Date: 20090325

Docket: T-564-08

Citation: 2009 FC 313

Ottawa, Ontario, March 25, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KERRY SCOTT

Applicant

and

PIIKANI FIRST NATION COUNCIL,
PIIKANI NATION REMOVAL APPEALS BOARD,
CHIEF REG CROW SHOE,
COUNCILOR ADAM NORTH PEIGAN,
AND COUNCILOR ERWIN BASTIEN

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicant filed an application for judicial review of two decisions of the Piikani First Nation Council. When the matter came on for hearing on February 9, 2009, counsel for the applicant informed the Court that the applicant would be filing a Notice of Discontinuance but that he wished to reserve his rights to address the Court on the issue of costs. The applicant had reached an agreement concerning the costs of the discontinued application with some of the respondents, but

not with the Piikani First Nation Council or its Chief, who were represented by the same counsel. The parties wished some time to see if an agreement on costs could be reached. Accordingly, I issued the following Direction:

> Counsel for the Applicant informed the Court on February 9, 2009 that the Applicant will be filing a Notice of Discontinuance reserving the issue of costs. He is directed to forthwith file the same with the Court. I shall remain seized of the issue of the costs of this motion. The parties are directed as follows:
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> 1. If the parties are unable to agree on costs by February 23, 2009, then the Respondents may file written submissions (no longer than 5 pages) on costs and deliver same to the Applicant's counsel and the Court on or before March 19, 2009;
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> 2. The Applicant shall file his submissions (no longer than 5 pages) on costs and deliver same to the Court and the Respondents no later than March 16, 2009.

[2] A Notice of Discontinuance has since been filed by the applicant. No agreement on costs has been reached and I have before me the submissions of the parties with respect to the outstanding issue of costs.

[3] Rule 402 of the *Federal Courts Rules* governs costs in the event that an application is discontinued. It provides as follows:

402. Unless otherwise ordered by the Court or agreed by the parties, a party against whom an action, application or appeal has been discontinued or against whom a motion has been abandoned is entitled to costs forthwith, which may be assessed and the payment of	402. Sauf ordonnance contraire de la Cour ou entente entre les parties, lorsqu'une action, une demande ou un appel fait l'objet d'un désistement ou qu'une requête est abandonnée, la partie contre laquelle l'action, la demande ou l'appel a été engagé ou la requête présentée a droit

which may be enforced as if judgment for the amount of the costs had been given in favour of that party.	aux dépens sans délai. Les dépens peuvent être taxés et le paiement peut en être poursuivi par exécution forcée comme s'ils avaient été adjugés par jugement rendu en faveur de la partie.

[4] It has been held that the Court should not discourage the discontinuance of unmeritorious proceedings by penalizing parties with costs by imposing a substantial award of costs when they have acted responsibly: *Fournier Pharma Inc. v. Apotex Inc.*, 2007 FC 433. The Court has permitted a discontinuance without costs where the party discontinuing the proceeding acted reasonably in bringing the proceeding and discontinued it promptly when provided with the other party's exculpatory information: *Dark Zone Technologies Inc. 1133150 Ont. Inc.*, 2002 FCT 1.

[5] As a result of the discontinuance the Court has not heard argument on the merits of the application and much of the parties' submissions would require that the Court engage in a detailed determination of the respective merits of the parties' positions in the application that has been discontinued. The Court is not in a position to do so; however, the Court is satisfied from reviewing the parties' submissions that the applicant acted reasonably in bringing the application against the Piikani First Nation Council. After these proceedings were commenced, the Council took steps to address the applicant's concerns. In fact, it is submitted by the applicant that Council's response was as a direct result of this application having been brought. Be that as it may, it is evident from the record that the Piikani First Nation Council did take steps to address the applicant's concerns and that this matter could have been discontinued much earlier than it was.

[6] The Piikani First Nation Council submits that the defects alleged by the applicants were cured by the Council and that the applicant would have been aware of this by June 6, 2008, at the latest, when the affidavit of Red Young Man was provided to him. The respondent submits that the applicant kept this application alive only because the respondent, the Piikani Nation Removal Appeals Board, had not yet rendered a decision. I am of the view that there is merit to that submission. While that may have justified continuing this application against that respondent, it appears to the Court that the applicant ought to have ceased to actively pursue this application and should have discontinued the proceedings against the Council.

[7] It is expected that expenses were incurred after that date as numerous prehearing steps were taken by the parties. While it is fair that the applicant not be punished in costs, it is also fair that the Piikani First Nation Council receive costs for the unnecessary litigation. Accordingly, the Piikani First Nation Council and its Chief shall have one set of costs as against the applicant for the fees and disbursements incurred after June 6, 2008, including their costs in making these submissions.

ORDER

THIS COURT ORDERS that the Piikani First Nation Council and its Chief shall have one set of costs as against the applicant for the fees and disbursements incurred after June 6, 2008, including their costs in making these submissions.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-564-08

STYLE OF CAUSE: KERRY SCOTT v.
PIIKANI FIRST NATION COUNCIL ET AL.

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO,
WITHOUT THE APPEARANCE OF THE PARTIES**

REASONS AND ORDER OF THE HONOURABLE MR. JUSTICE RUSSEL W. ZINN

DATED: March 25, 2009

WRITTEN REPRESENTATIONS BY:

Kenneth E. Staroszik, Q.C. FOR THE APPLICANT

Michael L. Pflueger FOR THE RESPONDENTS

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