rouleau in *Lac des Mille Lacs First Nation et al. v. Canada (Minister of Indian Affairs and Northern Development)*, [1998] F.C.J. No. 94 (QL), at para. 4 that the Minister has no authority over such elections. Nor does INAC have any role in determining what is band custom for the purpose of governance of an election: see *Chingee v. Chingee*, (1999), 153 F.T.R. 257, at para. 13.
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> [9] For the same reason, the Applicants cannot demand materials from the Respondents under Rule 317(1) because it authorizes a request of materials in the possession of a "tribunal whose order is a subject of the application". For the reasons given, there was no order here: see *Gaudes v. Canada (Attorney General)*, 2005 FC 351; [2005] F.C.J. No. 434 (QL), at para. 16.
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> [11] The Respondents asked that, for the same reasons, I dismiss the application for judicial review without prejudice to the rights of the Applicants to commence another proceeding against different parties and perhaps seeking different remedies. The Applicants ask, in the alternative, if I should find against them on their main position, that I not dismiss the application for judicial review but allow it to be amended keeping the same parties and adding other parties and perhaps other remedies. I see little virtue in this having just determined that the Respondents are not subject to judicial review in the matter as presently pleaded. I believe it is in the interests of justice that the application for judicial review be dismissed without costs without prejudice to the rights of the Applicants to seek other remedies against appropriate parties. It would appear that a declaration or a writ of quo warranto could be sought in this Court against parties the Applicants consider to be unlawfully exercising power. This is not, however, to be taken to be an extension of time for seeking judicial review as provided in subsection 18.1(2) of the *Federal Court Act*. Such an extension will have to be sought on a proper motion to that effect.

The net result in *Wood Mountain* was that Justice Strayer dismissed the Application but without prejudice to the rights of the Applicants to seek other remedies against appropriate parties.

[22] In my view, these two decisions govern the result in this case. While Counsel for the Applicants strongly urged the Court to find that the Minister had in fact made a decision which was reviewable by having "received and assessed a significant amount of information regarding the conduct of a leadership selection review process in Barrière Lake" that is not a reviewable decision pursuant to Sections 2 and 18.1 of the *Federal Courts Act*. In my view this situation is no different than the *Wood Mountain* case. The Minister was not engaging in a reviewable decision. The result of the Minister's registration of the results of the election does not determine whether or not the election was properly held pursuant to the MOA. It simply administratively determines that the Minister will continue its relations with the ABL via the newly elected Band Council. If the Applicants are concerned that all of the procedures of the MOA were not followed or certain sections were breached their remedy lies elsewhere. It is up to them to seek a review within the ABL of the leadership currently in place, or take such other remedies as are available to them through the very thorough process for leadership selection set out in the MOA or otherwise. In essence, the Applicants are seeking to do indirectly that which they have not done directly. That is, they seek to overturn the selection process by asking this Court to judicially review the action of the Minister instead of invoking the process mandated by the MOA.

[23] A motion to strike an application puts a very high onus on the moving party [see, for example, *David Bull Laboratories* v. *Pharmacia Inc. et al.*, [1995] 1 FC 588]. Recently, the principles governing motions to strike applications for judicial review have very usefully been analyzed in depth and summarized by Justice Mactavish in the case of *Amnesty International Canada et al.* v. *Chief of the Defence Staff et al.*, [2007] FC 1147. Justice Mactavish's summary is as follows:

Legal Principles Governing Motions to Strike

[22] Applications for judicial review are intended to be summary proceedings, and motions to strike Notices of Application add greatly to the cost and time required to deal with such matters.

[23] Moreover, as the Federal Court of Appeal observed in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. No. 1629, the striking out process is more feasible in actions than in applications for judicial review. This is because there are numerous rules governing actions which require precise pleadings as to the nature of the claim or the defence, and the facts upon which the claim is based. There are no comparable rules governing Notices of Application for Judicial review.

[24] As a consequence, the Federal Court of Appeal has observed that it is far more risky for a court to strike out a Notice of Application for Judicial review than a conventional pleading. Moreover, different economic considerations come into play in relation to applications for judicial review as opposed to actions. That is, applications for judicial review do not involve examinations for discovery and a trial - matters which can be avoided in actions by a decision to strike: *David Bull*, at ¶10.

[25] In contrast, the full hearing of an Application for Judicial review proceeds in much the same way that a motion to strike the Notice of Application would proceed, namely on the basis of affidavit evidence and argument before a judge of this Court.

[26] As a result, the Federal Court of Appeal determined that applications for judicial review should not be struck out prior to a hearing on the merits of the application, unless the application is "so clearly improper as to be bereft of any possibility of success".

[27] The Federal Court of Appeal further teaches that "Such cases must be very exceptional and cannot include cases ... where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at ¶15.

[28] Unless a moving party can meet this very stringent standard, the "direct and proper way to contest an originating notice of motion which the Respondent thinks to be without merit

> is to appear and argue at the hearing of the motion itself." (*David Bull*, at ¶10. See also *Addison & Leyen Ltd. v. Canada*, [2006] F.C.J. No. 489, 2006 FCA 107, at ¶5, rev'd on other grounds [2007] S.C.J. No. 33, 2007 SCC 33).
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> [29] The reason why the test is so strict is that it is ordinarily more efficient for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than as a preliminary motion: see the comments of the Federal Court of Appeal in *Addison & Leyen*, at ¶5.
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> [30] By analogy to the process prescribed in the *Federal Courts Rules* with respect to the striking out of statements of claim, as a general rule, no evidence may be led on a motion to strike a Notice of Application. In addition, the facts asserted by the Applicant in the Notice of Application must be presumed to be true: *Addison & Leyen Ltd. et al.*, above, at ¶6.
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> [31] However, the Court is not obliged to accept as true allegations that are based upon assumptions and speculation. Nor is the Court obliged to accept as true allegations that are incapable of proof: see *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441, at ¶27.
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> [32] There is an exception to the general principle that no evidence may be led on a motion such as this. That is, where the jurisdiction of the Court is contested, the Court must be satisfied that there are jurisdictional facts or allegations of such facts supporting the attribution of jurisdiction: see *MIL Davie Inc. v. Hibernia Management & Development Co.* (1998), 226 N.R. 369.
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> [33] Finally, in deciding whether an Application for Judicial review should be struck as bereft of any possibility of success, 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: see *Operation Dismantle*, at ¶14.

[24] Keeping in mind the admonition of Justice Mactavish in *Amnesty International* regarding the heavy onus on the moving party and the need to read the notice of application as generously as

possible, I am not persuaded that this case can succeed. In light of both the *Wood Mountain* and *Algonquins of Barrière Lake* cases, this Application is bereft of any chance of success and must be struck. However, in order to preserve any rights the Applicants may have, the Application is struck out but without prejudice to the rights of the Applicants to commence another proceeding for appropriate remedies against appropriate parties subject to the requirements of subsection 18.1(2) of the *Federal Courts Act*.

[25] The moving party seeks its costs of the motion. In the ordinary course as a successful moving party the Respondent is entitled to costs. The Applicants have pleaded impecuniosity. There was no evidence of impecuniosity before the Court except for the statement in the written representations of the Applicants, although counsel for the Applicants during oral argument did advise the Court of their impecunious situation. Counsel for the Minister seeks costs because, as they submitted, the law was clear that the Minister's action was not subject to judicial review. In the circumstances, the Respondent is entitled to its assessed costs, if demanded.

ORDER

THIS COURT ORDERS that:

1. This Application is struck out without prejudice to the rights of the Applicants to commence such other proceedings for appropriate remedies against appropriate parties, subject to the requirements of subsection 18.1 (2) of the *Federal Courts Act*.

2. The Respondent is entitled to its assessed costs, if demanded.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-462-08
STYLE OF CAUSE:	HARRY WAWATIE, TOBY DECOURSAY, JEANNINE MATCHEWAN AND LOUISA PAPATIE, IN THEIR CAPACITY AS MEMBERS OF THE ELDERS COUNCIL OF MITCHIKANIBIKOK INIK (also known as ALGONQUINS OF BARRIERE LAKE) and MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 25, 2008
REASONS FOR ORDER AND ORDER BY:	AALTO P.
DATED:	AUGUST 28, 2008

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