Federal Court  Cour fédérale

Date: 20110812

Docket: T-721-11

Citation: 2011 FC 994

Ottawa, Ontario, August 12, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LEAH BALLANTYNE, RANDY BEAR and DARRYL JOHN SINCLAIR

Applicants

and

CHIEF RATIFICATION OFFICER CLAUDETTE BIGHETTY, REVIEW OFFICER DANIEL GUNN, MATHIAS COLOMB CREE NATION, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by MICHAEL WERNICK, DEPUTY MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This matter began as an application for judicial review of: the decision of the Mathias Colomb Cree Nation (MCCN) and the Department of Indian and Northern Affairs to enter into an agreement, dated 30 March 2011, to settle a tort claim following a diesel spillage on the reserve

(Settlement Agreement); the decision of MCCN's Chief Ratification Officer (CRO) to hold the 14 March 2011 ratification vote (Second Ratification Vote); the decision of the CRO to accept the results of the 21 February 2011 ratification vote (First Ratification Vote) and the Second Ratification Vote; and the decisions of the Review Officer (RO), dated 9 March 2011 and 28 March 2011, dismissing Ms. Ballantyne's objections to the First Ratification Vote and the Second Ratification Vote.

[2] This, however, is an evolving application. By the time of the oral hearing in Winnipeg on July 13, 2011, the Applicants, with the consent of the Respondents, had amended their Notice of Application so that they were only seeking the following relief from the Court:

> 6. A Declaration that the Department of Indian Affairs and Northern Development's decision to enter into the Settlement Agreement with the Mathias Colomb First Nation without the Mathias Colomb First Nation having properly ratified the Settlement Agreement by conducting a Ratification Vote as per the rules set out in the Ratification Protocol, is invalid or unlawful and is quashed or set aside;
>
> 7. A Declaration that the Settlement Agreement is not consistent with the duties owed by Canada to the Mathias Colomb First Nation, and that therefore the Department of Indian Affairs and Northern Development's decision to enter into the Settlement Agreement with the Mathias Colomb First Nation is quashed or set aside;
>
> 8. An interim and permanent injunction restraining and prohibiting the Respondents, their employees, officers, agents or anyone acting on their behalf from implementing the terms of the Settlement Agreement (i) until the conclusion of this proceeding and (ii) at any time in the future, should the court grant the Applicants the relief sought, above, either in part or in whole.

BACKGROUND

[3] In January 1997, the Chief and Council of MCCN filed on behalf of MCCN members, in the Manitoba Court of Queen's Bench, a statement of claim in nuisance and trespass against Canada and Manitoba Hydro over diesel spillage from 1976 to 1985 from one or more generators on the reserve. Environmental assessment and remediation was undertaken following which a $17-million-dollar Settlement Agreement resolving the tort claim was negotiated. Before the parties could sign the Settlement Agreement, MCCN members were required to vote on whether or not MCCN should ratify the Settlement Agreement under the Ratification Protocol attached to the Settlement Agreement.

[4] Voting packages, containing the Settlement Agreement, a plain-language summary and a letter dated 15 February 2011 were distributed by mail to off-reserve eligible voters at least 10 days in advance of the vote, as required by the Ratification Protocol. The Settlement Agreement and the Ratification Voting Procedures were also introduced to the MCCN community at a public meeting on 21 February 2011. The First Ratification Vote was held on 28 February 2011, a provincial holiday. Members cast a total of 491 votes, which fell short of the required 507 votes.

[5] In consequence, the entire process was repeated. A second round of voting packages was mailed on 3 March 2011 to 336 off-reserve eligible voters. A second public meeting was held on 9 March 2011 to explain the Settlement Agreement and the Ratification Voting Procedures, and the Second Ratification Vote took place on 14 March 2011. Pursuant to the Ratification Protocol, this

vote required a simple majority. Members cast a total of 472 votes, 90 of which were mail-in ballots. In the end, there were 354 votes in favour of ratification, 98 against and 20 spoiled ballots. The Settlement Agreement was considered ratified.

[6] In the meantime, one of the Applicants, Ms. Ballantyne, who lives off-reserve, had been sent voting packages on 16 February 2001 and 3 March 2011. She claims that she received her second voting package on 10 March 2011. She contacted the CRO on 1 March 2011 and 14 March 2011 to file formal objections to the First Ratification Vote and the Second Ratification Vote. Her first objection was dismissed by the RO on 9 March 2011 and her second on 28 March 2011. She did not attend either of the public meetings and she did not vote. Applicant Sinclair also did not vote.

DECISIONS UNDER REVIEW

[7] In effect, the application now requires the Court to review the Settlement Agreement, including the Ratification Protocol, as well as natural justice and procedural fairness issues related to the conduct of Canada and the MCCN Chief and Council in entering the Settlement Agreement and as part of the ratification process carried out in accordance with the Settlement Agreement, as well as whether the Settlement Agreement is consistent with any duties owed by the Crown and the Chief and Council to MCCN.

ISSUES

[8] The Applicants raise the following issues:

i. Whether ratification of the Settlement Agreement was conducted lawfully; and

ii. Whether the Settlement Agreement is consistent with the duties that Canada owes to MCCN.

[9] The Respondents raise the following additional issues:

a. Whether this Honourable Court has jurisdiction to hear this application;

b. Whether the Applicants have standing to request the relief sought;

c. What is the appropriate standard of review, should jurisdiction be found; and

d. Whether the relief should be granted.

STATUTORY PROVISIONS

[10] The following provisions of the *Indian Act*, R.S.C. 1985, c. I-5 (Act), have been raised by the Applicants in this application:

Definitions	**Définitions**
2. (1) In this Act,	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart;	« terres cédées » Réserve ou partie d'une réserve, ou tout droit sur celle-ci, propriété de Sa Majesté et que la bande à l'usage et au profit de laquelle il avait été mis de côté a abandonné ou cédé.
[…]	[…]

Sales

37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

Other transactions

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

Surrender to Her Majesty

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

Designation

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

Vente

37. (1) Les terres dans une réserve ne peuvent être vendues ou aliénées que si elles sont cédées à titre absolu conformément au paragraphe 38(1) à Sa Majesté par la bande à l'usage et au profit communs de laquelle la réserve a été mise de côté.

Opérations

(2) Sauf disposition contraire de la présente loi, les terres dans une réserve ne peuvent être données à bail ou faire l'objet d'un démembrement que si elles sont cédées conformément au paragraphe 38(2) à Sa Majesté par la bande à l'usage et au profit communs de laquelle la réserve a été mise de côté.

Cession à Sa Majesté

38. (1) Une bande peut céder à titre absolu à Sa Majesté, avec ou sans conditions, tous ses droits, et ceux de ses membres, portant sur tout ou partie d'une réserve.

Désignation

(2) Aux fins de les donner à bail ou de les démembrer, une bande peut désigner par voie de cession à Sa Majesté, avec ou sans conditions, autre qu'à titre absolu, tous droits de la bande, et ceux de ses membres, sur tout ou partie d'une réserve.

[…]

Elected councils

74. (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that 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.

Composition of council

(2) Unless otherwise ordered by the Minister, the council of a band in respect of which an order has been made under subsection (1) shall consist of one chief, and one councillor for every one hundred members of the band, but the number of councillors shall not be less than two nor more than twelve and no band shall have more than one chief.

Regulations

(3) The Governor in Council may, for the purposes of giving effect to subsection (1), make orders or regulations to provide

(*a*) that the chief of a band shall be elected by

(i) a majority of the votes of the electors of the band, or

(ii) a majority of the votes of the elected councillors of the band from among themselves,

[…]

Conseils élus

74. (1) Lorsqu'il le juge utile à la bonne administration d'une bande, le ministre peut déclarer par arrêté qu'à compter d'un jour qu'il désigne le conseil d'une bande, comprenant un chef et des conseillers, sera constitué au moyen d'élections tenues selon la présente loi.

Composition du conseil

(2) Sauf si le ministre en ordonne autrement, le conseil d'une bande ayant fait l'objet d'un arrêté prévu par le paragraphe (1) se compose d'un chef, ainsi que d'un conseiller par cent membres de la bande, mais le nombre des conseillers ne peut être inférieur à deux ni supérieur à douze. Une bande ne peut avoir plus d'un chef.

Règlements

(3) Pour l'application du paragraphe (1), le gouverneur en conseil peut prendre des décrets ou règlements prévoyant :

a) que le chef d'une bande doit être élu :

(i) soit à la majorité des votes des électeurs de la bande,

(ii) soit à la majorité des votes des conseillers élus de la bande désignant un d'entre eux,
le chef ainsi élu devant cependant

but the chief so elected shall remain a councillor; and

(*b*) that the councillors of a band shall be elected by

(i) a majority of the votes of the electors of the band, or

(ii) a majority of the votes of the electors of the band in the electoral section in which the candidate resides and that he proposes to represent on the council of the band.

Electoral sections

(4) A reserve shall for voting purposes consist of one electoral section, except that where the majority of the electors of a band who were present and voted at a referendum or a special meeting held and called for the purpose in accordance with the regulations have decided that the reserve should for voting purposes be divided into electoral sections and the Minister so recommends, the Governor in Council may make orders or regulations to provide for the division of the reserve for voting purposes into not more than six electoral sections containing as nearly as may be an equal number of Indians eligible to vote and to provide for the manner in which electoral sections so established are to be distinguished or identified.

demeurer conseiller;

b) que les conseillers d'une bande doivent être élus :

(i) soit à la majorité des votes des électeurs de la bande,

(ii) soit à la majorité des votes des électeurs de la bande demeurant dans la section électorale que le candidat habite et qu'il projette de représenter au conseil de la bande.

Sections électorales

(4) Aux fins de votation, une réserve se compose d'une section électorale; toutefois, lorsque la majorité des électeurs d'une bande qui étaient présents et ont voté lors d'un référendum ou à une assemblée spéciale tenue et convoquée à cette fin en conformité avec les règlements, a décidé que la réserve devrait, aux fins de votation, être divisée en sections électorales et que le ministre le recommande, le gouverneur en conseil peut prendre des décrets ou règlements stipulant qu'aux fins de votation la réserve doit être divisée en six sections électorales au plus, contenant autant que possible un nombre égal d'Indiens habilités à voter et décrétant comment les sections électorales ainsi établies doivent se distinguer ou s'identifier.

[11] The following provisions of the *Indian Referendum Regulations*, C.R.C. c. 957, as amended by SOR/2000-392, have also been raised by the Applicants in this application:

1.1 These Regulations apply to a referendum held under subparagraph 39(1)(*b*)(iii) or subsection 39(2) of the Act.	**1.1** Le présent règlement s'applique aux référendums tenus au titre du sous-alinéa 39(1)*b*)(iii) ou du paragraphe 39(2) de la Loi.

[12] The following provisions of the *Federal Courts Act*, R.S.C. 1985, c. F-7, are applicable in this application:

Crown and subject: consent to jurisdiction	**Conventions écrites attributives de compétence**
17 (3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:	**17** (3) Elle a compétence exclusive, en première instance, pour les questions suivantes :
[…]	[…]
(*b*) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.	*b*) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.
[…]	[…]
Application for judicial review	**Demande de contrôle judiciaire**
18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.	**18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(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.

Délai de présentation

(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.

Powers of Federal Court

(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, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Pouvoirs de la Cour fédérale

(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, procédure ou tout autre acte de l'office fédéral.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board,

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que

commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or

(*f*) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(*b*) in the case of a defect in form

l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.	
[…]	[…]
Reference by federal tribunal	**Renvoi d'un office fédéral**
18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	**18.3** (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.
Reference by Attorney General of Canada	**Renvoi du procureur général**
(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.	(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

[13] The following provisions of the *Federal Courts Rules*, SOR/98-106, have been raised in this application:

Approval of discontinuance or settlement	**Désistement et règlement**
114 (4) The discontinuance or	**114** (4) Le désistement ou le

settlement of a representative proceeding is not effective unless it is approved by the Court.	règlement de l'instance par représentation ne prend effet que s'il est approuvé par la Cour.
[…]	[…]
Limited to single order	**Limites**
302. Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.	**302.** Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

STANDARD OF REVIEW

[14] The Respondents submit that, should the Court find that it has jurisdiction in respect of the decisions impugned and the relief requested, the impugned decisions would be reviewable under a standard of reasonableness.

[15] The decisions of Canada and MCCN to enter into the Settlement Agreement are highly discretionary decisions. If subject to judicial review, the Respondents say they are reviewable on the reasonableness standard.

[16] The Applicants have made no submissions with respect to the standard of review.

[17] It is the Court's view that the issues that remain as part of this application following the amendments at the oral hearing are concerned with procedural fairness, natural justice and the fiduciary duty of the Crown and the Chief and Council. The Court is also required to consider issues

of statutory interpretation and jurisdiction. It is my view that the issues that remain as part of the application, and others that were raised as part of the Applicants' argument before the Court, require review using a standard of correctness.

ANALYSIS

[18] Following the modification of their application at the review hearing in Winnipeg, the Applicants brought forward the following arguments:

a) The Settlement Agreement is not consistent with duties owed by the Chief in Council and Canada towards MCCN members;

b) The Ratification Protocol that is part of the Settlement Agreement is not consistent with basic notions of procedural fairness;

c) The Settlement Agreement and the Ratification Protocol are not simply a matter of private law. Once the decision was made to engage the qualified voters of MCCN in a ratification process, the process entered the public sphere and became subject to judicial review;

d) The Ratification Protocol was defective and procedurally unfair because the tight time-lines prevented voters from becoming sufficiently informed about the Settlement Agreement. For example, members living off-reserve were not given sufficient time to discuss the Settlement Agreement with members living on reserve. The tight time-frames defeated the purpose and spirit of ratification. Members should have been provided with voting and information packages far enough in advance so that they would have time to consider the material, discuss it with other

members, and seek the necessary information to enable them to make an informed vote;

e) Section 75 of the Ratification Protocol removes the right to complain from members who failed to vote. Many votes were never counted. Of the 400 voting packages sent to off-reserve members, only 90 voted;

f) The *Indian Referendum Regulations* should have been used because they are applicable to any agreement that impacts reserve land. Alternatively, even if the *Indian Referendum Regulations* were not applicable to ratification of the Settlement Agreement, the Chief and Council and the Crown should have adopted them as being the appropriate model for the kind of ratification that was required in this case. This is part of the fiduciary duty that Canada owes to MCCN members in this case to ensure that an informed referendum took place;

g) In accordance with *Stoney Band v Canada*, 2005 FCA 15, the Applicants agree that the honor of the Crown is not engaged in the litigation context. However, this only applies to matters that are supervised by the Court. The Settlement Agreement, and the negotiations that led to the Settlement of Agreement, were not supervised or blessed by the Court in this case. Hence, the honour of the Crown was engaged and a fiduciary duty arose that was not discharged;

h) The Settlement Agreement itself is deficient in that it does not contain an agreed statement of facts dealing with what has occurred and the extent of the damage caused by the spill. This means that future litigants will be left to prove damage that was not known at the time of the Settlement Agreement. Without an agreed statement of facts that explain what has led to the $17-million-dollars payable under

the Settlement Agreement for known damage, future litigants will have no practical chance in any future litigation;

i) Clause 9(e) of the Settlement Agreement, which deals with health claims, is misleading in that it suggests the $17-million-dollar settlement figure is the first of other payments and that litigation aimed at securing future amounts will continue;

j) Without an agreed statement of facts, voters cannot know what they are giving up under the indemnity clause;

k) At the time of the vote, MCCN members could not assess the adequacy of the $17-million-dollar settlement amount because they were not given the figures for legal costs. The Settlement Agreement provides that each party will bear their own legal costs. Chief Arlen Dumas did not know what the legal costs were. The MCCN is an impoverished reserve and needs the money. Hence, the voters needed to know how much they were really receiving when they were asked to ratify the Settlement Agreement;

l) Because there was insufficient time for voters to discuss and gain an understanding of the Settlement Agreement, that agreement was nothing more than a “sales pitch” that was used to bring the litigation to an end. Information was not presented in a digestible way and voters were not given sufficient time to discuss and assess what they were told;

m) The fact that less than half of the eligible MCCN membership actually voted shows that the whole ratification process was flawed.

[19] As these arguments reveal, the gist of the application for judicial review is that the Settlement Agreement is flawed in that it disadvantages possible future litigants, and the ratification process followed in this case was procedurally unfair because it did not allow enough time for voters to become sufficiently informed to render their votes meaningful. In addition, the Crown, and possibly the Chief and Council, are in breach of their fiduciary duties to the members of MCCN for concluding the Settlement Agreement and conducting a ratification process that was suspect, procedurally unfair and nothing more than a "sales pitch."

[20] With these criticisms in mind, it is disconcerting to find in the evidentiary record very little to support the Applicants' claims, much that contradicts them, and no evidence at all that anyone else at MCCN, including members who voted against the Settlement Agreement, has any concerns at all about the substance of the Settlement Agreement, the negotiation process that preceded the Settlement Agreement, or the subsequent ratification process. The Applicants do not appear to be, and indeed do not claim to be, representative of any group beyond themselves. And there is even difficulty in understanding whether the Applicants really are a group with shared concerns.

[21] Mr. Bear has placed nothing on the record so that the Court has no way of knowing what concerns, if any, he might have and/or the role he played in the whole process.

[22] Information from counsel suggests that Mr. Colomb, who was once an Applicant, decided to switch sides in the dispute and swore an affidavit in favour of the Respondents.

[23] Mr. Sinclair, who is Ms. Ballantyne's brother, was cross-examined and it would appear that his concerns related to one aspect of the Settlement Agreement: the indemnity provision.

[24] The evidence is that neither Ms. Ballantyne nor Mr. Sinclair cast a vote as part of the ratification process, and there is no evidence to suggest that they failed to vote as a result of some procedural fault in the process. Mr. Sinclair is a resident on the reserve. There is no evidence that Mr. Bear voted either.

[25] The Court must be concerned then, that of the named Applicants, and of all those who voted against the Settlement Agreement, it is only Ms. Ballantyne – a non-voter – who clearly wishes to raise the issues set out in this application.

[26] This is a concern because the Court, in effect, is being asked by Ms. Ballantyne to quash and set aside a Settlement Agreement that will bring $17 million into the MCCN reserve (Ms. Ballantyne does not live on the reserve, and is a practicing lawyer and splits her residence between Winnipeg and Kelowna, BC) that is badly needed for the construction of buildings. The information before the Court is that the applicable fiscal and funding rules may mean that, if the Settlement Agreement is set aside at this point, there is no certainty that equivalent funding will be available in the future.

[27] Fortunately, my review of the record and the available evidence allows me to say that I can find no factual or legal substance to the concerns raised in this application.

[28] I am highly cognizant of the timing issues that attach to the funding in the Settlement Agreement and, for this reason, I intend to be as concise and timely as possible in completing and issuing this judgment so that funding under the Settlement Agreement can occur at the earliest possible opportunity.

[29] First of all, the evidence of Chief Arlen Dumas (who was cross-examined) and Mr. Michel Yousseff, who was the Senior Negotiator for the Crown in the settlement process, provide the Court with a comprehensive and authoritative account of the history of the lawsuit, the settlement process, and the rationale behind the Settlement Agreement, and the education of MCCN members that lead to the ratification of the Settlement Agreement under the Ratification Protocol.

[30] My review of the evidence as a whole reveals that there were no material problems associated with the vote under the Ratification Protocol. A few people did not get to vote, but this seems to have been the result of personal circumstances rather than defects in the process and, in any event, the numbers involved could not have made a difference to the final result. These are matters that arise in every election and referendum and they do not de-legitimize the results in the present case.

Jurisdiction

[31] To begin with, I agree with the Respondents that the Court has no jurisdiction to review the Settlement Agreement and the ratification process in this case.

[32] In settling the diesel spill litigation through the Settlement Agreement, neither the Respondent Deputy Minister nor any Crown agent was acting as a "federal board, commission or other tribunal" under subsections 18.1(1) and (2) of the *Federal Courts Act*. Essentially, the Settlement Agreement was in the nature of the settlement of tort litigation. Not every act of the Minister of the Crown, or in this case a Deputy Minister, is public in its nature.

[33] The decision to settle was not made pursuant to any statutory authority. It derived from the inherent powers of the Crown as a natural person to settle litigation.

[34] Accordingly, in my view, this Court does not have jurisdiction to review the Respondent Deputy Minister's decision to enter into the Settlement Agreement.

[35] Looking at the functional approach set out in the *Devils Gap Cottagers (1982) Ltd v Rat Portage Band No 38B*, 2008 FC 812 and the authorities referred to herein, including *D.R.L. Vacations Ltd v Halifax Port Authority*, 2005 FC 860, leads me to the conclusion that, in this case, based on a private settlement agreement rather than a statutory duty, the decision to settle and the agreed ratification process is insulated from judicial review.

[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.

[38] It is true that there is some authority for judicial review of an Indian Band referendum to approve a settlement.

[39] However, *Brass v Key Band First Nation*, 2007 FC 581, is distinguishable, in that the referendum was conducted in accordance with the *Indian Referendum Regulations*. Moreover, the judicial review application in that case was dismissed on the basis that there was no substantial reason to think the referendum vote did not reflect the will of the voters.

[40] The more recent functional approach taken by Justice Eleanor Dawson in *Devils Gap*, above, and Justice Anne MacTavish in *D.R.L. Vacations*, above, and Justice Elizabeth Heneghan in *Peace Hills Trust Co v Moccasin*, 2005 FC 1364 is to be preferred. Applied to the facts at bar, this line of analysis leads to the conclusion that the decision to settle the diesel spill litigation and the ratification process are essentially governed by private contract, not public law. Similar considerations apply to the decision of MCCN to settle ordinary tort litigation.

Indian Referendum Regulations

[41] I also agree with the Respondents that the *Indian Referendum Regulations* have no application to this case.

[42] The Applicants insist that Canada and the MCCN were obligated to comply with the *Indian Referendum Regulations*. In my view, this is incorrect. Those Regulations apply only to surrenders and designations.

[43] Section 1.1 of the *Indian Referendum Regulations*, C.R.C. 1978, C. 957, AS AM. SOR/94-369, s. 4 (Sched. II); SOR/2000-392 states that:

1.1 These Regulations apply to a referendum held under subparagraph 39(1)(*b*)(iii) or subsection 39(2) of the Act.	**1.1** Le présent règlement s'applique aux référendums tenus au titre du sous-alinéa 39(1)*b*)(iii) ou du paragraphe 39(2) de la Loi.

[44] Subparagraph 39(1)(*b*)(iii) or subsection 39(2) of the *Indian Act* in turn refer to a referendum process involving a proposed absolute surrender or designation:

How lands surrendered or designated	**Conditions de validité**
39. (1) An absolute surrender or a designation is void unless	**39.** (1) Une cession à titre absolu ou une désignation n'est valide que si les conditions suivantes sont réunies :
(*a*) it is made to Her Majesty;	*a*) elle est faite à Sa Majesté;
(*b*) it is assented to by a majority of the electors of the band	*b*) elle est sanctionnée par une majorité des électeurs de la bande :
(i) at a general meeting of the band called by the council of the band,	(i) soit à une assemblée générale de la bande convoquée par son conseil,
(ii) at a special meeting of the band called by the Minister for the purpose of considering a	(ii) soit à une assemblée spéciale de la bande convoquée par le ministre en

proposed absolute surrender or designation, or	vue d’examiner une proposition de cession à titre absolu ou de désignation,
(iii) by a referendum as provided in the regulations; and	(iii) soit au moyen d’un référendum comme le prévoient les règlements;
(*c*) it is accepted by the Governor in Council.	*c*) elle est acceptée par le gouverneur en conseil.
Minister may call meeting or referendum	**Assemblée de la bande ou référendum**
(2) Where a majority of the electors of a band did not vote at a meeting or referendum called pursuant to subsection (1), the Minister may, if the proposed absolute surrender or designation was assented to by a majority of the electors who did vote, call another meeting by giving thirty days notice thereof or another referendum as provided in the regulations.	(2) Lorsqu’une majorité des électeurs d’une bande n’ont pas voté à une assemblée convoquée, ou à un référendum tenu, selon le paragraphe (1), le ministre peut, si la proposition de cession à titre absolu ou de désignation a reçu l’assentiment de la majorité des électeurs qui ont voté, convoquer une autre assemblée en en donnant un avis de trente jours, ou faire tenir un autre référendum comme le prévoient les règlements.

[45] The meaning of the terms “surrenders and designations” can be gleaned by reading subsections 37(1) and (2); 38(1) and (2) of the *Indian Act*, in conjunction with the definition of “surrendered lands” in subsection 2(1) of the Act. In short, surrenders and designations are special forms of transfer of reserve lands or interests to the Crown, usually as a precursor to the management, sale or lease of those lands for the benefit of those involved.

[46] Despite the insistence of the Applicants to the contrary, there is no legal foundation advanced by the Applicants for suggesting that the Settlement Agreement, being a simple settlement for money damages, amounts to a surrender or designation, or is even analogous to those forms of transfer.

[47] The Applicants' reference to the various environmental and remediation reports accumulated over years of remediation lends no support to their argument. Though this volume of reports is not directly in evidence, the available explanation of their general import is by way of identifying environmental damage and its remediation, which has nothing to do with transfer of legal interests to the Crown.

[48] The cross-examination of Ms. Ballantyne has clarified that she is not so much complaining about breaches of the Ratification Protocol, as she is protesting the sufficiency of the Ratification Protocol in its terms. This is based on the misconception that the *Indian Referendum Regulations* govern the proceedings which, in my view, is not the case.

[49] Other than the *Indian Referendum Regulations* discussed above, no authority is advanced for the proposition that there was anything unlawful about the agreed timelines or any other aspect of the ratification process that occurred in this case. No breach of the Ratification Protocol has been demonstrated. The dismissal of Ms. Ballantyne's objections was entirely justified in terms of section 75 of the Protocol, as outlined above.

[50] While the Applicants make some attempt to show that the short timelines led to perhaps 20 mail-in ballots not being counted, it has not been demonstrated that this could have changed the result of the vote.

No Fiduciary Duty Owed by Canada in this Context

[51] The Applicants urge that Canada has a fiduciary duty to either the members of MCCN, or perhaps to the Applicants themselves. In the Applicants' view, the content of this duty seems primarily about adequately informing the MCCN community about the terms and implications of the Settlement Agreement. They appear to argue that Canada's discharge of this duty is the proper subject of judicial review.

[52] In *Stoney Band*, above, Justice Marshall Rothstein dismissed the arguments of the Stoney Band that Canada could not rely on normal procedural defenses in litigation:

> 22 In litigation, the Crown does not exercise discretionary control over its Aboriginal adversary. It is therefore difficult to identify a fiduciary duty owed by the Crown to its adversary in the conduct of litigation. It is true that an aspect of the claim against the Crown by the Stoney Band is based on an allegation of breach of fiduciary duty with respect to the surrender and disposition of reserve land. But even if such a fiduciary duty existed, that duty does not connote a trust relationship between the Crown and the Stoney Band in the conduct of litigation.
>
> 23 As indicated in *Haida* at paragraph 18 and in *Wewaykum* at paragraph 81, the term "fiduciary duty" does not create a universal trust relationship encompassing all aspects of the relationship between the Crown and the Stoney Band. Any fiduciary duty imposed on the Crown does not exist at large but only in relation to specific Indian interests.

> 24 Focusing specifically on litigation practices, I find it impossible to conceive of how the conduct of one party to the litigation could be circumscribed by a fiduciary duty to the other. Litigation proceeds under well-defined court rules applicable to all parties. These rules define the procedural obligations of the parties. It seems to me that to impose an additional fiduciary obligation on one party would unfairly compromise that party in advancing or defending its position. That is simply an untenable proposition in the adversarial context of litigation. Even where a fiduciary relationship is conceded, the fiduciary must be entitled to rely on all defenses available to it in the course of litigation.

[53] Similarly, fiduciary principles do not trump limitations defenses. The Crown undertakes to protect specific cognizable Indian interests only in limited circumstances. See *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 and *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245, 2002 SCC 79.

[54] The Applicants have made little effort to show how a fiduciary duty to the Applicants could be engaged in the present context over and above the requirements of the Settlement Agreement. The Crown can scarcely undertake to look after the best interests of the Applicants to the exclusion of others in the context of settling litigation against Canada.

[55] The Settlement Agreement represents the settlement of tort litigation, an action grounded in nuisance over spillage of diesel fuel. Canada is the defendant. Applying the reasoning of Justice Rothstein in *Stoney Band*, above, as a party defendant negotiating the terms of settlement in litigation, Canada cannot be said to owe a fiduciary duty to MCCN or its members, including the Applicants, even if the original cause of action had a component alleging fiduciary duty. As an aside, given the nuisance involved in a diesel spill, it is doubtful that fiduciary principles are necessary to uphold the original cause of action.

[56] Having negotiated terms of settlement, those agreed terms leave it to MCCN to take charge of the community information and ratification process.

Adequacy of Ratification Process

[57] Even if the Court were to agree with the Applicants that the Court has the jurisdiction to carry out a review of the Settlement Agreement and the Ratification Process, and that Canada owed a fiduciary duty to MCCN in this context, the evidence is clear that the Ratification Process followed in this case led to an informed vote that clearly expressed the communal will to ratify and accept the Settlement Agreement.

[58] In addition, even if the Court were to determine that there was a breach of natural justice or procedural fairness in relation to the Ratification Process this does not mean that the Court must grant the relief sought by the Applicants in this case. The Court retains the discretion to deny relief if the relief would be disproportionate, or ultimately of little consequence, to the final outcome of the matter. In the present situation, the Court must balance the interest of not only the Applicants, but also of the band members who voted in favor of the Settlement Agreement. The results of the Second Ratification Vote show approximately a 3:1 ratio of “yes” votes to “no” votes. It is clear that the MCCN band membership voted in favor of the Settlement Agreement as they felt it was in the best interests of their community.

[59] In *Mathias Colomb Cree Nation v Manitoba*, 2011 MBQB 44, Justice Martin of the Manitoba Court of Queens Bench found that the agreement at issue had negotiated by duly elected

members of the Band Council, and that one or two unelected members should not have the power to veto the decisions of duly elected band councilors. In the present case, not only did the elected Band Council negotiate the Settlement Agreement, but the MCCN band membership voted and ratified that agreement. The positions, opinions, views, wishes, and preferences of the three Applicants herein should not be allowed to outweigh the position of the band membership at large.

[60] The Court agrees with the Applicants that Chief Dumas and the MCCN Council did have a duty to keep MCCN band members informed of their actions in the litigation and the settlement process.

[61] However, my review of the evidence leads me to conclude that the Chief and Council did keep the band members of MCCN involved throughout the settlement process. Prior to the beginning of the settlement process, the MCCN band members had every opportunity to review the numerous studies and reports completed on the soil contamination on the reserve. Many MCCN band members reviewed these studies and reports.

[62] In a meeting held in the summer of 2008, Chief Dumas asked for permission from MCCN members to allow him to negotiate a settlement in relation to the ongoing action. A motion was passed and Chief Dumas was allowed to pursue a potential settlement.

[63] Further, Chief Dumas testified at his cross-examination in relation to this application that he welcomed people into his office if they had questions about the soil contamination or the possible settlement of the litigation. Chief Dumas also testified that between January 2011 and the first

ratification vote in February 2011, six separate information sessions were held. Those sessions were recorded and copies could be burned on DVD for anyone who wished to review them. The meetings were also broadcast on the radio.

[64] I also agree that the Chief and Council have a fiduciary obligation towards the band membership to act in the band membership's best interests. However, my review of the evidence leads me to conclude that Chief Dumas and the MCCN Council complied with their fiduciary duty and have consistently acted in the band membership's best interest. In resolving the litigation, the Chief and Council brought an end to a long-standing legal matter and the settlement funds will bring much-needed monies into the community.

[65] The process that led to the negotiated Settlement Agreement was an open and fair process. Chief Dumas requested permission from the band membership before even pursuing settlement. Further, as time progressed and settlement became a potential reality, six separate information sessions were held in the community in less than two months. Further, the information discussed in those meetings was readily available to members of the band who could not attend in person, either via radio broadcast or via a DVD.

[66] The Applicants in the current Application chose to not participate or educate themselves, despite the fact that information was readily available to them. The Applicants have failed to provide an explanation as to why they did not attend the information sessions or, in the alternative, why they did not order DVD copies all the information sessions. Mr. Sinclair, who resides on the reserve, stated in his cross-examination that he chose to not attend either of the information sessions

that were held prior to the ratification vote and the second ratification vote, despite knowing that they were being held.

[67] Ms. Ballantyne has stated in her affidavit evidence that she did not know of any “defined set of territorial boundaries” such as land surveyor’s demarcations that help to define the lands referred to in the Settlement Agreement. In Ms. Ballantyne’s cross-examination it was clarified that she never made any attempt to find out if there was a defined set of territorial boundaries.

[68] Mr. Sinclair failed to request any studies on the soil contamination in February 2011 from the Chief and Council, even though he could have made requests for the studies at anytime. Mr. Sinclair also failed to file any objections in relation to either the First Ratification Vote or the Second Ratification Vote. Mr. Sinclair also never complained about either Canada’s conduct or the conduct of the Chief and Council prior to the filing of the application herein.

[69] Further, Mr. Sinclair appears to have been well aware that there were many occasions over the last number of years when remedial measures were taken to clean the soil contamination that occurred because of the diesel spill. Mr. Sinclair testified that he had personally witnessed soil being removed and buildings being torn down.

[70] Full information and disclosure was available to all the Applicants prior to any settlement talks beginning, throughout the settlement process, and as part of the ratification process. The Applicants simply were not interested, or alternatively, did not care to put in any effort to educate themselves on the issues being discussed in the MCCN community. The Court agrees with the

Respondents that the Applicants were willfully blind to the issues that were affecting their community, and should not now be allowed to request judicial review of matters in which they took no interest prior to filing the application herein.

[71] The Applicants have provided no evidence that the rules set out in the Ratification Protocol were not followed. Their argument appears to be that the Ratification Protocol was an inadequate process for ascertaining the informed consent of the MCCN community.

[72] However, by the time the Second Ratification Vote was held on March 14, 2011, the Applicants had had additional time to inform themselves concerning the Settlement Agreement, and to discuss the Settlement Agreement with other community members. Further, a second information session was held on the reserve on March 9, 2011, which the Applicants could have attended. Instead of taking the opportunity to inform themselves and vote, all three Applicants chose not to vote in either the First Ratification Vote or the Second Ratification Vote.

[73] Mr. Bear and Mr. Sinclair did not file any objections after either the First Ratification Vote or the Second Ratification Vote. The only objection filed after the First Ratification Vote was the improperly filed objection letter of Ms. Ballantyne. The only objection filed after the Second Ratification Vote was the objection of Ms. Ballantyne.

[74] The Court agrees with the Respondents that the Second Ratification Vote involved an open and fair process which allowed band members of MCCN to inform themselves about the Settlement Agreement and to make an educated decision as to what was in the best interests of their

community. MCCN band members participated in a democratic vote and decided as a community that they wanted to accept the Settlement Agreement. There was no breach in procedural fairness or natural justice.

The Adequacy of the Settlement Agreement

[75] The Applicants have also attempted to discredit the Settlement Agreement by pointing to what they claim are its inadequacies. For reasons given above, it is not the role of the Court to review the Settlement Agreement. However, having read the document it seems to me that the criticisms made by the Applicants are entirely speculative and are without any evidentiary foundation. The Settlement Agreement makes quite clear that future claims are not affected. The absence of a formal agreed statement of facts does not, in my view, make any future litigation impractical. And I see nothing misleading about clause 9(e).

[76] In the end, the Applicants have failed to show anything wrong with the Settlement Agreement or the ratification process. They have failed to show that MCCN did not secure a favorable resolution to its claim against Canada. They have also failed to show any substantial reason why the Settlement Agreement should not be implemented to the common good of MCCN and its members.

Conclusions

[77] My conclusions are that Canada owed no fiduciary duty to the MCCN members in this case. However, even if such a duty was owed, it was discharged through the negotiation and ratification process that, in the full context of the litigation and the knowledge available to the MCCN community allowed an informed and procedurally fair vote to take place. The same process also discharged the fiduciary duty owed to MCCN members by Chief Dumas and the MCCN Council. Reading through the evidence, I think that Chief Dumas discharged his duties in a thorough, open, and professional manner. He and his Council should be commended for their work.

[78] I am also of the view that, even if the Court had the jurisdiction to review the Settlement Agreement and the Ratification Protocol, what occurred in this case was entirely fair and reasonable.

Exercise of Discretion

[79] The relief requested by the Applicants would have the effect of further delaying Canada's payment of the settlement funds under the Settlement Agreement, and would put the total implementation of the Settlement Agreement in jeopardy, in the sense that ratification is a condition precedent to the Settlement Agreement. It is a well-recognized principle that this Court may decline to exercise its jurisdiction where the harm to many by quashing a decision outweighs the need to denounce relatively minor or technical defects in decision-making.

[80] The Applicants have not made a credible case against the worth of the Settlement Agreement itself, or Canada's decision to enter it. The Applicants have made out no case that MCCN members were not properly advised, or that the Settlement Agreement, in its proper context of historical remediation undertaken, is in the least improvident. If the Applicants real complaint is that the Settlement Agreement is improvident, then their remedy would be more appropriately sought in the Manitoba Court of Queens Bench where the substantive litigation originates, and where they should have to make their case against the Settlement Agreement.

[81] If the Applicants' complaint is not really about an improvident agreement, but is more or less confined to complaints about the community information process and legitimate ratification, then it is difficult to see on what grounds the Court could or should grant the relief requested and potentially frustrate the implementation of the Settlement Agreement, given that the Court is satisfied that the informed collective will of the MCCN community has been clearly ascertained and implemented.

Costs

[82] The Crown says in its written submissions that a substantial award of costs is warranted in this case. The other Respondents request costs on a solicitor and client basis.

[83] I can see why the Respondents are very annoyed by this litigation. It has delayed and jeopardized settlement funding that MCCN badly needs and has presented little in the way of justification for doing so. Ms. Ballantyne, who appears to be the principal Applicant, also appears to

be acting in isolation. I say this because the evidence for procedural unfairness or breach of any duty owed to MCCN is non-existent. The application is little more than a series of vague accusations that are unsupported by evidence and which bear little relation to the facts and the law. Also, as the dispute has evolved and cross-examinations have occurred, it has been revealed that the Applicants have made little effort to acquaint themselves with the facts of the ratification process that was followed or to be forthright about what they knew had taken place. This application has placed much-needed funding in jeopardy with very little by way of justification. Some of the Applicants may have acted out of inexperience, but Ms. Ballantyne is a qualified and practicing lawyer who knows full-well that litigation should not be undertaken lightly and without a solid evidentiary basis.

[84] In reviewing the record in an attempt to understand what may have motivated the application, however, I think I have to take into account that the Second Ratification Vote conducted on March 14, 2011 resulted in 472 votes being cast of which 354 votes were in favour of accepting the Settlement Agreement and 98 were against.

[85] Bearing in mind that my conclusions are that the Chief and Council did a good job in educating the members of MCCN on the merits and significance of the Settlement Agreement, this means that a quarter of the informed votes cast were against acceptance. This leads me to conclude that a not insubstantial portion of the community was against acceptance for one reason or another. It seems to me that Ms. Ballantyne, and perhaps the other Applicants, have been attempting to articulate in legal terms what they believe that opposition vote represents. I cannot say they have been successful in this regard because there is no evidence before me that speaks to why 98 members voted against the Settlement Agreement, or whether they continue to be dissatisfied with

the eventual result. While understanding the frustration and anger of the Respondents, I think that enhanced costs would be an overreaction in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed with costs to the Respondents.

2. As agreed by the parties at the hearing, the style of cause is amended to show the following as Respondents: Chief Ratification Officer Claudette Bighetty, Review Officer Daniel Gunn, Mathias Colomb Cree Nation, and Her Majesty the Queen in Right of Canada, as represented by Michael Wernick, Deputy Minister of Indian and Northern Affairs Canada.

"James Russell"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-721-11
STYLE OF CAUSE:	**LEAH BALLANTYNE, RANDY BEAR and DARRYL JOHN SINCLAIR** **And** **CHIEF RATIFICATION OFFICER CLAUDETTE BIGHETTY, REVIEW OFFICER DANIEL GUNN, MATHIAS COLOMB CREE NATION, and HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by MICHAEL WERNICK, DEPUTY MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA**
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	July 13, 2011
REASONS FOR JUDGMENT AND JUDGMENT	**Russell J.**
DATED:	August 12, 2011

APPEARANCES:

Sasha Harvard	FOR THE APPLICANTS
Paul Anderson	FOR THE RESPONDENT (CROWN)
Grant A. Stefanson, Usma Saeed, and Brad Regehr	FOR THE RESPONDENTS (C. BIGHETTY AND MCCN)

SOLICITORS OF RECORD:

Alghoul & Associates Law Firm Winnipeg, Manitoba	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENTS (CROWN)
D'Arcy & Deacon LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENTS (C. BIGHETTY AND MCCN)