Date: 20090414

Docket: T-1538-08

Citation: 2009 FC 368

Ottawa, Ontario, April 14, 2009

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

BETTY HORSEMAN

Applicant

and

**HORSE LAKE FIRST NATION,
AS REPRESENTED BY ITS CHIEF AND COUNCIL,
CHIEF DION HORSEMAN, WALTER HORSEMAN,
MICHAEL HORSEMAN, EUGENE HORSEMAN,
AND DEAN HORSEMAN**

Respondents

REASONS FOR ORDER AND ORDER

[1] In the present Application, Ms. Horseman seeks access to justice to gain a declaration with respect to her status as a member of the Horse Lake First Nation (First Nation and HLFN). Ms. Horseman's request is for a declaration that "the Applicant is, and has been since July 7, 1972, a member of the Band". The First Nation sought to bar access to Ms. Horseman by bringing a motion to strike her Notice of Application. In a decision dated January 26, 2009, Prothonotary Lafrenière dismissed the motion based on an application of the principle set by the Federal Court of Appeal in

David Bull Laboratories (Canada) inc. v. Pharmacia Inc. et al., [1995] 1 F.C. 588 (C.A) that a motion to strike an application for judicial review will only be entertained in exceptional circumstances; a moving party must establish that the application is "so clearly bereft of any possibility of success" that it should be struck out (Decision, pp. 4 - 5). In reaching this finding, Prothonotary Lafrenière addressed the following key access issues: whether a First Nation decision has been made against Ms. Horseman's membership interests; whether Ms. Horseman has produced evidence respecting any delay in bringing the present Application; and whether this Court has jurisdiction over the subject matter of the declaration requested.

[2] The present Motion is an appeal of Prothonotary Lafrenière's order. I agree that paras. 20 to 23 of the argument presented by Counsel for Ms. Horseman correctly sets out the current standard of review, and, in particular, under what circumstances should a Judge hearing an appeal consider issues *de novo*:

> The standard of review applicable to an appeal from a Prothonotary, articulated in *Canada v. Aqua-Gem Investments Ltd.* ([1993] 2 F.C. 425 (Fed. C.A.)) and affirmed in *Z.I. Pompey Industrie v. ECU Line N.V.* ([2003] 1 S.C.R. 45) was reformulated by the Federal Court of Appeal in *Merck & Co. v. Apotex Inc.* (2003 FCA 488, para. 19, leave to appeal refused, 331 N.R. 394 (S.C.C.)) as follows:
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> > To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining

> whether the orders are clearly wrong. The test would now read: "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."
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> [Emphasis in the original)

A Prothonotary's decision to not strike an application is not vital to any final issue in the case. In *Peter G. White Management Ltd. V. Canada* (*Peter G. White Management Ltd. v. Canada* (2007), 315 F.T.R. 284) the Court stated:

> . . . the mere fact that what was sought before the prothonotary might have been determinative of the final issues in the case does not result in the judge hearing the matter entirely *de novo*. A reading of the decisions, and particularly the key decision of the Court of Appeal in the case of Canada v. Aqua-Gem Investments Ltd., makes it quite clear that it was not what was sought but what was ordered by the prothonotary which must be determinative of the final issues in order for the judge to be required to undertake *de novo* review.
> . . . . .
>
> Put briefly, barring extraordinary circumstances, a decision of a prothonotary not to strike out a statement of claim is not determinative of any final issue in the case. In determining the standard of review the focus is on the Order as it was pronounced, not on what it might have been.

The Court in *Chrysler Canada Inc. v. Canada et al.* (2008 FC 1049) followed the same logic in the specific context of an application, and noted that:

> While there may be merit in seeking an early termination of an action upon a motion to strike there

> is less reason to do so, except in the clearest of cases, where the proceedings are brought by way of an application. Much of the argument expended on a motion to strike is simply duplicative of arguments that can be raised at the hearing of the application itself. To expend the Court's resources on a motion to strike, particularly on an appeal from a decision of a Prothonotary not to strike, means that the Court is obliged in many cases, to hear the matter twice, on the motion by way of appeal, and on the merits of the application itself. Only where, to use the words of the Court of Appeal in Merck, the Prothonotary can be demonstrated to have been "clearly wrong" should an appeal from a refusal to strike be considered.
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> The Court has even more recently affirmed that the formulation in *Peter G. White* is correct (*Apotex Inc. v. Astrazeneca Canada Inc.*, 2009 FC 120).

[3] In the present Motion, Counsel for the First Nation states that, by refusing to strike out the Notice of Application, Prothonotary Lafrenière erred in law or exercised discretion based upon an error of principle on the following grounds:

> a. The learned Prothonotary erred in law or exercised discretion based upon an error of principle in that:
>
> i. The HLFN Chief and Council is a federal board, commission or tribunal delegated by Parliament to make determinations as to any person's membership status in the HLFN, subject thereafter to right of appeal or judicial review;
>
> ii. The only relief sought by the Applicant is "[a]declaration that the Applicant is, and has been since July 7, 1972, a member of the band";
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> iii. This application for judicial review is barred because the Applicant has failed to avail herself of adequate alternative legal remedies which so clearly apply as to render the judicial review bereft of any possibility of success;

iv. This proceeding is so clearly an impermissible collateral attack on the jurisdiction of the HLFN Chief and Council as a federal board, commission or tribunal that the judicial review is bereft of any chance of success;

v. The declaration of membership in the HLFN claimed by the Applicant is outside the jurisdiction of this Court because it relates only to facts. In the alternative, the question of membership in the HLFN is a question of mixed fact and law which is also outside the jurisdiction of this Court. The Applicant does not seek a declaration of an extricable question of law in respect of band membership;

vi. The Court's lack of jurisdiction over the sole relief sought by the Applicant constitutes a "exceptional circumstance" such that this is a proper case to contest the Notice of Application on a preliminary motion to strike;

vii. The Applicant has not met the cumulative substantive conditions for a declaratory order to be made. The application does not disclose a real question; and

viii. The Court's jurisdiction to "fashion other remedies to assist the Applicant in having her membership status properly adjudicated" does not exist where the Applicant has not claimed "such other relief" as may be within the Court's jurisdiction. The Applicant's sole, single claim for relief is a declaration of membership status, and the Applicant has not sought to amend her Notice of Application.

b. While the Applicant did not seek the Court's leave to amend her Notice of Application, no leave to amend the Notice of Application should be granted because it is plain and obvious that the Applicant is out of time to commence judicial review proceedings in respect of the HLFN's decision which the Respondents say was made and communicated to the Applicant in the fall of 1999 that she was not a member.

> c. The relief sought on this motion is appropriate to be decided by a Motions Judge early in this proceeding and prior to the merits of the judicial review before the Applications Judge.
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> (Motion, pp. 2-4)

These grounds are supported by a 33 - page written argument. The standard of review is the first issue addressed in the argument, and on this issue *Aqua-Gem* is stated to be the prime authority in support of the proposition that the grounds cited in the Motion can "dispose of this proceeding, and, therefore must be considered vital to the final resolution of the case" (Appellant's Argument, para. 14). This argument fails to apply the current standard of review.

[4] I find that, since Prothonotary Lafrenière denied the motion to strike, the arguments advanced by Counsel for the First Nation are not vital to the final resolution of the Application. In my opinion, they are arguments which are properly to be addressed by the Justice who hears and determines the Application.

[5] With respect to the second leg of the standard of review set in *Merck & Co. v. Apotex Inc.*, I find that Prothonotary Lafrenière proceeded on the basis of a correct principle and under no misapprehension of the facts. As a result, I find that Prothonotary Lafrenière's decision is not made in error.

ORDER

Accordingly, the present Motion is dismissed.

I award costs of the Motion to Ms. Horseman payable forthwith.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1538-08
STYLE OF CAUSE:	BETTY HORSEMAN v. HORSE LAKE FIRST NATION, AS REPRESENTED BY ITS CHIEF AND COUNCIL, CHIEF DION HORSEMAN, WALTER HORSEMAN, MICHAEL HORSEMAN, EUGENE HORSEMAN, AND DEAN HORSEMAN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	APRIL 9, 2009
REASONS FOR ORDER AND ORDER BY:	CAMPBELL J.
DATED:	APRIL 14, 2009

APPEARANCES:

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