Federal Court  Cour fédérale

Date: 20090730

Docket: T-1497-07

Citation: 2009 FC 784

Montréal, Quebec, July 30, 2009

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

TOBIQUE INDIAN BAND

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion by the Tobique Indian Band, the applicant, pursuant to subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the Act), to convert this Application for judicial review into an action (the Application).

[2] If this Court does not agree, the applicant seeks, alternatively, an order for leave to amend the grounds in the Notice of Application and, in further alternative, to require officers of the Department of Indian and Northern Development (DIAND), to wit, specifically, but not limitatively, Ian Gray and Allen Williamson, to be examined pursuant to rule 316 of the *Federal Courts Rules* (the rules).

Background

[3] The underlying Application to this motion is a judicial review, initiated on August 14, 2007, of a decision of Dougal MacDonald, then Acting Regional Director General, DIAND, in August 2007, to appoint a third party manager, replacing then existing co-management (the impugned decision).

[4] The essential facts of this matter are as follows.

[5] The applicant would have been in default of its funding agreements with DIAND for the past 18 years. Until 2005 the remedial intervention by DIAND was a self-administered intervention that required the applicant to implement and comply with remedial management plans it itself had developed. In December 2005, DIAND required the applicant to enter a higher level of remedial intervention: co-management. The applicant entered into a co-management agreement with the firm Teed Saunders Doyle & Co (Teed Saunders). DIAND was not a party to said co-management agreement.

[6] This two-year co-management agreement was coming to an end when the applicant did not have full support of the Chief and Council to continue the co-management agreement with the existing co-managers. The firm Arbuthnot, MacNeil, Douglas, Dorey and Associates Ltd. (AMDD) replaced Teed Saunders as co-managers with the applicant in June 2007.

[7] On June 11, 2007, the applicant entered into the co-management agreement with AMDD. A new management plan was to be completed by the new co-managers by August 31, 2007. The applicant was continuously trying to find support for financial restructuring; the applicant had a proposal by Merchant Capital LLC to consolidate the applicant's debt obligations at a more beneficial interest rate than the current loan rates of the applicant, and also to provide extra financial resources for the construction of a new school, housing, a hotel and other infrastructure improvements (the Merchant Capital proposal).

[8] On July 12, 2007, at a meeting in Halifax between representatives of the applicant and of the respondent, Ian Gray, then Acting Associate Regional Director with DIAND, would have expressed his qualified support of the Merchant Capital proposal.

[9] On July 13, 2007, representatives for the respondent, Mr. Williamson and Mr. William Nicholls met with AMDD in Fredericton to discuss the co-management arrangement with the applicant. At this meeting AMDD expressed to the DIAND representatives that the financial situation was worse than anyone knew. DIAND became aware of outstanding debts and that the applicant was "basically bankrupt".

[10] On July 18, 2007, a report was created by Mr. Nicholls that outlined the issues of concern relating to the applicant. The report detailed the financial situation of the applicant, and noted that the Merchant Capital proposal was an area of concern.

[11] On another Risk Assessment chart dated August 2, 2007, the Merchant Capital proposal was not included. The applicant perceived this as a rejection of the Merchant Capital proposal.

[12] The impugned decision was made by Dougal MacDonald on August 3, 2007, communicated orally to the applicant on August 7, 2007 at a meeting, and in writing, via fax on August 9, 2007.

[13] The fax outlined the reason for increasing the level of financial management intervention to third party management. The fax states as follows:

> It has been determined that Council is in default of the DIAND/Tobique Funding Agreement, and specifically section 8.0 of the Agreement, with respect to the following clauses:
>
> (a) the Council defaults in any of its obligations set out in this Agreement; or
>
> (c) the Audit indicates that the Council has incurred a cumulative deficit equivalent to either (8)% or more of the Council's total annual revenues; or
>
> (d) the Minister has a reasonable belief, based on material evidence, that the health, safety or welfare of the Members or Recipients is being compromised.

[14] Said communication also provides that the impugned decision was taken to secure funding provided under the Funding Arrangement and to maintain provision of programs and services.

[15] When a third party manager is appointed, the funds provided pursuant to a funding agreement are held in trust by the third party manager, who administers the funding and the band's obligations under the funding agreement.

[16] In its Application, the applicant is seeking to have the impugned decision quashed, and among other declarations, to have the applicant restored to the status of co-management.

[17] Following the filing of the Application, the applicant and respondent filed affidavits. The respondent and applicant both filed motions for extension of time to file further affidavits; each party filed a further affidavit. Cross-examinations on affidavits took place March 3-6, 2008.

[18] More specifically, the applicant proceeded then to cross-examine extensively on their affidavits three out of four of the affiants put forth by the respondent in support of her position on the merits of the case. The three affiants that were cross-examined by the applicant were: Brian Arbuthnot, Dougal MacDonald and William Nicholls. Chief Gerald Bear was cross-examined by the respondent.

[19] Mr. Dougal MacDonald, the person who made the impugned decision, was cross-examined extensively and the transcript of that cross-examination was also submitted in the respondent's record on this motion. He provided the details about how the decision was made and the considerations that took place leading up to the impugned decision and its transmittal to the applicant.

[20] Mr. MacDonald was questioned also at length about Mr. Ian Gray's prior position and conduct in relation to the impugned decision and Mr. Allen Williamson's email to ADMM on July 13, 2007. The basis of the email was the alleged interference by the respondent in trying to convince AMDD to take on the role as third party manager without informing the applicant. Mr. Williamson was then Director of Funding Services with DIAND.

Current motion

[21] The applicant submits essentially that the conversion of this Application to an action is justified on the basis that the issues raised cannot be satisfactorily established or weighed through affidavit evidence but rather the Court should have the opportunity to observe the demeanour and credibility of witnesses.

[22] The fact that the respondent has not provided an affidavit of Mr. Gray and Mr. Williamson is also another reason for the applicant to request the conversion.

[23] Additionally, as alluded to earlier, the applicant has applied for an order seeking leave under rule 316 to examine Messrs. Gray and Williamson. The basis for this request is that these two officers were involved in the decision-making process that resulted in the impugned decision and affidavits were not submitted by them.

[24] The final issue in this motion is the request for an order to amend the Notice of Application. The applicant submits that these amendments would not prejudice the respondent,

but would rather specify and clarify the generally cited grounds in the current Notice of Application.

Analysis

[25] The noted three remedies on this motion are dismissed for the reasons that follow.

[26] The possibility to convert an Application to an action is set out in subsection 18.4(2) of the Act. It is an exceptional remedy, as section 18.4 states that an application should be heard without delay and in a summary way.

[27] Section 18.4 reads as follows:

18.4 (1) Hearings in a summary way - Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.	**18.4 (1) Procédure sommaire d'audition -** Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.
(2) Exception - The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	**(2) Exception -** Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.
1990, c. 8, s. 5; 2002, c. 8, s. 28.	1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

[28] *Macinnis v. Canada (Attorney General)*, [1994] 2 F.C. 464, is the applicable leading authority for the test determining whether an application should be converted to an action (*"Macinnis"*).

[29] At pages 470 to 472 of *Macinnis*, Justice Décary stated for the Federal Court of Appeal:

> It is, in general, only where facts of whatever nature cannot be satisfactorily established or weighed through affidavit evidence that consideration should be given to using subsection 18.4(2) of the Act. One should not lose sight of the clear intention of Parliament to have applications for judicial review determined whenever possible with as much speed and as little encumbrances and delays of the kind associated with trials as are possible. The "clearest of circumstances", to use the words of Muldoon J., where that subsection may be used, is where there is a need for *viva voce* evidence, either to assess demeanour and credibility of witnesses or to allow the Court to have a full grasp of the whole of the evidence whenever it feels the case cries out for the full panoply of a trial.[7] The decision of this Court in *Bayer AG and Miles Canada Inc. v. Minister of National Health and Welfare and Apotex Inc.*[8] where Mahoney J.A. to some extent commented adversely on a decision made by Rouleau J. in the same file,[9] is a recent illustration of the reluctance of the Court to proceed by way of an action rather than by way of an application.
>
> En général, c'est seulement lorsque les faits, de quelque nature qu'ils soient, ne peuvent pas être évalués ou établis avec satisfaction au moyen d'un affidavit que l'on devrait envisager d'utiliser le paragraphe 18.4(2) de la Loi. Il ne faudrait pas perdre de vue l'intention clairement exprimée par le Parlement, qu'il soit statué le plus tôt possible sur les demandes de contrôle judiciaire, avec toute la célérité possible, et le moins possible d'obstacles et de retards du type de ceux qu'il est fréquent de rencontrer dans les procès. On a des "motifs très clairs" d'avoir recours à ce paragraphe, pour utiliser les mots du juge Muldoon, lorsqu'il faut obtenir une preuve de vive voix soit pour évaluer l'attitude et la crédibilité des témoins ou pour permettre à la Cour de saisir l'ensemble de la preuve lorsqu'elle considère que l'affaire requiert tout l'appareillage d'un procès tenu en bonne et due forme[7]. L'arrêt rendu par la présente Cour dans l'affaire *Bayer AG et Miles Canada Inc. c. Ministre de la Santé nationale et du Bien-être social et Apotex Inc.*[8], où le juge Mahoney, J.C.A. s'est montré jusqu'à un certain point en désaccord avec la décision rendue par le juge Rouleau dans la même affaire[9], est un exemple récent de l'hésitation de la Cour à instruire une affaire par voie d'action plutôt qu'au moyen d'une demande.

Strayer J. in *Vancouver Island Peace Society*, and Reed J. in *Derrickson* have indicated that it is important to remember the true nature of the questions to be answered by the Court in judicial review proceedings and to consider the adequacy of affidavit evidence for answering those questions. Thus, a judge would err in accepting that a party could only introduce the evidence it wants by way of a trial if that evidence was not related to the narrow issues to be answered by the Court. The complexity of the factual issues would be, taken by itself, an irrelevant consideration if the conflicting expert affidavits on which they are based are related to the issues before the tribunal rather than issues before the Court. In the same vein, speculation that hidden evidence will come to light is not a basis for ordering a trial.[10] A judge might be justified in holding otherwise if there were good grounds for believing that such evidence would only come to light in a trial, but the key test is whether the judge can see that affidavit evidence will be inadequate, not that trial evidence might be superior.

[Emphasis added.]

Le juge Strayer, dans l'arrêt *Vancouver Island Peace Society*, et le juge Reed dans l'arrêt *Derrickson*, ont mentionné qu'il est important de se rappeler la vraie nature des questions auxquelles la Cour doit répondre dans une procédure de contrôle judiciaire, et de considérer la pertinence d'utiliser la preuve déposée par affidavit pour répondre à ces questions. Par conséquent, un juge commettrait une erreur en acceptant qu'une partie puisse seulement présenter la preuve qu'elle veut au moyen d'un procès si cette preuve n'était pas liée aux questions très précises auxquelles la Cour doit répondre. La complexité, comme telle, des questions de faits ne saurait être prise en considération si les affidavits contradictoires des experts qui s'appuient sur ces faits se rapportent aux questions soumises au tribunal plutôt qu'aux questions soumises à la Cour. Par conséquent, supposer qu'on pourra mettre au jour une preuve cachée n'est pas une raison suffisante pour ordonner la tenue d'un procès[10]. Un juge peut être justifié de statuer autrement s'il a de bonnes raisons de croire qu'une telle preuve ne pourrait être mise au jour qu'au moyen d'un procès. Mais le vrai critère que le juge doit appliquer est de se demander si la preuve présentée au moyen d'affidavits sera suffisante, et non de se demander si la preuve qui pourrait être présentée au cours d'un procès pourrait être supérieure.

[Je souligne.]

[7] *See Canadian Pacific Ltd. v. Matsqui Indian Band*, [1993] 2 F.C. 641 (C.A.), at pp. 649-650; *Edwards v. Canada (Minister of Agriculture)* (1992), 53 F.T.R. 265 (F.C.T.D.), at p. 267, Pinard J.

[7] Voir *Canadien Pacifique Ltée. c. Bande indienne de Matsqui*, [1993] 2 C.F. 641 (C.A.), aux p. 649 et 650; *Edwards c. Canada (Ministre de l'Agriculture)* (1992), 53 F.T.R. 265 (1re inst.), à la p. 267, le juge Pinard.

[8] (25 October 1993), A-389-93, not yet reported.

[9] [Bayer AG et al. v. Canada (Minister of National Health and Welfare) et al.] (1993), 66 F.T.R. 137 (F.C.T.D.).

[10] *Oduro v. Canada (Minister of Employment and Immigration)*, 9 December 1993, IMM-903-93 (F.C.T.D.), McKeown J. (not yet reported).

[8] (25 octobre 1993), A-389-93, encore inédit.

[9] [*Bayer AG et autre c. Canada (Ministre de la Santé nationale et du Bien-être social) et autre*] (1993), 66 F.T.R. 137 (C.F. 1re inst.).

[10] *Oduro c. Canada (Ministre de l'Emploi et de l'Immigration)*, 9 décembre 1993, IMM-903-93 (C.F. 1re inst.), le juge McKeown, (encore inédit).

[30] In *Drapeau v. Canada (Minister of National Defence)*, [1995] F.C.J. No. 536, Justice Hugessen found that there are certain circumstances under which no limits should be placed on the considerations to be taken into account when deciding whether to convert an application to an action (*"Drapeau"*).

[31] The applicant has however focused its argument for conversion on evidentiary requirements, and therefore the conclusion in *Drapeau* is not applicable.

[32] Taking from *Macinnis* and *Drapeau*, the Court concludes here that there are three criteria that require to be considered to determine whether the Application should be converted to an action. They are the following:

a. The true nature of the central question the Court must answer in the Application;

b. The adequacy of the affidavit evidence; and

c. The need to assess demeanour and credibility of witnesses.

[33] The Court must decide the Application on the issue concerning the decision of Mr. MacDonald putting the applicant into third-party management. The true nature of the question the Court must answer in this Application is how the decision by Mr. MacDonald was arrived at and whether that decision was reasonable.

[34] The issues surrounding other decisions of DIAND in the past are not matters under review in this Application. The aspects of the decision making process that directly regard the August 3, 2007 decision of Dougal MacDonald will only be considered.

[35] The adequacy of the affidavit evidence is determined by establishing whether the evidence provided is sufficient for this Court to piece together the history and context of the matter, and draw a conclusion based on that evidence.

[36] The applicant submits that the affidavit evidence submitted is not adequate because Mr. Gray and Mr. Williamson have not provided affidavits and have not been examined. The applicant believes that there is pertinent information being withheld by the respondent and the two representatives that have not submitted affidavits.

[37] However, Justice Décary suggested in *Macinnis* that "speculation that hidden evidence will come to light is not a basis for ordering a trial."

[38] In addition, with regard to the issues related more directly to what influenced the decision of Mr. MacDonald, I find that the affidavits submitted to date and cross-examinations on those affidavits are more than adequate. As pointed out by the respondent in her written

representations in opposition to the motion at bar, it is Mr. MacDonald who was ultimately responsible to draw the impugned decision, and in his affidavit and during his two-day cross-examination, he was questioned and did address the involvement and point of view of Mr. Gray and the conduct of Mr. Williamson. I am satisfied that Mr. MacDonald as well as the other two affiants of the respondent were questioned by counsel for the applicant within the parameters to be followed under an examination on an affidavit, which exercise of course is somehow different than a discovery under an action.

[39] The applicant asserts that a conversion is required in order to allow an examination of Mr. Williamson because, *inter alia*, there was no trip report for the visit to the Tobique Indian Reserve on August 7, 2007. This visit involved a meeting where Mr. Williamson was involved and issues respecting the applicant's finances were discussed with the applicant's council and other members of the applicant. The absence of a trip report does not provide a justification to necessitate a conversion of this Application.

[40] Affidavits could also have been sought from the applicant's membership that were in attendance to provide evidence of that meeting. Furthermore, it is unclear, on the evidence, whether the applicant has approached either Mr. Gray or Mr. Williamson for affidavit evidence.

[41] I am of the view that the *viva voce* evidence of Ian Gray or Allen Williamson is not necessary for determining the issue on the underlying Application. The adequacy of the affidavit evidence is sufficient for the Court to evaluate the history and context to decide the issues on this Application for judicial review. Furthermore, from this finding that the affidavit evidence is

sufficient, it follows that it is not necessary to determine the demeanour and credibility of the witnesses.

[42] As more particularly with respect to the financial history of the applicant, the Court upon analysis of the affidavit evidence submitted by the parties, and especially the affidavits submitted by the respondent under the motion at bar, agrees with the following representations found at paragraph 33 of the respondent's written representations in her motion record in response:

> The financial history has been carefully and thoroughly laid out in Nicholls' Affidavit, MacDonald's Affidavit and Arbuthnot's Affidavit. In particular, MacDonald's Affidavit explains the rationale of the decision-maker and in Robertson's Affidavit, the contextual background with respect to funding agreements is explained. Nearly every document in the Tribunal Record has been explained to the Court through these affidavits to aid it in its consideration of the impugned decision. The Applicant has cross-examined Nicholls, MacDonald, and Arbuthnot, and had the opportunity to cross-examine Robertson but chose not to. The Applicant has failed to articulate what facts it needs to establish regarding its financial history and why it can only be done orally before the Court through witnesses. (…)

[43] Furthermore, converting this judicial review into an action, at this stage of the process, would not be in the best interests of judicial economy. Although cross-examinations were held in March of 2008, it would appear that it is the decision of this Court early in January 2009 to put this case under case management that reactivated this case and most likely prompted the applicant to consider moving this Court with the motion under study.

[44] Parties are now at the stage of producing the records under rules 309 and 310 and these steps should be undertaken in an application whose filing goes back to August 2007.

[45] The alternative remedy requested by the applicant was an order under rule 316 directing that Mr. Gray and Mr. Williamson, and all necessary persons, be required to submit to an examination by the applicant.

[46] It seems to me, respectfully, that the applicant is requesting that if it does not get what it asks for through the front door, it is hoping to get it through the back door.

[47] Justice MacKay in *Holland v. Canada (AG)*, [1999] F.C.J. No. 1849, has laid out the test for rule 316 at paragraph 3:

> 3 Rule 316 of the Court's Rules reads as follows:
>
> > On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised in an application.
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> This Rule (formerly Rule 319(4)) was considered by my colleague, Mr. Justice Rouleau, in Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) and Apotex Inc. et al. (1987), 11 F.T.R. 132 at 133, where he commented in part:
>
> > Under Rule 319 all the facts on which a motion is based must be supported by affidavit evidence. It is only "by leave of the Court" and "for special reason" that a witness can be called to testify in relation to an issue. There were no cases presented to me by counsel for the plaintiff nor am I aware of any case law which identifies the test as to what constitutes "special reason". In my opinion, this is a question to be decided on the facts of a particular case with the onus being on the applicant to prove the existence of "special reason" to the satisfaction of the Court. What is clear from the jurisprudence is that leave will be granted by the Court only in exceptional circumstances.

[48] The applicant has not established any special circumstances to justify the calling of Mr. Gray and Mr. Williamson to testify in relation to the above noted issues.

[49] This request to examine Mr. Gray, Mr. Williamson and whomever else the applicant may consider necessary is, as I reasoned above, unnecessary. I found above that the affidavit evidence is adequate and therefore, these examinations are extraneous and unjustified.

[50] The final remedy requested by the applicant is a motion for leave to amend its Application pursuant to rules 4, 54, 79 and 107. However, the appropriate basis for leave to amend is rule 75. Rule 75 states:

Amendments with leave	Modifications avec autorisation
75. (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.	**75.** (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.

[51] I am cognizant of the liberal approach of this Court articulated in *Canderel Ltd. v.* Canada, [1993] F.C.J. No. 777 (C.A.), and *Visx Inc. v. Nidek Co.*, [1998] F.C.J. No. 1766. However, I cannot find, on the issues in this motion, that it is in the interests of justice that the applicant's amendments be allowed.

[52] The applicant asserts that the amendments sought are for the purpose of specifying and clarifying the more general grounds stated in the Application. However, I find that the amendments do not relate directly to the issue in this judicial review. With the proposed amendments the applicant is attacking numerous decisions made by various people within DIAND. This demonstrates that the amendments sought are for issues not related to the

Application. As for the second and fourth amendments proposed by the applicant, I agree with the respondent's submissions that the issues or grounds they address are already raised in the Notice of Application. To allow them would only serve to confuse what the Application is really concerned with.

[53] The amendments at this late stage in the process would prejudice the respondent. The amendments do not clarify the grounds, but rather broaden them to include decisions that are not under review in this Application. I find that the amendments would not serve the best interests of justice in this matter.

[54] Finally, insofar as the applicant's motion seeks to file, for the purpose of the merits of the Application, the affidavit of Mr. Gerald Bear dated August 19, 2008, said remedy is denied for the reasons that rule 84 is not complied with and that the applicant's motion record does not satisfy the Court that this late production of merits evidence on the part of the applicant passes the four-element test developed in *Atlantic Engraving Ltd. v. Lapointe Rosenstein*, 2002 FCA 503, [2002] F.C.J. No. 1782 (F.C.A.) (QL) (*Atlantic Engraving*). In addition, this Court very much tends to agree with the representations of the respondent to the effect that said affidavit is replete not with statements of material facts but with opinions, arguments and bald assertions devoid of any reference as to the basis of the affiant's information and belief.

ORDER

Consequently, for the above reasons, the applicant's motion is denied, the whole with costs.

As for the advancement of this case, the parties shall abide by the following schedule:

1. The applicant's record under rule 309 shall be served and filed on or before September 14, 2009;

2. The other applicable rules shall apply thereafter.

"Richard Morneau"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1497-07
STYLE OF CAUSE:	TOBIQUE INDIAN BAND and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	July 22, 2009
REASONS FOR ORDER:	MORNEAU P.
DATED:	July 30, 2009

APPEARANCES:

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Susan R. Taylor Jonathan Tarlton	FOR THE RESPONDENT

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