Federal Court  Cour fédérale

Date: 20121220

Docket: T-434-06

Citation: 2012 FC 1536

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

MAGGIE MYRNA LORRAINE GAMBLIN

Applicant

and

NORWAY HOUSE CREE NATION BAND COUNCIL AND THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Ms. Maggie Myrna Lorraine Gamblin, is a member of the Norway House Cree Nation (NHCN). She seeks a writ of *certiorari* quashing the February 7, 2006 resolution by the Respondent, the NHCN Council (NHCN Council). The Applicant also seeks a declaration that an earlier written NHCN Council resolution (BCR) dated July 21, 2005 is void *ab initio* because the BCR was not a Council decision passed at a duly convened NHCN Council meeting.

[2] The February 7, 2006 Council resolution purports to ratify the July 21, 2005 NHCN Council resolution. The latter resolution was reduced to writing on Indian and Northern Affairs Canada form for Indian band council resolutions. It is identified as BCR N.H. / 2005-06/050 (BCR/050) and resolves that:

a. the NHCN requests Manitoba Hydro to pay a present value sum of $6,365,000 in lieu of payments over 17 years of the aggregate value sum of $10,920,000;

b. in reliance on the agreement that Manitoba Hydro will pay NHCN the present value amount of $6,365,000.00, NHCN

    i. has provided Canada with a full and final release of all future obligations of Canada to NHCN under the Claim 138 First Nations Settlement Agreement, and

    ii. hereby provides Manitoba Hydro with a receipt and acknowledgement that the payment of the present value of $6,365,000.00 satisfies Manitoba Hydro's obligations to Canada under the August 27, 2004 Memorandum of Settlement between Canada and Manitoba Hydro, and the June 17, 2005 direction from Canada to Manitoba Hydro concerning payment of funds payable to Canada under the August27th, 2004 Memorandum of Settlement.

c. the proper officers of NHCN are authorized to take all steps necessary to execute all documentation, if any, required to implement this resolution.

The funds are payment by Manitoba Hydro in settlement of the balance of a claim, Claim 138, by Canada relating to the Manitoba Hydro's 50 % share of infrastructure costs for potable water supply for the NHCN reserve.

[3] This case raises issues concerning First Nation governance as well as subsidiary questions concerning this specific application. Briefly, the substantive issues are:

a. whether the Federal Court has jurisdiction to hear this application for judicial review of the impunged decisions by the NHCN Council;
b. whether the NHCN Council complied with NHCN procedural laws concerning approval of the impugned BCR/050; and
c. whether this is an appropriate instance for the Court to exercise its jurisdiction to grant relief.

[4] I conclude the Court has jurisdiction to hear this application for judicial review. I agree with the Applicant that the challenged BCR/050 were not approved in compliance with NHCN procedural laws. However, I find this is a case in which this Court should decline to exercise its jurisdiction to grant the relief sought by the Applicant.

[5] My reasons follow.

Background

[6] The NHCN is a First Nation governed by a council comprised of an elected chief and six elected councillors. During the period when the impugned BCR/050 was passed and ratified, the six elected Councillors were Eric Apetagon, Marcel Balfour, Eliza Clarke, Fred Muskego, Mike Muswagon and Langford Saunders. The Chief of the NHCN was Ron Evans who held office from March 2002 until his resignation on August 1, 2005. The chief's position was vacant from August 2005 to March 2006.

[7] The NHCN is a 'custom band' under the *Indian Act*, RSC 1985, c I-5. The *Indian Act* defines the council of a band, where the section 74 election provisions do not apply, as that chosen by the custom of the band. The NHCN had been under the *Indian Act* election provisions but reverted to custom on January 23, 1998 when the Minister of Indian and Northern Affairs Canada (INAC), by Ministerial Order, excluded the NHCN from the electoral provisions of the *Indian Act*.

[8] In a letter dated January 30, 1998, INAC officials advised the NHCN Council that, as a result of the Ministerial Order, the *Indian Band Council Procedure Regulations*, CRC, c. 950 no longer applied to NCHN council meetings and recommended that the NHCN Council adopt a replacement for the *Indian Act* regulations. The NHCN has enacted its own election law and procedural regulations as described in *Muskego v Norway House Cree Nation Appeal Committee*, 2011 FC 732 at para 4 by Justice de Montignay who wrote:

> The Norway House Cree Nation ("NHCN") is a custom band. In December 1997, the NHCN adopted the NHCN Elections Procedures Act, and on January 23, 1998 the band was granted the right to be removed from section 74 (Elections Procedures) of the Indian Act to exercise self-government through a custom election system. This entitles the band to hold its elections pursuant to its own custom election code. On October 18, 2005, the amended "Norway House Cree Nation Elections Procedures Act" was adopted and ratified by the Chief and Council (hereinafter the Elections Procedures Act, 2005 or "EPA").

[9] In March 2001, the NHCN Council adopted the Policy and Procedural Guidelines Manual (the Guidelines). The Applicant did not provide a copy of the NHCN *Elections Procedure Act* but did provide the Guidelines which she makes reference to. I am satisfied the Guidelines replicate the relevant custom election laws and procedural regulations. The custom law and procedural regulations for the NHCN replace the *Indian Act* section 74 election provisions and the Indian Band Council Procedural Regulations.

[10] The Guidelines provide that NHCN by-laws and resolutions are to be adopted at "duly constituted Council meetings", whether "Regular Chief and Council meetings" or "Special Council meetings".

[11] The context and history giving rise to the impugned NHCN Council resolutions was described by Prothonotary R. Lafrenière, the Case Management Judge, in his Order dated January 19, 2011: *Maggie Myrna Lorraine Gamblin v Norway House Cree Nation Band Council*, 2010 FC 1244. Paragraphs 4-18 are reproduced here:

> On December 16, 1977, Canada, the Province of Manitoba, Manitoba Hydro and the Northern Flood Committee Inc., representing five First Nations, including the NHCN, executed the

Northern Flood Agreement (NFA). The NFA was designed to compensate the said First Nations for adverse effects of flooding caused by Manitoba Hydro projects.

Under Article 6.1 of the NFA, Canada accepted responsibility to ensure the continuous availability of a potable water supply on each of the First Nations reserves. Under Article 6.2, Manitoba Hydro promised to reimburse Canada 50% of its reasonable potable water-related expenditures attributable to adverse effects of the Project.

On May 10, 1988, Canada entered into an Infrastructure Agreement (IA) with the Northern Flood Committee Inc., the Northern Flood Capital Reconstruction Authority Inc. (NFCRA), and the five First Nations. The IA was intended to satisfy Canada's obligations to ensure a continuous availability of a potable water supply for the First Nations by enabling them to provide it for themselves.

Under Article 15 of the IA, Canada agreed to attempt to recover the maximum amount possible from Manitoba Hydro pursuant to Article 6.2 of the NFA using arbitration, if necessary, and to transfer any amounts recovered to the NFCRA for potable water projects of the NFA First Nations, subject to the conditions contained in Article 15 of the IA.

Canada filed arbitration Claim 138 against Manitoba Hydro on April 19, 1984, to determine Manitoba Hydro's liability under NFA Article 6.2 for Canada's potable water expenses. The First Nations subsequently intervened, at Canada's expense, in Claim 138.

On November 19, 2003, Canada and Manitoba Hydro signed a letter of intent outlining the key components of a settlement of Claim 138. NHCN gave "interim approval in principle" to the amount of the settlement and terms of its payment as reflected in a Band Council Resolution (BCR) dated May 19, 2004.

Canada and Manitoba Hydro formalized the settlement on August 27, 2004. Manitoba Hydro agreed to pay $40.5 million to Canada, in installments over 17 years from 2004 to 2021; Canada had the express right to instruct Manitoba Hydro to pay one or more of the First Nations directly; and Canada and Manitoba Hydro agreed to seek a consent dismissal of Claim 138 from the NFA Arbitrator.

On October 28, 2004, Canada signed the Claim 138 Settlement Agreement (Settlement Agreement) with NHCN and three other First Nations. Canada agreed that Manitoba Hydro would pay the $40.5 million directly to NHCN and the other signatory First Nations by installments. NHCN's share of each installment was 28%, totaling $11,340,000.00 of the $40.5 million.

In the Settlement Agreement, NHCN consented to a dismissal of Claim 138 (Article 2.1); released Canada from any further liability under Article 6 of the NFA and section 15 of the IA (Article 3); agreed that NHCN Chief and Band Council had approved the terms and conditions of the Settlement Agreement as evidenced by a BCR prior to executing it (Article 5.1 and 6.1(a)); had received independent legal advice prior to executing it (Article 6.1(b); represented and warranted that it was not under any legal impediment that would prevent it from executing the Settlement Agreement (Article 9.1); and agreed that the Settlement Agreement was binding upon its members (Article 11.1).

On November 26, 2004, the NFA Arbitrator dismissed Claim 138 with the consent of Canada and Manitoba Hydro. NHCN also gave its consent to the dismissal of Claim 138 through its own legal counsel.

Manitoba Hydro made its first installment payment of $1.5 million to Canada on September 1, 2004. NHCN received $420,000.00 from Canada as its 28% share. On June 10, 2005, at the request of NHCN, Canada instructed Manitoba Hydro to pay NHCN's 28% share of further installments directly to NHCN. Manitoba Hydro accepted this direction.

Subsequently, at NHCN's request, Manitoba Hydro agreed to pay the balance of NHCN's share ($10,920,000.00) by way of an accelerated lump sum payment of $6,365,000.00, which was the present value of that share as determined by NHCN's independent legal and accounting advisors.

On July 21, 2005, NHCN produced the BCR being impugned in the present application. The BCR formally approved and acknowledged receipt of the accelerated lump sum payment of $6,365,000.00 from Manitoba Hydro and authorized NHCN to provide a full and final release to Canada regarding all future obligations under the Claim 138 Settlement Agreement. The BCR and Release were duly signed by a majority of Chief and Band Council.

> Manitoba Hydro subsequently paid the amount of $6,365,000.00 to NHCN in satisfaction of Canada's obligation to pay the balance of NHCN's share of the Manitoba Hydro monies.
>
> At a NHCN Band Council meeting held on February 7, 2006, Councillor Saunders moved to ratify the BCR dated July 21, 2005. Councillors Clarke, Muswagon and Saunders voted in favour of the motion, while Councillor Balfour was the sole vote against it.

[12] On March 9, 2006, the Applicant filed a Notice of Application challenging the validity of BCR/050. As noted above, BCR/050 was dated July 21, 2005. It was not ratified by the NHCN Council until the NHCN Council meeting on February 7, 2006.

[13] The Attorney General of Canada applied to be added as a respondent. The Applicant opposed Canada's application contending the only parties that would be affected by the application for judicial review were the NHCN and its members. However, Prothonotary Lafrenière concluded the underlying issue was an attack on the validity of the Claim 138 Settlement. He stated at paragraphs 31 and 32 of his Order:

> It is understandable that Canada has expressed an interest in these proceedings. If the order sought by the Applicant is made, the Applicant or other person may use that order to attack the validity of the consent dismissal of Claim 138 and release of Canada, the Claim 138 Settlement Agreement with NHCN itself, or NHCN's agreement with Manitoba Hydro to accept a discounted lump sum rather that installments over time.
>
> The Applicant suggests that the application for judicial review is simply about whether a band council resolution, and its purported ratification, is valid or not. It remains, however, that at is root, the main purpose of the application appears to be to impugn the Claim 138 Settlement Agreement, by attacking the underlying authority of the Band Council to effectively execute the Claim 138 Settlement Agreement on behalf of the NHCN, and its authority to negotiate an accelerated payment and to provide the Release. The potential consequences are not, in my view, a "local matter" or a simple issue of good governance.

[14] The Prothonotary decided Canada has an interest in the application should be joined as a respondent to ensure all matters in dispute may be effectively and completely determined given that the NHCN Council has maintained a passive role in the application. In result, the Prothonotary ordered Canada added as a respondent.

[15] The Respondent NHCN council did not respond or otherwise participate other than provide documents requested by the Applicant. Accordingly, I will refer to the Attorney General as either the Respondent or as Canada.

Decision Under Review

[16] The Applicant seeks a writ of *certiorari* quashing the February 7, 2006 NHCN Council decision ratifying the July 5, 2005 BCR/050 and a declaration that the latter BCR/050 is void *ab initio* and without force and effect.

[17] The impugned July 5, 2005 BCR/050 purports to be a council resolution passed at a duly convened meeting of the same date by the Chief and four Councillors. BCR 050 resolves that:

> WHEREAS, Canada and Manitoba Hydro, on August 27, 2004, entered into a Memorandum of Settlement that resulted in the full and final resolution of Canada's claim against Manitoba Hydro in relation to Northern Flood Agreement Claim 138, and
>
> WHEREAS, paragraph 2 of the Memorandum of Settlement sets out specific funds to be paid by Manitoba Hydro to Canada on specific dates, and

WHEREAS, Canada, subsequently, made a separate agreement with Norway House Cree Nation that resolved the manner in which the funds to be paid by Manitoba Hydro to Canada would be distributed to each of those NFA First Nations for sewer and water projects, and

WHEREAS, Canada, on June 17, 2005, directed Manitoba Hydro, pursuant to paragraph 3 of the August 27, 2004 Memorandum of Settlement between Canada and Manitoba Hydro, to pay 28% of the specified funds to Norway House on the specified dates, and

WHEREAS, [t]he aggregate amount of the 28% that Canada directed Manitoba Hydro to pay to the Norway House on the specified dates is $10,920,000.00, and

WHEREAS, Norway House, based on independent advice, calculated that the present value, of the aggregate amount of $10,920,000.00 that Canada directed Manitoba Hydro to pay to Norway House is, $6,365,000.00, and

WHEREAS, Manitoba Hydro has agreed to make such a present value payment of $6,365,000.00 to Norway House provided Canada is prepared to accept and acknowledge that upon such present value payment being made to Norway House, twenty eight percent (28%) of all obligations owed by Manitoba Hydro to Canada under the Memorandum of Settlement of August 27, 2004 and Canada's direction of June 17, 2005 are fully and finally met and resolved, and

WHEREAS, Canada is prepared to acknowledge that the present value payment of $6,365,000.00 would, if paid now, fulfill twenty eight percent (28%) of all obligations owed by Manitoba Hydro to Canada under the Memorandum of Settlement of August 27, 2004, provided Norway House releases Canada for all future obligations of Canada to Norway House under the Claim 138 First Nations Settlement Agreement.

NOW THEREFORE BE IT RESOLVED THAT:

1. Norway House requests Manitoba Hydro to pay to Norway House the present value amount of $6,365,000.00 in lieu of the aggregate payment over time of $10,920,000.00.

2. In reliance on the agreement between Manitoba Hydro and Norway House that Manitoba Hydro will pay the present value amount of $6,365,000.00 to Norway House, Norway House:

a) has provided Canada with a full and final release of all future obligations of Canada to Norway House under Claim 138 First Nations Settlement Agreement, and

b) hereby provides Manitoba Hydro with a receipt and acknowledgement that the payment of the present value of $6,365,000.00 satisfies Manitoba Hydro's obligations to Canada under the August 27, 2004 Memorandum of Settlement between Canada and Manitoba Hydro, and the June 17, 2005 direction from Canada to Manitoba Hydro concerning payment of the funds payable to Canada under the August 27th, 2004 Memorandum of Settlement.

3. The proper officers of Norway House are authorized to take all steps necessary to execute all documentation, if any, required to implement this resolution.

[18] BCR/050 records the date of the duly convened meeting is 21-07-05 and indicates the quorum is four members of the NHCN Council. It is signed by the Chief and four Councillors.

[19] The minutes of the Regular Council meeting on February 7, 2006 provide, after discussion, that:

> Motion # 10:
> Councillor Langford Saunders moves that Deputy Chief and Council ratify BCR N.H./2005-06/050. Counsellor Mike Muswagon seconds the motion.
> 3 in favour, 1 against (Marcel); Motion is carried.

Legislation

[20] The *Federal Courts Act*, RSC 1985, c F-7 provides:

2. (1) In this Act,	2. (1) Les définitions qui suivent s'appliquent à la présente loi.
"federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867 ;	« office fédéral » Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d'une prérogative royale, à l'exclusion de la Cour canadienne de l'impôt et ses juges, d'un organisme constitué sous le régime d'une loi provinciale ou d'une personne ou d'un groupe de personnes nommées aux termes d'une loi provinciale ou de l'article 96 de la Loi constitutionnelle de 1867.
…	…
18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :
(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and	a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral;
(b) to hear and determine any	b) connaître de toute demande

application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

…

18.1 (2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate,

de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

…

18.1 (2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance,

prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	procédure ou tout autre acte de l'office fédéral.

[Emphasis added]

[21] The *Indian Act* provides:

2. (1)	2. (1)
"council of the band" means	« conseil de la bande »
(b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;	b) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi selon la coutume de la bande ou, en l'absence d'un conseil, le chef de la bande choisi selon la coutume de celle-ci.
…	…
(3) Unless the context otherwise requires or this Act otherwise provides,	(3) Sauf indication contraire du contexte ou disposition expresse de la présente loi :
(a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and	a) un pouvoir conféré à une bande est censé ne pas être exercé, à moins de l'être en vertu du consentement donné par une majorité des électeurs de la bande;
(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.	b) un pouvoir conféré au conseil d'une bande est censé ne pas être exercé à moins de l'être en vertu du consentement donné par une majorité des conseillers de la bande présents à une réunion du conseil dûment convoquée.

[Emphasis added]

[22] The NHCN's Guidelines state:

> At present, the local Norway House Cree Nation government has its legal basis in the *Indian Act*.
>
> *Indian Act* 74 (1)
>
> "Whenever he deems it advisable for the good government of a band, the Minister may declare by order after a day to be named therein the Council of the Band, consisting of a Chief and Councillors, shall be selected by elections to be held in accordance with this Act."
>
> This section of the Act means that Bands, can legally, elect a Chief and Council responsible for the governing of the Band.
>
> In practice, it means that either in accordance with the Act or with accepted Band Custom, the Band will regularly elect its governing council.
>
> …
>
> 3.1 Chief and Council are the elected representatives of the Norway House Cree Nation responsible for the following:
>
> 3.1.1 Forming the local government, for the well being and benefit of the members of the Norway House Cree Nation.
>
> 3.1.2 Managing the Norway House Cree Nation's affairs by making policies and regulation through by-laws and resolutions.
>
> 3.1.3 Ensuring that established policies, guidelines and regulations are put into effect and are properly administered by the Norway House Cree Nation staff.
>
> …
>
> 3.3 The Chief and Council, once elected, draw their authority from the Indian Act.
>
> …
>
> 3.5 The Chief and each Councillor execute their responsibilities through three forums:

> 3.5.1 Through Chief and Council, at duly constituted Council meetings, where by-laws and resolutions are adopted.
>
> …
>
> 11.1 Frequency of Meetings Regular Chief and Council meetings shall commence promptly at 9:00 a.m. on the first and third Tuesday of every month. All Managers and Directors must attend these regular Chief and Council meetings.
>
> …
>
> 11.4 Special Council Meetings Special Council meetings may be called by the Chief upon provision to each member of Council of twenty-four (24) hours' notice and a specific agenda relating to the special meeting. Special meetings may be called by the Chief on his or her own initiative, or by the Chief at the request of a majority of Council.
>
> [Emphasis added]

Issues

[23] Both the Applicant and Respondent raise a number of issues in this application. In my view, the determinative issues, in more expanded form, are:

1. Does the Federal Court have jurisdiction to hear this application for judicial review of the decisions by the NHCN Council a judicial review application considering:
   a. the NHCN Council is chosen by custom,
   b. the decision is a financial nature, and
   c. the application for a writ of *certiorari* with respect to BCR/050 is made out of time;

2. Did the NHCN Council validly approve the impugned BCR/050 having regard for NHCN Guidelines for procedural requirements concerning approval of the NHCN Council resolutions; and

3. Is this an appropriate instance for the Court to exercise its discretion to grant relief?

Standard of Review

[24] The Applicant submits that this application concerns matters of the jurisdiction and *vires* of the actions of the NHCN Council under the *Indian Act* and the NHCN Guidelines.

[25] The Supreme Court of Canada has held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact: *Dunsmuir* at paras 50 and 53. The Supreme Court has also held that where the standard of review has previously been determined, a standard of review analysis need not be repeated: *Dunsmuir* at para 62.

[26] The Applicant submits the applicable standard of review of the NHCN Council decision is correctness and cites Justice Gauthier's decision in *Laboucan v Little Red River Cree Nation No. 447*, 2010 FC 722, [2010] FCJ no 871 [*Laboucan*]. At paragraph 21, Justice Gauthier stated:

> The applicable standard of review to the issue of jurisdiction of Council is that of correctness: *Martselos v. Salt River Nation #195,*

> 2008 FCA 221 (CanLII), 2008 FCA 221, 168 A.C.W.S. (3d) 224 at paras. 28-32 (*Martselos*); *Jackson v. Piikani Nation*, 2008 FC 130 (CanLII), 2008 FC 130, 164 A.C.W.S. (3d) 549 at para. 17. In fact, such question relates to the interpretation of the Code by the Chief and Council of LRRCN. This is a question of law for which no deference is owed.
>
> [Emphasis added]

[27] This case requires the consideration of the NHCN Council's jurisdiction or authority and interpretation of the NHCN rules governing the decision-making process of its elected council. I agree with the Applicant the issue involves interpretation of the NHCN governance law concerning council decision making. Such questions, as Justice Gauthier pointed out, involve a question of law and I consider the appropriate standard of review correctness.

Analysis

[28] In this application, the Respondent NHCN Council takes no position, has submitted no evidence other than that provided to the Applicant, and makes no submissions. The Respondent NHCN Council did not even attend the hearing of the judicial review. The application is contested solely by the Respondent Canada.

Does the Federal Court have jurisdiction to hear a judicial review application concerning a decision by the custom elected NHCN Council?

[29] The first issue to be considered is whether this Court has jurisdiction to entertain the current application and grant the relief sought by the Applicant. Addressing this issue involves determining if the NHCN Council is a "federal board, commission or other tribunal" for the

purposes of section 18.1 of the *Federal Courts Act*. The question further involves a determination whether the NHCN Council was exercising or purporting to exercise jurisdiction or powers encompassed by s. 18.1 of the *Federal Courts Act* when it made the impugned decisions.

[30] Section 18.1 provides that an application for judicial review may be made in respect of decisions or orders of federal boards, commissions or other tribunals. The definition of federal board, commission or other tribunal found in s. 2 of the *Federal Courts Act* is reproduced here:

> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown...
>
> [Emphasis added]

[31] Canada submits even where a federal entity is sometimes recognized as a "federal board, commission, or other tribunal", it is necessary to have regard to the powers exercised. *DRL Vacations Ltd. v Halifax Port Authority*, 2005 FC 860 (*DRL Vacations Ltd.*) Further, Canada contends the power the entity is seeking to exercise must be determined and the source of the power examined. *Anisman v Canada* 2010 FCA 52 (*Anisman*).

[32] Canada submits that the NHCN Council exercised its inherent power to contract or settle claims when it purported to approve expedited payment under the Settlement Agreement. Additionally, the NHCN Council resolution on when and how to be paid is derived from private law rather than the public law considerations that arise in judicial review applications. Canada

points to a line of cases in support of its position: *Devil's Gap Cottagers (1982) Ltd. v Rat Portage Band*, 2008 FC 812, *Peace Hills Trust Co. v Moccasin*, 2005 FC 1364 (*Peace Hills Trust*), and *Ballantyne v Bighetty*, 2011 FC 994 (*Ballantyne*).

[33] The Applicant submits the NHCN Council meets the definition of a "federal board, commission or other tribunal" for the purposes of section 18.1 of the *Federal Courts Act*. The Applicant relies on a decision by Justice Blais, as he then was, in which Justice Blais concluded that the NHCN Council constitutes a federal board in *Balfour v Norway House Cree Nation*, 2006 FC 213 (*Balfour*). In *Balfour* Justice Blais stated:

> [20] The jurisprudence has established that an Indian Band Council constitutes a "federal board, commission or other tribunal" pursuant to section 18 of the Act (*Rider v. Ear* (1979), 103 D.L.R. (3d) 168 and *Gabriel v. Canatonquin*, [1978] 1 F.C. 124). As such, the Federal Court of Appeal confirmed in *Salt River First Nation 195 (Council) v. Salt River First Nation 195* [2003] F.C.J. No. 1538, at paragraph 18, that this Court has jurisdiction to issue a writ of *quo warranto* or to grant declaratory relief against an Indian Band Council and its constituent members:
>
> > Pursuant to paragraph 18(1)(a) of the Federal Court Act, the Federal Court has jurisdiction to issue a writ of quo warranto or to grant declaratory relief. I see no reason why declaratory relief which, in substance, is in the nature of quo warranto, cannot be granted. That procedure appears to have been approved in Lake Babine Indian Band et al. v. Williams et al. (1996), 194 N.R. 44 (F.C.A.). Robertson J.A. states at paragraphs 3 and 4:
> >
> > [3] It is to be noted at the outset that the appellants do not dispute the jurisdiction of the court to address the issues herein. The respondents seek declaratory and injunctive relief, which in these circumstances essentially amounts to a request for a writ of quo warranto. Quo warranto allows a challenge of an individual's right to hold a particular office...

> [4] There is no doubt therefore that there is jurisdiction per se, an Indian Band Council being a "federal board, commission or other tribunal" within the meaning of ss. 2 and 18 of the Act....Accordingly, this Court has jurisdiction to address the issue but it can do so only in the context of a s. 18 application not the context of an action initiated by way of statement of claim.

…

[25] The respondents further mention that the applicant had approached a representative of the Minister regarding similar concerns found in the present matter. The applicant had requested that the redress mechanisms found in the Canadian First Nations Funding Agreement (CFNFA) between Indian and Northern Affairs Canada (INAC) and the NHCN be used to remedy the disputes. Those disputes related to the failure of the NHCN Council to adhere to its own operating procedures and the issues surrounding the applicant's salary and expense budget (see email sent from Mr. Martin Egan (Minister's representative) to Marcel Luke Hertlein Balfour, dated November 25, 2003, page 316 of the respondent's record – volume III).

[26] The Minister's representative refused the applicant's request for assistance. As such, the respondents submit that the applicant should have instituted an application for judicial review of the Minister's representative's decision as opposed to commencing an application requesting a declaration in the nature of a writ of *quo warranto*.

[27] I disagree with the aforementioned position. Again, the NHCN Band Council constitutes a federal board. If the applicant wished to challenge the decisions of the Band Council for failing to adhere to its own operating procedures, the correct course of action is not to request the assistance of the Minister; it is an application for judicial review in this Court.

[28] I conclude that this Court does have jurisdiction in the present matter. Further, I find that the application for judicial review, brought in this Court, of the NHCN Band Council's conduct and decisions, is the appropriate course of action for the applicant. However, it remains to be seen whether or not a writ of *quo warranto* is warranted. I will now turn my attention to this very matter.

[Emphasis added]

[34] The NHCN Council is a custom First Nation council. The capacity of NHCN to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power. Rather it is a result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance. This was been indirectly acknowledged in *Wood Mountain First Nation v Canada (Attorney General)* (2006), 55 Admin. L.R. (4th) 293 (F.C.) (*Wood Mountain First Nation*), where Justice Strayer wrote at paragraph 8:

> 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 [Indian and Northern Affairs Canada] 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.
>
> [Emphasis added]

The implication is that the jurisdiction of the NHCN Council to manage governance of NHCN affairs is not necessarily derived from a statutory source such as the *Indian Act*.

[35] *Gabriel v Canatonquin,* [1978] 1 FC 124 [*Gabriel*] is treated as the seminal case for the proposition that a First Nation council is a "federal board, commission or other tribunal". In *Gabriel*, Justice Thurlow reviewed the powers the *Indian Act* bestowed on a First Nation council

and decided the scheme disclosed by the statute resembled a restricted form of municipal government by the council of and on the reserve. He concluded that such a council was a "federal board, commission or other tribunal" within the meaning of the *Federal Court Act*. This decision was confirmed by the Federal Court of Appeal without further elaboration.

[36] In deciding as he did, Justice Thurlow noted two qualifications, one indirectly referencing custom band councils and one explicitly relating to the nature of powers exercised. Justice Thurlow quoted Justice Laskin, writing:

> 11 However, in The Attorney General of Canada v. Lavell, Laskin J. (as he then was), with whom three other judges of the Court concurred, expressed doubt that a band council fell within the definition. He said at page 1379:
>
> > I share the doubt of Osler J. whether a Band Council, even an elected one under s. 74 of the Indian Act (the Act also envisages that a Band Council may exist by custom of the Band), is the type of tribunal contemplated by the definition in s. 2(g) of the Federal Court Act which embraces "any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada". A Band Council has some resemblance to the board of directors of a corporation, and if the words of s. 2(g) are taken literally, they are broad enough to embrace boards of directors in respect of powers given to them under such federal statutes as the Bank Act, R.S.C. 1970, c. B-1, as amended, the Canada Corporations Act, R.S.C. 1970, c. C-32, as amended, and the Canadian and British Insurance Companies Act, R.S.C. 1970, c. I-15, as amended. It is to me an open question whether private authorities (if I may so categorize boards of directors of banks and other companies) are contemplated by the Federal Court Act under s. 18 thereof. However, I do not find it necessary to come to a definite conclusion here on whether jurisdiction should have been ceded to the Federal Court to entertain the declaratory action brought by Mrs. Bédard against the members of the Band Council. There is another ground upon which, in this case, I would not interfere with the exercise of jurisdiction by Osler J.
>
> [Emphasis added]

[37] In *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band*, 2008 FC 812, [*Devil's Gap*], Justice Dawson, as she then was, touched on both of Justice Laskin's doubts when she held that a decision by the First Nation council to refuse to consent to an extension of a lease of reserve land was not a decision of a "federal board, commission or other tribunal". Justice Dawson first considered the source of the First Nation's authority and concluded it "did not flow from any grant of statutory authority or from any power that is public in nature." Rather, the power to refuse is the result of the First Nation's inherent interest in its lands and the reservation of its right to consent to a lease of reserve land in Treaty No. 3." She wrote, at paragraph 45:

> 45 Given that nature of the First Nation's interest in the reserve lands, and the reservation of rights in Treaty No. 3, I am unable to conclude that the decision to refuse to proceed with a lease extension agreement is an exercise of any power conferred under the Act or any other Act of Parliament. As such, I find that the Chief and Council were not acting as a "federal board, commission or other tribunal" when they refused to consent to an extension of the Cottagers' lease. It follows that the Court does not have jurisdiction to deal with this application for judicial review.
>
> [Emphasis added]

Justice Dawson went on to find this result was also consistent with the decision in *Peace Hills Trust*, where the Court found that a decision embodied in a band council resolution relating to a commercial loan agreement was a matter of private law, independent of the public interest. *Devil's Gap* at para 46.

[38] The Federal Court's jurisdiction to judicially review decisions by custom First Nations councils and related bodies was considered in *Elders of Mitchikinabikok Inik v Algonquins of Barriere Lake Customary Council*, 2010 FC 160 *(Algonquins of Barriere Lake)*. Justice Mainville, as he then was, considered whether the traditional council of the Algonquins of

Barriere Lake selected by custom, and the bodies purporting to supervise such selections under the custom, such as the Elders Council, were included in the expression "federal board, commission or other tribunal" used in the *Federal Courts Act*. Justice Mainville held that they were, holding at paragraphs 101-103 the following:

> The use [of] customary selection processes is one of the few aboriginal governance rights which has been given explicit federal legislative recognition through the *Indian Act*. The *Mitchikanibikok Anishinabe Onakinakewin* is itself the contemporary manifestation of the traditional customary governance selection system of the Algonquin of Barriere Lake. That custom is explicitly recognized by this provision of the *Indian Act*.
>
> As a form of aboriginal customary law, the *Mitchikanibikok Anishinabe Onakinakewin* is an emanation of the federal common law following the principles set out by the Supreme Court of Canada in *Wewayakum Indian Band v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.). In that case, it was found that federal common law formed part of the laws of Canada under the meaning of section 101 of the *Constitution Act, 1867*. The Supreme Court of Canada also added that the federal common law included the law of aboriginal title. This view was further reiterated in *R. c. Côté*, [1996] 3 S.C.R. 139 (S.C.C.) at para. 49. As noted by J.M. Evans and B. Slattery:
>
> > In this manner, the common law of aboriginal title – and indeed the common law governing aboriginal and treaty rights generally – became federal common law. To put this point precisely, it became a body of basic *public* law operating uniformly across the country within the federal sphere of competence. In this respect, then, the law of aboriginal title resembles the law of Crown liability, which Laskin C.J.C. earlier singled out as a prime example of federal common law. ['Federal Jurisdiction-Pendant Parties-Aboriginal Title and Federal Common Law-Charter Challenges-Reform Proposals: *Roberts v. Canada*" (1989) 68 Can. Bar Rev. 817 at 832]
>
> In the absence of an order under subsection 74(1) of the Act, the implementation of the *Mitchikanibikok Anishinabe Onakinakewin* is a condition precedent under the *Indian Act* to the recognition of

> a band council under that Act for the Algonquin of Barriere Lake. The exercise of authority by that band council under the Act is dependant on the *Mitchikanibikok Anishinabe Onakinakewin*. Consequently, the traditional council selected pursuant to the *Mitchikanibikok Anishinabe Onakinakewin* and the bodies purporting to supervise the proper selection of the Chief and council under that custom, such as the Elders Council, fall under the meaning of "federal board, commission or other tribunal" as those terms are defined in the *Federal Courts Act*.
>
> [Emphasis added]

[39] In *Ballantyne*, *supra*, Justice Russell aptly summarized the Court jurisprudence concerning First Nation council decisions stating:

> 36 It is true that the Federal Court has assumed jurisdiction over the decisions of Chiefs and Councils when they function as federal boards, commissions, or tribunals during elections, or in relation to the appointments or dismissal of employees, or to any statutory duty. So too with decisions of electoral officers, which have been held to meet the definition of a federal board, commission or tribunal.
>
> 37 Many of these cases involve clearly defined statutory functions, however, or analogous custom election code functions, and are therefore distinguishable from the situation that is before me in this application.
>
> [Emphasis added]

[40] The jurisprudence holds the Federal Court has jurisdiction to judicially review decisions of custom First Nation councils and related agencies. Case law reveals those decisions usually involve an exercise by the custom First Nation council of a statutory power under the *Indian Act* or matters concerning the holding of office as either chief or councillor. In the latter instance, since a chief or councillors selected under custom may exercise statutory powers under the *Indian Act*, given the definition in section 2 of the "council of the band", it follows that decisions

by custom electoral officers or custom election appeal panels affecting custom office holders can be related to an exercise of statutory power.

[41] Members of a custom First Nation council may, for instance, vote to approve a by-law under section 81(1) of the *Indian Act*. Should an unsuccessful candidate for a position on a custom council appeal the election result, the custom election appeal panel hearing the appeal will decide whether the appeal succeeds or not. In doing so, the custom appeal panel will decide whether or not the appellant may have an opportunity to exercise the aforementioned statutory power. While custom electoral officers or custom appeal tribunals stand outside of the *Indian Act*, they can reach out and touch the ability of individuals to exercise authority under the *Indian Act*. Accordingly, such custom election bodies impact, one step removed, on the exercise of federal statutory powers.

[42] In *Devil's Gap*, Justice Dawson considered the nature of the Council decision and the source of the authority of the First Nation Council to so decide. In this she had regard to the Federal Court of Appeal decision in *Anisman*, *supra*, which was concerned with whether the Federal Court had jurisdiction under section 18.1 to review the Canadian Border Services Agency's (CBSA) decision to collect a mark-up from the appellant and his wife and the CBSA's refusal to refund the mark-up.

[43] In *Anisman* at paragraphs 29 and 30, Justice Nadon describes a two-step approach in order to determine whether a body or person is a "federal board, commission or other tribunal":

> The operative words of the s. 2 definition of "federal board, commission or other tribunal" state that such a body or person has,

> exercises or purports to exercise jurisdiction or powers "conferred by or under an Act of Parliament or by or under an Order made pursuant to a prerogative of the Crown…". Thus, a two-step enquiry must be made in order to determine whether a body or person is a "federal board, commission or other tribunal". First, it must be determined what jurisdiction or power the body or person seeks to exercise. Second, it must be determined what is the source or the origin of the jurisdiction or power which the body or person seeks to exercise.
>
> In *Judicial Review of Administrative Action in Canada*, Vol. 1, looseleaf (Toronto: Canvasback Publishing, 1998) at para. 2:4310, the learned authors, D.J.M. Brown and J.M. Evans, state that in determining whether a body or person is a "federal board, commission or other tribunal", one must look at "the source of a tribunal's authority". They write as follows:
>
> > In the result, the *source* of a tribunal's authority, and not the *nature* of either the power exercised or the body exercising it, is the primary determinant of whether it falls in the definition. The test is simply whether the body is empowered by or under federal legislation or by an order made pursuant to a prerogative power of the federal Crown. […]
> >
> > [Emphasis added]

[44] Justice Dawson also dealt with Justice Laskin's second doubt about the character of the power's exercised:

> 31 The jurisprudence of this Court with respect to whether an entity is acting as a federal board, commission, or other tribunal was extensively reviewed by my colleague Justice Mactavish in *DRL Vacations Ltd. v. Halifax Port Authority*, [2006] 3 F.C.R. 516 (F.C.). I endorse and adopt both her review of the authorities and the conclusions drawn from that review. To Justice Mactavish's review of the authorities, I would only add the following case.
>
> 32 In *J.G. Morgan Development*, the Court found that it did not have jurisdiction to review a decision by Public Works Canada to contract for leased office space. The Court found that the negotiations that led to the contract were conducted pursuant to the Crown's inherent right to contract and were not conducted pursuant to the *Government Contracts Regulations*, SOR/87-402. Thus, the

> final decision was not made pursuant to powers conferred by an Act of Parliament. It followed that Public Works Canada was not acting within the scope of the definition of a "federal board, commission or other tribunal."
>
> 33 Following her review of the jurisprudence, Justice Mactavish distilled, at paragraph 48 of her reasons, a number of principles. The following are of particular relevance to the present case:
>
> > 1. The phrase "powers conferred by or under an Act of Parliament" found in the definition of a "federal board, commission or other tribunal" in subsection 2(1) of the Federal Courts Act is "particularly broad" and should be given a liberal interpretation: *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694 (C.A.).
> >
> > 2. The powers referred to in subsection 2(1) of the Federal Courts Act do not include the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or authorized business: *Wilcox v. Canadian Broadcasting Corporation*, [1980] 1 F.C. 326 (T.D.).
> >
> > 3. Although the character of the institution is significant to the analysis, it is the character of the powers being exercised that determines whether the decision-maker is a "federal board, commission or other tribunal" for the purposes of section 18.1 of the *Federal Courts Act: Aeric*.
> >
> > 4. While an organization may be a "federal board, commission or other tribunal" for some purposes, it is not necessarily so for all purposes. In determining whether an organization is a "federal board, commission or other tribunal" in a given situation, it is necessary to have regard to the nature of the powers being exercised: *Jackson v. Canada (Attorney General)* (1997), 141 F.T.R. 1 (T.D.), aff'd (2000), 261 N.R. 100 (C.A.).
>
> [Emphasis added]

[45] Justice Dawson dismissed the narrow view that a First Nation council was a federal board limited to merely exercising powers delegated to it by Parliament. She wrote:

56 The Cottagers make two arguments as to why the Chief and Council were "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament" so as to make the impugned decision reviewable. The Cottagers base their arguments upon the following passage from *Goodtrack v. Lethbridge* (2003), 242 Sask. R. 45 (Q.B.), at paragraphs 6 and 7:

> It is well-established that an Indian band council is a "federal board" within the meaning of that term in the Federal Court Act. In *Canatonquin v. Gabriel*, [1980] 2 F.C. 792, the Federal Court of Appeal held that as a consequence of an Indian band council being a "federal board", s. 18 of the Federal Court Act gave the Federal Court, Trial Division, jurisdiction in the matter. It is interesting to note that the court also held that the Federal Court had jurisdiction even though the validity of the impugned council election was governed by customary Indian law and not by a federal statute.
>
> In discussing the powers of an Indian band council, Cameron J.A. in *Whitebear Band Council v. Carpenters Provincial Council of Saskatchewan and Saskatchewan Labour Relations Board* (1982), 15 Sask.R. 37 at 44 (C.A.), stated:
>
> ... [A]n Indian band council is an elected public authority, dependent on parliament for its existence, powers and responsibilities, whose essential function it is to exercise municipal and government power-delegated to it by parliament-in relation to the Indian reserve whose inhabitants have elected it; as such it is to act from time to time as the agent of the minister and the representative of the band with respect to the administration and delivery of certain federal programs for the benefit of Indians on Indian reserves, and to perform an advisory, and in some cases a decisive role in relation to the exercise by the minister of certain of his statutory authority relative to the reserve.
>
> Therefore, it is clear that the powers of an Indian band council are delegated by Federal Parliament. Its powers are conferred under the *Indian Act*, R.S.C. 1985, c. I-5.

57 Two things are said to flow from this passage. First, a band council is said to obtain its existence, powers, and responsibilities from Parliament. It follows that the decision to refuse to extend the lease flows from powers conferred by Parliament. Second, the

> refusal by the Chief and Council to extend the lease is said to have played a decisive role in respect of the exercise of the Minister's statutory authority.
>
> 58 Dealing first with the argument that a band council obtains its existence, powers, and responsibilities from Parliament, as stated by Woodward, the *Whitebear Band Council* decision, which was relied upon in *Goodtrack*, exemplifies the narrow conception of a band council and its powers. Woodward observes that the powers of band councils, in carrying out their functions under the Act, are increasingly founded in their status as governments and not merely as agents of the federal government. See: Woodward at 7 s. 690. The broader view recognizes that band councils possess at least all of the powers necessary to effectively carry out their responsibilities, even if not specifically provided under the Act:
>
> > It may be said that band councils possess at least all the powers necessary to effectively carry out their responsibilities under the *Indian Act*, even when not specifically provided for. There is an implied power to contract, without the need for authority under the *Indian Act*. [footnotes omitted]
>
> See: Woodward at 7 s. 700.
>
> [Emphasis added]

[46] Two other cases involve First Nation council decisions that were found to relate to private commercial law rather than public law.

[47] In *Peace Hills Trust*, the applicant trust company brought an application for judicial review of a BCR which directed INAC and a third-party manager to withhold payments flowing from a $5.3 million debt held by the Band. Justice Heneghan held that the decision of the Band to withhold or allow the payment of money under contract was a matter of private law and was independent of the public interest. Justice Heneghan held that the impugned BCR was not amenable to judicial review since it was unrelated to the exercise of statutory authority pursuant to the *Indian Act*, and was a matter arising from contract: *Peace Hills Trust* at paras 61-62.

[48] The third case, *Ballantyne*, involved members of the Mathias Colomb Cree Nation who sought judicial review of a Mathias Colomb Cree Nation council decision to settle a litigation claim against Canada. Justice Russell, relying on the reasoning in *Devil's Gap* and *Peace Hills*, found that the decision to settle the litigation which involved a claim relating to diesel spillage on the reserve and the ratification process were essentially governed by private contract, not public law. Justice Russell concluded that the Court did not have jurisdiction to review the impugned Council decision as the band council had not acted as a "federal board, commission or other tribunal": *Ballantyne* at para 40.

[49] The Respondent submits the impugned NHCN Council decisions are "private law" in nature. They are not decisions made pursuant to the exercise of a statutory authority but are instead an exercise of an Indian band's inherent power to contract and settle claims.

[50] In my view, the NHCN Council decisions are not "private law" decisions. They are made by a First Nation entity that is federal in nature. The NHCN derives its jurisdiction from both the federal common law of aboriginal rights and its capacity to exercise federal statutory powers conferred on a council of an Indian band by the federal *Indian Act*. The nature of jurisdiction the NHCN Council is exercising is in relation to First Nation governance and is a matter of public interest given the impugned decisions are part of a series of decisions relating to the provision of potable water for the members of the NHCN.

[51] The impugned NHCN BCR/050 requests Manitoba Hydro to pay the present value of the aggregate payment over time. BCR/050 releases Canada from all future obligations of Canada to NHCN under the Claim 138 Settlement Agreement; provides a receipt for payment and acknowledges the payment satisfies Manitoba Hydro's obligations to Canada under the Settlement Agreement and direction to pay NHCN. This decision is inextricably related to antecedent NHCN Council decisions.

[52] The antecedents to July 21, 2005 BCR/050 go back decades to 1977 were, in reverse chronological order:

a. the June 10, 2005 NHCN request that Canada direct Manitoba Hydro pay NHCN share directly,
b. the NHCN participation in the October 28, 2004 Claim 138 Settlement Agreement between Canada and NHCN and three other First Nations where Canada agreed Manitoba Hydro would pay $40.5 million directly to the signatory First Nations in installments; the amount represented Manitoba Hydro's reimbursement to Canada of 50% of reasonable potable water-related expenditures attributable to adverse effects of the hydro projects; the NHCN's share was 28%, totalling $11,340,000.00, payable in installments, the first of which was paid;
c. the NHCN participation in the May 10, 1988 Infrastructure Agreement (IA) between Canada and the Northern Flood Committee, the Northern Flood Capital Reconstruction Authority Inc. and the five First Nations, including NHCN;

d. the NHCN participation in the December 16, 1977 Northern Flood Agreement (NFA) between Canada, Manitoba, Manitoba Hydro and the Northern Flood Committee Inc., representing the five First Nations including NHCN.

[53] Having regard to the factors Justice Dawson drew from in *DRL Vacations Ltd*., I would note:

a. *Powers conferred by or under an Act of Parliament should be given a liberal interpretation*: the *Indian Act* in s 2 recognizes councils selected by the "custom of the band" and confers the powers set upon band councils upon custom First Nation councils including the NHCN Council; in effect, the *Indian Act* recognizes custom First Nation councils as the governing body of the First Nation;

b. The powers do not include the private powers exercisable by an ordinary corporation created under a federal statute which are merely incidents of its legal personality or authorized business: the NHCN Council is not an ordinary corporation and its powers to make decisions are those necessary to carry out its responsibilities for NHCN governance; these are wide powers that include the capacity for entering into agreements and implementing approved settlements. The NHCN Guidelines provide the NHCN Council is responsible for forming the local government for the well being and benefit of the members of the NHCN and ensuring established policies, guidelines and regulations are put into effect through by-laws and resolutions;

c. *The character of the powers being exercised*: the BCR/050 decision of the NHCN Council is one that is intimately related to the antecedent decisions that involve the well being of the membership of the NHCN, namely the securing a supply of potable water for NHCN members; as such, it is not merely a private law commercial matter but rather a matter of public interest;

d. *The nature of the powers being exercised*: the power being exercised by the NHCN Council in BCR/050 is the power to financially contract and consent to release but this financial aspect cannot be separated from the subject matter of the antecedent decisions which concern agreements relating to the supply of potable water for the NHCN membership.

[54] In my view, the foregoing is sufficient to support a finding that impugned NHCN decisions are not merely matters of private law.

[55] The question to be now answered is whether the Federal Court has jurisdiction to judicially review a decision of a custom First Nation which does not involve a question of private law, does not involve the exercise of a federal statutory power or prerogative order, and does not relate to the election or holding of office as chief or councillor.

[56] In my view, four considerations point to the answer to this question.

[57] First, is the lacuna to which Justice Thurlow referred to in *Gabriel*. Justice Thurlow noted the Quebec Superior Court had declined jurisdiction because of the federal nature of the First Nation. Here again is a matter involving First Nation cloaked with a federal nature. The importance of having a forum available to seek recourse must be a consideration much as it was then.

[58] Second, there are repeated findings by both the Federal Court and the Federal Court of Appeal that the Federal Court has jurisdiction with respect to varied proceedings involving decisions by custom First Nation councils and their agencies.

[59] Third, the analysis in the *Algonquins of Barriere Lake* confirms the common law of aboriginal title and aboriginal and treaty rights as being federal common law. This necessarily includes the aboriginal right of governance which is part of "public law operating uniformly across the country within the federal sphere of competence". This analysis supports the finding that a custom First Nation council is unquestionably a federal entity.

[60] Finally, the exercise of authority by a custom First Nation council is an exercise by a federal entity of its jurisdiction for governance in a manner analogous to the exercise by a federal board; commission or other tribunal exercising jurisdiction or power conferred by a federal statute or prerogative order of the Crown. Both address matters of governance in the federal sphere.

[61] Having regard to the foregoing, I am satisfied the Federal Court has jurisdiction for judicial review of governance decisions by a custom First Nations council

[62] In this case, the NHCN Council's authority to make decisions is derived from their election as the governing body of the NHCN. The evidence demonstrates that the NHCN Council were exercising their authority as the elected leaders of the NHCN. Their positions as elected Chief and Councillors authorized them to make decisions on behalf and for the benefit of the members of the NHCN. Their decisions in this matter relate to governance of the NHCN.

[63] I conclude that the NHCN Council July 21, 2005 BCR/050 decision and the subsequent February ratification are decisions which the Federal Court has jurisdiction to judicially review.

Was the application for judicial review brought in a timely manner?

[64] There are two decisions by the NHCN Council to consider in this application: first, BCR/050 which was issued on July 21, 2005; second, the "ratification" of BCR/050 Council on February 7, 2006. The Applicant filed her application on March 9, 2006 within 30 days of the ratification decision as required by s. 18(2).

[65] The evidence is equivocal as to when the BCR/050 decision became known. The affidavit of then Councillor Marcel Balfour refers to learning of the July 21 BCR/050 in August 2005 when he was informed by Councillor Eric Apetagon of the BCR. Councillor Balfour declares there was no council meeting on July 21, 2005 and it was a subgroup of Council members who

signed BCR/050. Arguably, BCR/050 was not a "decision" until the NHCN Council ratified it on February 7, 2006

[66] The question of the timeliness of the application for judicial review of July 21, 2005 BCR/050 cannot be separated from the ratification decision made on February 7, 2006. The decisions are themselves inextricably linked. The application for judicial review was brought within 30 days of the ratification resolution.

[67] I am satisfied that this application was brought in a timely manner consistent with s. 18.1(2) with respect to both decisions, the February 7, 2006 ratification and the July 21, 2012 BCR/050.

Are BCR/050 and its subsequent ratification valid?

[68] The Applicant submits the impugned BCR/050 was not made in accordance with the legal decision making processes that the NHCN Council must follow, and accordingly, BCR/050 is invalid. The Respondent makes no argument on the issue of the proper decision making process or the validity of BCR/050. As noted earlier, the Respondent NHCN did not attend or make submissions on the question.

[69] On its face, BCR/050 records it was a resolution by the Norway House Cree Nation passed at a duly convened meeting on 21-07-05 by five members of the Council for which the quorum was four members.

[70] The NHCN procedural regulations require by-laws and resolutions of the NHCN Council to take place at duly convened Regular or Special Council meetings. The Guidelines provide:

> 3.1 Chief and Council are the elected representatives of the Norway house Cree Nation responsible for the following:
>
> …
>
> 3.1.2 Managing the Norway House Cree Nation's affairs by making policies and regulation through by-laws and resolutions.
>
> …
>
> 3.3 The Chief and Council, once elected, draw their authority from the Indian Act.
>
> …
>
> 3.5 The Chief and each Councillor execute their responsibilities through three forums:
>
> 3.5.1 Through Chief and Council, at duly constituted Council meetings, where by-laws and resolutions are adopted.
>
> …
>
> 11.1 Frequency of Meetings Regular Chief and Council meetings shall commence promptly at 9:00 a.m. on the first and third Tuesday of every month. All Managers and Directors must attend these regular Chief and Council meetings.
>
> …
>
> 11.4 Special Council Meetings Special Council meetings may be called by the Chief upon provision to each member of Council of twenty-four (24) hours' notice and a specific agenda relating to the special meeting. Special meetings may be called by the Chief on his or her own initiative, or by the Chief at the request of a majority of Council.
>
> [Emphasis added]

[71] In addition, the provisions of the *Indian Act* are relevant in that the NHCN Guidelines specifically reference the Act. Paragraph 2(3)(b) of the *Indian Act* states:

> b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

[72] The Applicant submits there is no record of any NHCN Council meeting on July 21, 2005. The Applicant declares there is no notice, no agenda, and no minutes in evidence that indicate a Band Council meeting was duly convened on that date.

[73] Counsel for the Applicant, pursuant to Rule 317 of the *Federal Courts Rules*, requested from the Respondent HNCN any notice of the July 21, 2005 meeting, the agenda, the minutes, and the record of documents that were before the Band Council on that date. There is no indication that the Respondent NHCN has forwarded these materials or whether they exist at all.

[74] Marcel Balfour was a Councillor at the time BCR/050 was purportedly decided. In his affidavit he affirmed that in July 2005, there was only one meeting of the NHCN Council on July 5, 2005. In particular, he declares there was no council meeting held on July 21, 2005, stating:

a. he did not receive any notice of any NHCN Council meeting to be held on July 21, 2005;

b. he never saw draft or final minutes for any meeting on that date;

c. minutes for that date were never put before the Council or approved at a Council meeting.

Marcel Balfour states he subsequently became aware the subgroup of Council members signed a BCR form dated July 21, 2005 being BCR/050.

[75] There is no other evidence to contradict the evidence of Marcel Balfour but for the BCR/050 itself. If there was a meeting, he would, as a member of the NHCN Council, be entitled to notice of the council meeting. He received no notice and affirms he learned Councillor Eric Apetagon was similarly unaware of BCR/050 until after it was signed.

[76] I conclude, on the evidence before me that no notice was given to all of the members of the NHCN Council for a meeting to consider BCR/050 on July 21, 2005.

[77] In *Balfour*, Justice Blais, as he then was, strongly criticized the decision making processes used by the same NHCN Council in respect of other decisions. Justice Blais stated:

> 3. Should the sub-group of Band councillors be allowed to exist?
>
> 45 The applicant contests the fact that a sub-group has been created. He contends that when decisions are taken by the smaller group of councillors, the rules regarding quorum, notices and the recording of decisions and minutes are not respected.
>
> …
>
> 49 … I find that it is permissible for a sub-group of Band Council members to meet outside the formal confines of Band Council meeting to discuss issues concerning the Band. However, a distinction must be drawn between the latter and what has occurred in the present matter. <u>That is, it is not permissible for the sub-group of Band councillors to make decisions in secret and subsequently have those decisions rubber stamped at future Band Council meetings without regard to the Band Council guidelines or the provisions of the Indian Act.</u>
>
> [Emphasis added]

[78] I agree with Justice Blais. A council decision cannot be validly made where not all the councillors were given notice of the meeting. However, such a decision may be subsequently

ratified at a council meeting where notice is given, opportunity to participate is provided to all members of council, and the matter is not already finally decided.

[79] The Applicant does not allege the February 7, 2006 meeting was not a duly constituted Council meeting. The minutes of the council meeting show Councillor Balfour was present and the merits of BCR/050 were debated before the vote ratifying it three to one. However, the decision does not mean BCR/050 was now properly ratified.

[80] Again, Justice Blais considered the same practice by the same NHCN Council and decided much the same issue in *Balfour*. He stated:

> 54 The respondents argue that they may ratify their resolutions at a later point in time at a duly convened meeting. I am satisfied, however, that in the present matter, the outcome of the ratification process was pre-determined in many situations. That is, resolutions drafted in secret meetings that did not respect the NHCN guidelines, often represented positions that were incapable of being changed. Further, the content of said resolutions was never circulated to the Band's members and properly debated at duly convened meetings and objectors were not given the opportunity to be heard.
>
> 55 I would like to emphasize that the ratification process mentioned by the respondents is a myth. Resolutions cannot be adopted in secret meetings, and then subsequently ratified at a duly convened meeting without being discussed and debated. The resolution itself must be passed at a duly convened meeting. It cannot be the product of a secret meeting and subsequently rubber stamped at a later date at a duly convened meeting. Resolutions cannot be the product of predetermined decisions. They must be debated and passed in accordance with the rules and guidelines of the Band and in accordance to the principles of democracy. In the present matter, there are many examples which illustrate that the ratification process of Band Council resolutions was inherently biased. …

[Emphasis added]

[81] In this instance, the ratification vote is taken over six months after BCR/050 was decided. I in fact, the vote was taken at the last Council meeting before the end of the NHCN Council's term of office.

[82] Since BCR/050 was presented to Canada and Manitoba Hydro as representing the official decision of the NHCN Council, which was then acted upon by them, the ratification process on February 7, 2006 could not be considered anything other than having been predetermined. The vote was taken long after parties have acted on BCR/050 and provides the NHCN Councillors no realistic opportunity to decide other than for ratification.

[83] I conclude the ratification of BCR/050 flawed in that it was pre-determined before the approval vote.

Is the within application an appropriate instance for this Court to exercise its discretion to grant the relief sought?

[84] The Respondent urges this Court to not exercise its discretion to invalidate these decisions. The Applicant is silent on this issue.

[85] The Respondent submits a grant of relief on judicial review is discretionary, and that in certain circumstances, courts should decline to grant the relief sought, even if the applicant establishes valid grounds for the Court's intervention.

[86] In *Canada (Attorney General) v TeleZone Inc*. Justice Binnie stated, "[i]n judicial review, 'the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals'…" . *Canada (Attorney General) v TeleZone Inc*., 2010 SCC 62, [2010] 3 SCR 585 at para 56.

[87] In *MiningWatch v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 (*MiningWatch*) at paragraph 52, the Supreme Court held that although the subject decision makers had acted without authority, the Federal Court should nonetheless not have set aside the impugned decisions, but rather should have exercised its discretion to not grant the relief requested:

> In the exercise of that discretion to deny a portion of the relief sought, balance of convenience considerations are involved. Such considerations will include any disproportionate impact on the parties or the interests of third parties. In my respectful opinion, that is the situation here. The focus of Mining Watch's interest as a public interest litigant is the legal point to which the declaration will respond. On the other hand, I can see no justification in requiring Red Chris to repeat the environmental assessment process when there was no challenge to the substantive decisions made by the RAs.
>
> [Citations omitted]

[88] In *Community Panel of the Adams Lake Indian Band v Adams Lake Band* Justice Stratas stated at paragraph 30:

> The message in *MiningWatch* is that the broadest range of practical factors must be considered and legal error or non-compliance should not be given undue weight: the practicalities may outweigh the legalities.

[89] The Respondent submits there are good policy reasons for why the settlement agreement and the NHCN Council resolution to accelerate payment and its ratification should stand.

[90] Invalidating the impugned decisions would cause burdens and risks to fall on Canada and Manitoba Hydro. Both Canada and Manitoba relied on the July 21, 2005 BCR/050 in regards to the lump sum payment of approximately $6.4 million. Manitoba Hydro has long since made the payment and NHCN has already spent these monies. Declaring BCR/050 invalid would undermine the security and finality of the Settlement of Claim 138.

[91] BCR/050 was represented as a valid NHCN Council BCR to Canada and Manitoba Hydro. Canada and Manitoba Hydro relied on what otherwise appeared to be a valid NHCN Council BCR with assurances that NCHN had received independent legal advice and that Canada would be provided with a "full and final release of all future obligations of Canada to Norway House under the Claim 138 First Nations Settlement Agreement".

[92] Manitoba Hydro, as per BCR/050, paid in full. It should not be confronted with the possibility of a debt, thought to be long paid off, coming under uncertainty.

[93] The Respondent also submits that courts have found that First Nations can be bound to contracts even when those contracts did not receive the full approval of a Band Council. In *Maloney v Eskasoni First Nation*, 2009 NSSC 177 at paragraphs 251 and 270 the Nova Scotia Supreme Court held that ostensible authority can apply in the absence of Band Council approval:

> A person may be bound by the words or deeds of an apparent agent. Ostensible agency is created by making a representation,

> through words or conduct, that leads another to believe that the apparent agent has actual authority [citations omitted].
>
> …
>
> [B]y conduct of its Chief, Councillors, and managers, Eskasoni First Nation represented to Mr. Maloney that Chief Francis had authority to enter into Mr. Maloney's employment contracts. I find he relied on those representations, and he altered his position as a result of that reliance. Therefore, the defendant is bound by the contract executed on May 17, 2004 even if Chief Francis did not have actual authority to sign it.

[94] The Respondent submits this is appropriate since negotiating partners need to be able to rely on BCRs which are given by First Nations chiefs and councillors where cloaked with apparent authority.

[95] Finally, the Respondent submits that it is important to keep in mind that a declaration that BCR/050 is invalid could impact years of arbitration and sensitive negotiations which ultimately led to complex settlements with Manitoba Hydro and four First Nations.

[96] I agree with the Respondent's submissions in respect of the above. However, I find there are some further considerations I should have regard for.

[97] First, Prothonotary Lafrenière noted that the Applicant had suggested the application for judicial review is simply about whether a Council resolution and its purported ratification is valid or not. The Applicant had contended it was merely a "local matter" or a simple issue of good governance. In this application the Applicant has achieved obtaining her answer in relation to the question of "good governance" for the NHCN.

[98] Second, a declaration that the NHCN council decision BCR/050 is invalid has serious implications for the NHCN itself. Aside from the potential for adverse financial consequences, namely the return the monies paid, there is the question of the impact on the NHCN ability to do business in the future. NHCN Council decisions in the course of future dealings with government and corporations would be cast under a shadow of doubt as to their validity even if apparently valid in the face of the BCR. Given the import of such questions, it is essential to consider the position of the Respondent NHCN Council. Since the NHCN Council chose not to participate, that voice was not heard. I consider it unwise to decide such a question when the Respondent NHCN Council has not been heard.

[99] Finally, I note that BCR/050 was signed by the Chief and four Councillors out of the seven members of Council. That is five out of seven Councillors approved of BCR/050 while two Councillors had not. What was not observed was the procedural requirements for approving a NHCN Council resolution in accordance with the NHCN procedural regulations. When the matter was presented for ratification, a quorum of council was present and BCR/050 was approved by a vote of three to one. In all of this, it is apparent to me that a majority of the elected NHCN leadership at the relevant times were in favour of BCR/050. They did not do so in an open manner required by the NHCN procedural requirements.

[100] I am satisfied the above drawbacks to finding BCR/050 to be invalid far outweigh the procedural violations by the majority of the NHCN Council.

[101] After considering the submissions, the authorities presented, and the evidence before me, I find that on the balance that this Court should not exercise its discretion to grant the relief sought by the Applicant under s. 18.1(3).

[102] Given the Applicant's success against the Respondent NHCN, I would have granted the Applicant costs as against the Respondent NHCN but for the fact that the NHCN chose not to oppose her application. As between the Applicant and the Respondent Canada, these two parties enjoyed mixed success. In result, I would ask the Applicant and the Respondent Canada to provide me with their submissions on costs within 30 days from the date of this order.

Conclusion

[103] In conclusion, I would find that this Court has jurisdiction to hear the application, and that the application was brought in a timely manner.

[104] With regards to the impugned decisions, I conclude that BCR/050 was not valid as it passed in accordance with the procedural requirements under the NHCN Guidelines. Following the reasons of Blais J. in *Balfour*, I would also conclude that when BCR/050 was ratified, it was a pre-determined decision.

[105] I would find that this is a case where the Court ought not to exercise its jurisdiction to grant the relief sought by the Applicant.

[106] The Applicant and the Respondent Canada to provide their submissions on costs within 30 days from the date of this order identifying costs claimed and reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Court exercises its discretion and declines to grant judicial review.

2. The Applicant and Respondent Canada are to provide their submissions on costs within 30 days from the date of this Order identifying costs claimed and reasons therefore in no more than 10 pages each

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MAGGIE MYRNA LORRAINE GAMBLIN v. NORWAY HOUSE CREE NATION BAND COUNCIL AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
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