Date: 20090106

Docket: T-462-08

Citation: 2009 FC 8

Ottawa, Ontario, January 6, 2009

PRESENT: The Honourable Mr. Justice Zinn

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 is an appeal under Rule 51 of the *Federal Courts Rules.* The applicants seek to set aside the Order of Prothonotary Aalto dated August 28, 2008, wherein he granted the respondent's motion to strike the underlying Application for Judicial Review of the Minister's decision, act, or conduct to register the results of a purported leadership selection and to conduct his relationship with the Algonquins of Barrière Lake according to those results. For the reasons that follow, I am

of the view that the underlying application is not bereft of any possibility of success and thus the application ought not to have been struck; accordingly, this appeal is allowed.

Background

[2] The Algonquins of Barrière Lake (ABL), are in the midst of a leadership crisis. It is not the first such crisis. The roots of the present crisis extend back to earlier governance disputes involving the same or similar factions of the ABL. Mr. Wawatie and the other applicants deny the legitimacy of the Band Council of Chief Casey Ratt (the Ratt Council), and maintain that its election was not undertaken in accordance with the *Mitchikanibikok Anishinabe Onakinakewin* (MAO), the ABL's customary governance code. They claim that the Matchewan-Nottaway Band Council elected in July and August of 2006, and acknowledged by the respondent on May 29, 2007, was and is the only legitimate band council. Section 2 of the *Indian Act* provides that a band council may be elected either pursuant to the *Indian Act* or pursuant to a custom of the band. The ABL maintains autonomy and control over its electoral custom, which is to say that its custom election procedure is not governed by or subject to the *Indian Act*; it is codified in the MAO.

[3] Although the ABL has had many leadership crises which began in or about 1996, for the purposes of the present appeal, only the more recent history is relevant.

[4] In March 1996, Chief Matchewan and his Customary Council resigned and a leadership selection was triggered. A Customary Council lead by Harry Wawatie was selected, which the Minister refused to recognize; instead, the Minister recognized an Interim Band Council as the

leadership of the ABL. The crisis was resolved with the assistance of a mediator and facilitators. The resolution involved the codification of the MAO and, ultimately, the Minister's recognition of the Harry Wawatie Council.

[5] Harry Wawatie resigned as Chief in 2006. Four members of the Elders Council, one of whom was Harry Wawatie, were recognized by a resolution of the Elders to preside over the leadership process to select a successor in accordance with the MAO. This leadership process resulted in the selection of a Customary Council composed of Chief Jean Maurice Matchewan and four Councillors.

[6] Initially, the Minister refused to recognize the Matchewan Council as there was another group claiming to be the ABL Customary Council. The Minister refused to deal with either. A mediator was again appointed and he reported that only the Matchewan Council had followed the selection process outlined in the MAO; accordingly, he found that it was the proper leadership of the ABL. Based on that report the Minister, by letter dated May 29, 2007, recognized the Matchewan Council as the leadership of the ABL.

[7] By letter dated September 18, 2007, Harry Wawatie on behalf of the Council of Elders wrote to the Minister advising that Chief Matchewan "has agreed to be relieved of his duties and responsibilities as Chief of Mitchikanibikok Inik [ABL], pending the outcome of charges recently laid against him by the Sureté du Quebec". He further advised that "in the meantime, Councillor, Benjamin Nottaway, will be Acting Chief for our First Nation".

[8] On January 31, 2008, Casey Ratt wrote to the Minister informing him that he had been selected Chief and four new persons had been selected Councillors at a leadership selection conducted by the Elders on January 30, 2008. The letter states that the selection was conducted in accordance with the MAO. Within days, Harry Wawatie, on behalf of the Elders Council, wrote to the Minister asking that Mr. Ratt's letter be disregarded as "there has been no new leadership selection process undertaken within Barrière Lake." The letter also informed the Minister that the Customary Council continued to be that of Acting Chief Nottaway and his Council.

[9] On March 10, 2008, André Côté, on behalf of the respondent, responded to Casey Ratt and those listed as Councillors in his letter of January 31, 2008. He wrote:

> "The Algonquins of Barriere Lake select their leadership in accordance with a community custom selection process. In this context, and unlike for elections held under the *Indian Act*, the Department's role pertaining to customary elections is limited mainly to acknowledge the outcome of the processes held in communities and to register the results within the Band Governance Management System.
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> 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 Barriere Lake. Based upon all of 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 Council composed of [Chief Casey Ratt and others].

The applicants argue that the respondent's letter, or the course of action it announces, constitutes a reviewable decision; however Prothonotary Aalto found otherwise and struck their application.

[10] The Prothonotary accepted the respondent's submission that the Minister was not acting as a federal board, commission, or other tribunal within the meaning in section 18.1 of the *Federal Courts Act* and thus there was no decision that was reviewable in this Court. Prothonotary Aalto was of the view that the decisions of this Court in *Algonguins of Barrière Lake Band v. Canada (Attorney General)*, [1996] F.C.J. No. 175 ("*Barrière Lake*") and *Wood Mountain First Nation v. Canada (Attorney General)*, [2006] F.C.J. No. 1638 ("*Wood Mountain*") were the most apposite to the facts at hand and concluded, on the basis of those authorities, that the applicants' application for judicial review was bereft of any chance of success.

Analysis

[11] The parties are in agreement that the Court should review this matter *de novo*, as the Prothonotary's Order was dispositive of the underlying application. They also concur that the proper test on a motion to strike is whether or not the application is so clearly improper as to be bereft of any possibility of success: *Amnesty International Canada et al. v. Chief of Defence Staff et al.*, 2007 FC 1147.

[12] The applicants advance the following submissions in support of a restoration of their application:

(a) The Prothonotary failed to give any consideration to the applicants' assertion that the Minister did not discharge his constitutional duty to consult the applicants;

(b) The Prothonotary misapprehended the facts and evidence that, it is alleged, show that the Minister exceeded his jurisdiction and de facto decided the leadership of the First Nation; and

(c) The Minister is a federal board, commission or other tribunal when he decides to recognize and conduct relations with a council of the Band.

[13] I begin with an examination of the two authorities relied on by the Prothonotary.

[14] *Barrière Lake*, a decision of Justice McGillis, involved the same First Nation as is involved in this matter and arose during the earlier leadership crisis outlined in paragraph 4, above. The Interim Band Council, by originating notice of motion, sought relief against the Matchewan Council, the Attorney General of Canada and others, claiming various forms of prerogative relief. The proceeding challenged the status of the 1980 Chief and Council. When, on January 23, 1996, the Department recognized the Interim Band Council as the legitimate Council of the Band (which recognition was later reversed), the Interim Band Council brought a motion to withdraw the originating notice of motion on the basis that the Department's recognition of its legitimacy made the matter moot.

[15] The Minister opposed the application for withdrawal and took the position that the issue of the legitimacy of the band council was not moot. Its position, as set out in the reasons of Justice McGillis, was as follows:

> 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.

[16] Justice McGillis dismissed the motion to withdraw the originating notice, on the basis that the underlying issue was not moot. She wrote:

> 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.

[17] Prothonotary Aalto concluded that "[w]hat 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". I agree. *Barrière Lake* is about the legitimacy of the method of selection of Council and, in particular, the legality of the selection of the Interim Band Council. *Barrière Lake* does not stand for the proposition that the Minister's decision to determine whom he will deal with as the representative of the Band is not a reviewable decision. That proposition is neither necessary to, or implicit in, the outcome of *Barrière Lake.*

[18] *Wood Mountain* is a more recent decision of this Court and it also involves a Band election. The Band in *Wood Mountain*, like the ABL, selects its leaders by custom. The Department received a copy of a resolution of the Band Council appointing an electoral officer for an election to be held on March 24, 2006, together with a request for a list of the band membership maintained by the

Department. On March 26, 2006, the Department received a report of the electoral officer and the election results. An official of the Department responded by letter of March 31, 2006, in which, according to the judgment, "she acknowledged receipt of the results of the custom election purportedly held by the Wood Mountain Lakota Nation on March 24, 2006". In the interim, on March 21, 2006, the Department received another report from a different electoral officer reporting on a different election held March 16, 2006, with different results. An application for judicial review was filed "in respect of [the Minister's] recording of the purported Wood Mountain First Nation 'custom election' results…" as set out in its March 31, 2006 letter.

[19] The Order of Justice Strayer of this Court related to a refusal to provide documents under Rule 318 on the ground that the respondent was not a tribunal within the meaning of the Rules and the *Federal Courts Act*, as no reviewable decision had been made by the Department. Justice Strayer held that the March 31, 2006 letter was not a reviewable decision.

> I have concluded that the action taken by Ms. Shalapata in writing the letter of March 31, 2006, is not reviewable as the action of a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Court Act.* To be such, the body or person must have, exercise or purport to exercise, jurisdiction or powers conferred by or under Act of Parliament.
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> 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: … 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. …[T]he 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: …

> 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".
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> (citations omitted)

[20] The respondent submits that the Minister, in the case at bar, did no more than was done in the *Wood Mountain* case. He writes in paragraphs 39 and 43 of his memorandum:

> By acknowledging the results of the 2008 "leadership review", the Minister did no more than take notice of the results of the "leadership review" or selection process by the Band according to the *Mitchikanibikok Anishinabe Onakinakewin* which were provided to INAC in the ordinary course of business.
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> …The Minister did no more than mechanically record information that had been provided by the new Band Council of Chief Casey Ratt.

[21] If all the respondent did was a mechanical recording, then it may well be that the outcome of this motion to dismiss would be the same as that reached in *Wood Mountain*. However, as submitted by the applicants, the Minister purported to do much more than merely record results provided to him, without passing any judgment on them.

[22] The author of the letter of March 10, 2008, states that the Department has received "and assessed" a significant amount of information regarding the conduct of the leadership/selection process. Accordingly, as even the respondent's counsel admitted at the hearing, the respondent made a decision as to which, of the conflicting claims, it would record.

[23] Second, the author of the letter states that in addition to recording the information as to the new band council, the Department will deal with the Ratt Council when dealing with the ABL Band. He writes: "… I wish to inform you that, effective immediately, the Department will conduct its relationship with the Council composed of [Chief Casey Ratt and others]". In my view, this assertion distinguishes this case from both *Barrière Lake* and *Wood Mountain*. In neither case was there an explicit decision that the Department would be dealing with a particular Council when dealing with the First Nation.

[24] In my view, it is open to the applicants to argue that the Minister of Indian Affairs and Northern Development, when he decided that in dealing with the ABL, he would deal with the Ratt Council, made or purported to make, a decision under the *Indian Act*, R.S.C. 1985, c. I-5 or the *Department of Indian Affairs and Northern Development Act*, R.S.C. 1985, c. I-6, or acted pursuant to a Constitutional authority. Decisions made pursuant to such legislation or pursuant to a prerogative of the Crown are reviewable under section 18.1 of the *Federal Courts Act*.

[25] The applicants also submit that the Prothonotary erred in that he failed to consider that one aspect of the application was its claim that the Minister had a duty to consult with the Band prior to deciding that he would deal with the Ratt Council. They rely upon the decision of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 and the observation of the Chief Justice at paragraph 60 that where the government's conduct is challenged on the basis of an allegation that it failed to consult and accommodate, the matter may go to the court for review. Whether the duty to consult can be said to arise in the present

circumstances is not without question. This appears to be an area of evolving jurisprudence. In this respect, the observations of Justice Hugessen in *Shubenacadie Indian Band v. Canada (Attorney General)*, 2001 FCT 181, at paragraph 5, made in the context of a motion to strike an action involving aboriginal law, are apt:

> I turn now to the second aspect of the motion which is to strike out the Statement of Claim as disclosing no reasonable cause of action. The principle is well established that a party bringing a motion of this sort has a heavy burden and must show that indeed it is beyond doubt that the case could not succeed at trial. Furthermore, the Statement of Claim is to be read generously and with an open mind and it is only in the very clearest of cases that the Court should strike out the Statement of Claim. This, in my view, is especially the case in this field, that is the field of aboriginal law, which in recent years in Canada has been in a state of rapid evolution and change. Claims which might have been considered outlandish or outrageous only a few years ago are now being accepted.
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> If there is in a pleading a glimmer of a cause of action, even though vaguely or imperfectly stated, it should, in my view, be allowed to go forward. In this respect the motion to strike varies dramatically from the situation where a party brings a motion for summary judgment, where the Court must grapple with the issue of law in limine. Here, the Court must read the Statement of Claim, as I say, with a generous eye and with a view to allowing the plaintiff, if he can, to make his case.

[26] For these reasons, it is my view that it cannot be said that the applicants' application is bereft of any chance of success. They, and the respondent, ought to be permitted to make full submissions to the Court on all of the issues raised in the application. Accordingly, the appeal will be allowed.

[27] The applicants sought costs if they were successful on this appeal. There is no reason why they should not be granted their costs, both here and below.

ORDER

THIS COURT ORDERS that the appeal is allowed and the Order of Prothonotary Aalto dated August 28, 2008, is set aside. The applicants are allowed their costs on this appeal and on the motion before the Prothonotary.

"Russel W. Zinn"
Judge

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) *v.* MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVEOPMENT
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	January 6, 2009

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