Federal Court		Cour fédérale

Date: 20100914

Docket: T-502-09

Citation: 2010 FC 919

Edmonton, Alberta, September 14, 2010

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**NORMAN AMAHOOSE, WALLACE MOUNTAIN,
HENRY J. WATCHMAKER, ELAINE WATCHMAKER,
ELMER PAUL, VERNON BADGER, SIDNEY PAUL
and JOSEPH WALTER WATCHMAKER**

Applicants

and

**THE CHIEF AND COUNSEL OF KEHEWIN CREE NATION,
and THE DEPARTMENT OF INDIAN AFFAIRS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for *mandamus* to require that the Respondent Chief and Counsel of the Kehewin Cree Nation engage an external auditor to audit its accounts for all years that an audit has not been performed and that such audits be posted in a conspicuous place on the Band Reserve for examination by the Band members within seven (7) days of the completion of said audits. For the reasons that follow I am dismissing the application with no costs awarded to any party.

[2] The Applicants Norman Amahoose et al are members of the Kehewin Cree Nation. They are not the Chief nor members of the Counsel of that Nation. The Respondents are the Chief and Counsel of the Kehewin Cree Nation. Originally the Department of Indian Affairs was also a named Respondent however this application was discontinued as against that party. Consequently nobody appeared or made representations on behalf of the Department of Indian Affairs or Indian and Northern Affairs Canada (INAC) as it is sometimes called.

[3] It is common ground between the parties that the financial affairs of the Kehewin Cree Nation are in a mess. In 1995 a substantial audit and report referred to as the Browning Report was conducted and delivered outlining in detail many of the financial difficulties encountered. Since that time, it is agreed between the parties, audit reports of the kind contemplated by section 8(1) of the *Indian Band Revenue Moneys Regulations*, C.R.C., c. 953 have been prepared and posted, however the Applicants argue that they are inadequate in revealing its nature and extent of the financial difficulties. In the record before me are audit reports for the year 2006, 2007 and 2008. The Applicants argue that these reports are inadequate and that something in the nature of the Browning Report is required for each year since 1995. The evidence before me is that to prepare audit reports of the nature and extent sought by the Applicants would cost in the area of at least $70,000 to $100,000 per year and then only if the appropriate records could be located. I have no evidence as to the whether the appropriate records still exist and can be located. In brief the Applicants seek a form of relief that, even if it is possible, would cost at least one million dollars. Nobody knows who would pay for this. Some of the Applicants in their evidence speculate that INAC would pay but there is certainly no evidence that INAC is obliged to pay or would be willing to pay for such audits.

[4] There is no doubt that the financial affairs of the Kehewin Cree Nation are a mess. The affidavit evidence of Chief Ernest Gadwa acknowledges this and states that, in his belief, the worst is over. In cross-examination he acknowledged that a number of financial administrators have, in succession, been engaged to put the situation back on track. At the hearing before me Counsel for the Applicants and Respondents acknowledged and agreed that I may take into account that INAC has since the institution of the present application, placed the Kehewin Cree Nation under its direct administration. There is, however, a Court challenge in respect thereof presently under way.

[5] The evidence, particularly in the cross-examination transcripts of the individual Applicants, is clear that there is no allegation of fraud being made by the Applicants, simply mismanagement.

[6] Applicants' Counsel argues that the relief requested is the only way that the members have to evaluate the situation to know fully and correctly the actual state of financial affairs of the Nation. Without that evaluation, it is argued, there is no way that the members can appreciate what appropriate remedies may be proposed or taken to rectify those affairs. As to the cost, it is argued, the audits could take place over a period of time and the savings that the audits would reveal could be used offset the cost of the audit.

[7] Respondents' Counsel argues that the Chief and Counsel are well aware of the financial difficulties and are taking reasonable steps to address them. In addition to submitting the audit reports as required by section 8 of the *Regulations*, supra, financial administrators have been engaged and, now, the Nation is under direct administration, albeit challenged, by INAC. It is

argued that the recovery of cost of the audit as proposed by the Applicants is speculative and that the revelations, if any, of such an audit are also speculative.

[8] Section 44 of the *Federal Courts Act*, R.S.C. 1985, c F-7 makes it clear that any award of *mandamus* of the nature sought by the Applicants herein is a discretionary remedy:

44. In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a mandamus, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	*44. Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un mandamus, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.*
R.S., 1985, c. F-7, s. 44; 2002, c. 8, s. 41.	*L.R. (1985), ch. F-7, art. 44; 2002, ch. 8, art. 41.*

[9] Justice Phelan of this Court set out the considerations that must be made in exercising such discretion in *Ermineskin Indian Band and Nations* v. *Canada*, September 23, 2008, 2008 FC 1065 at paragraph 31:

> *On the issue of mandamus, the Court of Appeal in Apotex v. Canada (A.G.), [1994] 1 F.C. 742 (F.C.A.), held that the principles applicable to mandamus are:*
>
> *1. There must be a public duty to act.*
> *2. The duty must be owed to the applicant.*
> *3. There is a clear right to performance of the duty, in particular:*

> *(a) the applicant has satisfied all conditions precedent giving rise to the duty;*
> *(b) there is (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can either be expressed or implied, e.g. unreasonable delay;*
>
> *4. Where the duty sought to be enforced is discretionary, the following rules apply:*
>
> *(a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";*
> *(b) mandamus is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";*
> *(c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;*
> *(d) mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way; and*
> *(e) mandamus is only available when the decision-maker's discretion is "spent"; i.e. the applicant has a vested right to the performance of the duty. (emphasis added by Court)*

[10] Counsel agreed that, as a general principle, the Chief and Council of a Band or Nation such as the Respondents here are in a fiduciary relationship with the members of the Band or Nation. They both acknowledge this principle as set out by Skipp J. in *Williams Lake Indian Band* v. *Abbey*, [1992] 4 C.N.L.R. 21, [1992] B.C.W.L.D. 1783 at paragraph 14:

> *There can be no question that a duly-elected chief as well as the members of a Band Council are fiduciaries as far as all other members of the Band are concerned.*

[11] However, in the present case, I am satisfied that the Chief and Counsel have not acted improperly or in an unfair or oppressive manner or in bad faith. I am satisfied that the Chief and Counsel are aware of the problems and are taking measures to address them.

[12] I am not satisfied that the remedy sought in the present application will be likely to have any real effect in improving the situation. At best the effect, if any, is largely speculative. The cost of the proposed remedy is proportionately quite large and it is by no means clear who, if anyone, will bear the cost.

[13] Under the circumstances therefore, I decline to exercise my discretion and will not order the *mandamus* sought.

[14] As to costs I am satisfied that each party should bear its own costs, therefore I will make no order as to costs.

JUDGMENT

FOR THE REASONS provided herein:

THIS COURT ORDERS AND ADJUDGES that:

1. The application is dismissed.

2. No order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-502-09
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