Federal Court  Cour fédérale

Date: 20130315

Docket: T-182-13

Citation: 2013 FC 276

Ottawa, Ontario, March 15, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

PEGUIS FIRST NATION AND CHIEF GLENN HUDSON, ACTING ON BEHALF OF THE CHIEF AND COUNCIL OF PEGUIS FIRST NATION

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] By Notice of Application filed January 25, 2013, the Peguis First Nation and Chief Glenn Hudson, acting on behalf of the Chief and Council of Peguis First Nation (collectively, the PFN or the Applicants) have commenced an application for judicial review (the Application) naming Her Majesty the Queen as Respondent. The Applicants seek judicial review of certain alleged

"decisions" of the Respondent in relation to lands described as the Kapyong Barracks site (the Barracks Lands).

[2] The parties are agreed that the proper Respondent to the application for judicial review should be the Attorney General of Canada (referred to in these reasons as Canada or the Respondent).

[3] The Respondent has brought this motion seeking to strike the Application on a number of grounds. Alternatively, Canada seeks to stay this application pending the disposition of its appeal, in Federal Court of Appeal File No. A-34-13, of the decision and judgment of Justice Roger Hughes in *Long Plain First Nation v Canada (Attorney General)*, 2012 FC 1474, [2012] FCJ No 1596 [*Long Plain*]. The *Long Plain* decision was released on December 13, 2012, and an amended decision was issued on December 20, 2012. In *Long Plain*, Justice Hughes was dealing with the same lands – the Barracks Lands. The PFN was one of the successful parties in that litigation in which Canada was held to have breached its duty to consult with a number of First Nations, including the PFN, prior to disposing of the Barracks Lands. Justice Hughes overturned the decision of Canada to sell the land to a third party and enjoined Canada from selling the Barracks Lands until Canada could demonstrate to the Court that the duty to consult with the four successful Treaty One First Nations had been fulfilled.

II. Issues

[4] The issues raised by this motion are as follows:

1. Should the PFN's Application be struck as an abuse of process, on the basis that:

    a. There has been no reviewable decision of the Respondent;

    b. It is an indirect way for the PFN to supplement the record before the Federal Court of Appeal in the appeal of *Long Plain*;

    c. Certain of the relief sought is in direct conflict with the Judgment of the Court in *Long Plain* or would effectively amend that Judgment;

    d. The relief sought with respect to alleged contempt should have been made – if at all – under the contempt procedures set out in Rules 466 to 472 of the *Federal Courts Rules*, SOR/98-106; and

    e. The PFN fails to name other "directly affected persons" – specifically, the other First Nations who were parties to *Long Plain*?

2. In the alternative should the Application be stayed pending the outcome of the appeal of *Long Plain*?

[5] For the reasons that follow, I have concluded that the Application should be struck. Given this conclusion, there is no need to consider the Respondent's alternative request for a stay of the Application.

III. The context of this application

[6] Before embarking on an analysis of the various arguments, it is important to understand the context of the current Application.

[7] In *Long Plain*, the PFN and six other First Nations, all of whom who were signatories to Treaty No. 1 (collectively referred to as the "Treaty One First Nations") brought an application for judicial review to overturn the decision of the Respondent to sell the Barracks Lands to the Canada Lands Company Limited (Canada Lands Company). The basis of the application was that the Respondent had failed to fulfill its duty to consult with the Treaty One First Nations prior to transferring title to the Barracks Lands. One of the Treaty One First Nations discontinued. Of the remaining six First Nations, four ultimately succeeded in the judicial review – Long Plain First Nation, Roseau River Anishinabe First Nation, Swan Lake First Nation and PFN – and two were unsuccessful – Sagkeeng First Nation and Sandy Bay Ojibway First Nation. The remedies granted to the four successful parties were not differentiated: one blanket judgment was issued, overturning the decision to transfer the Barracks Lands and enjoining the sale of the Barracks Lands until the Respondent "can demonstrate to the Court that they have fulfilled in a meaningful way their duty to consult with the Applicants".

[8] Once again, I highlight that the Application now before me involves the same Respondent and the potential sale of the same Barracks Lands.

[9] Immediately upon receiving the decision and judgment in *Long Plain*, the PFN began to make written requests of the Respondent in regards to the Barracks Lands. On or around December 18, 2012, the PFN forwarded an Offer to Purchase the Barracks Lands and requested certain information. Further letters were subsequently sent. The PFN claims that its requests have gone unanswered. That is not entirely true; counsel for Canada responded – albeit not to the liking of the PFN – to every letter. The final response from the counsel for the Respondent, on January 10, 2013, was that:

> The Crown continues to consider its options in respect of the decision of Justice Hughes. Once a decision in that regard has been made, it will be communicated to you and counsel for the other successful applicants. Until then, I have nothing further to add in respect of the issues raised by you.

[10] As noted above, Canada appealed the judgment in *Long Plain* on January 25, 2013. In addition, the two unsuccessful applicants have brought cross appeals. Given that the *Long Plain* decision was only issued in December 2012, it is not surprising that the appeal and cross appeals are in preliminary stages.

[11] The PFN argues that there is information relevant to its rights to the Barracks Lands that make its case with respect to such Lands even stronger than the rights that were recognized in *Long Plain*. Specifically, the PFN refers to the PFN Treaty Land Entitlement Agreement entered into by Canada on April 29, 2008 (the PFN Treaty Entitlement Agreement). The PFN applied to the court to have the PFN Treaty Entitlement Agreement included as part of the evidentiary

record before Justice Hughes. Insofar as the PFN Treaty Entitlement Agreement was concerned, Prothonotary Lafrenière's Order, dated September 13, 2011, precluded the filing of this document as it did not precede the impugned decision. The PFN Treaty Entitlement Agreement was not considered by Justice Hughes; the PFN submits that it should be before the Court of Appeal on the hearing of the appeal of *Long Plain*.

[12] Thus, it appears that the real reason for bringing this Application is two-fold: (1) the Applicants want an "insurance policy" in case the Court of Appeal overturns Justice Hughes's decision and Canada moves to immediately transfer the Barracks Lands to the Canada Lands Company; and, (2) the Applicant wants to get the evidence of the PFN Treaty Entitlement Agreement before the Court of Appeal. During oral submissions, counsel for the PFN candidly admitted as much. With respect to this second reason, the Applicant wants this application to go first so that they can then join any appeal of that decision to the appeal of Justice Hughes's decision in *Long Plain*. Stated differently, they wish to supplement the record before the Court of Appeal to include reference to documents that were disallowed from the first judicial review application and hearing. These overarching motives of the Applicants inform my reading of the PFN Notice of Application and of the material filed by the PFN in response to this motion to strike.

[13] The relief sought by the PFN, as set out in its Notice of Application, includes the following:

1. A Declaration that Canada has acted unlawfully and unreasonably by refusing to engage with the PFN with respect to the Barracks Lands;

2. An Order that Canada must sell the Barracks Lands to the PFN on the same terms and conditions as those agreed with the Canada Lands Company, subject to any overlapping claims by other Treaty One First Nations as set out the PFN Treaty Entitlement Agreement;

3. In the alternative, an Order that the parties must immediately proceed to dispute resolution pursuant to the terms of the PFN Treaty Entitlement Agreement;

4. An Order that the injunctive relief in the Judgment of Justice Hughes in *Long Plain* (preventing the sale of the Barracks Lands) remains in full force and effect until the matter is resolved, either through the sale of the Barracks Lands to the PFN or through dispute resolution pursuant to the terms of the PFN Treaty Entitlement Agreement; and

5. A Declaration that Canada is in contempt of the Judgment of Justice Hughes by its ongoing decision to continue to refuse to consult with the PFN.

IV. Analysis

[14] The parties agree that the test for striking an application for judicial review is high. A motion to strike in the context of judicial review will only be granted in the most obvious cases, where the notice of application is fundamentally flawed (*David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 at 600, [1994] FCJ No 1629; *Beatty v Canada (Attorney General)*, 2003 FC 1029 at paras 7-9, [2003] FCJ No 1303). Such cases include those where there was no decision or where the issue raised was already litigated (*Beatty*, above at para 9).

[15] It is an abuse of process for a party to re-litigate what is essentially same dispute, where there is substantial factual overlap and duplication of evidence between the two proceedings (*Khadr v Canada (Minister of Foreign Affairs)*, 2004 FC 1145 at para 11, 266 FTR 20).

[16] Having read the motion materials and heard the submissions of the parties, and having directed my mind to the test for the striking of an application for judicial review at this preliminary stage, I am persuaded that this is an appropriate case for striking the Application.

A. *No reviewable decision*

[17] As a threshold requirement for every judicial review, an applicant must identify a "decision" that is reviewable. In my view, the PFN has failed to identify any decision or action of the Respondent that could form the basis of a judicial review at this time.

[18] This can be best demonstrated by reference to the PFN's Notice of Application, where it states that:

> This is an application for judicial review in respect of a decision made by the Respondent to not consult or adequately consult with the [PFN] regarding the [Barracks Lands] or not to transfer such lands pursuant to the [PFN Treaty Entitlement Agreement] and to refuse to acknowledge the rights of the [PFN] under its [PFN Treaty Entitlement Agreement] as well as Canada's failure to follow the Reasons for Judgment and Judgment of the Honourable Justice Hughes [in *Long Plain*]. [Emphasis added.]

[19] A review of the record demonstrates that there has been no decision of Canada not to consult on the sale of the Barracks Lands. An overriding consideration for Canada is that it is unable, pursuant to the judgment in *Long Plain*, to dispose of the Barracks Lands at this time. A fair characterization of Canada's response thus far is that it is considering its options, given the decision in *Long Plain*, and is not in a position to discuss the sale of the Barracks Lands to the Applicants at present. This is neither a refusal nor a failure.

[20] Moreover, the Judgment of Justice Hughes set no time limitations with respect to the obligation to consult on the disposition of the Barracks Lands. The position of the Respondent is that it cannot make any decision with respect to the disposition of the Barracks Lands unless the Judgment of Justice Hughes is set aside or it has consulted with all of the ultimately successful parties to the judicial review at issue in *Long Plain*. At this time, given the cross appeals, there is no framework within which to consult or to accept offers to purchase the Barracks Lands. The rights of all parties to the appeal must be determined. Stated in different terms, no decision has been taken by Canada not to consult or not to transfer the Barracks Lands because it is not possible or reasonable to do so at this time.

[21] Similarly, I see no decision that the Respondent has refused to acknowledge the rights of the PFN under the PFN Treaty Entitlement Agreement.

[22] Any failure – if there is one – to "follow" the Reasons for Judgment and Judgment of the Honourable Justice Hughes is an enforcement matter and not the proper subject of a new judicial review application. The PFN, through this judicial review, is attempting to enforce the terms of a judgment; there is no reviewable decision. The PFN argue that, if Canada wanted to postpone its obligations to consult imposed by the *Long Plain* Judgment, it should have brought a motion for the stay that portion of the Judgment under Rule 398 of the *Federal Courts Rules*. Even if true, that does not change the nature of the relief sought by the PFN.

[23] In their written submissions, the Applicants suggest that the decision "not to consult or adequately consult" is in respect of the Respondent's failures beginning in 2004 (Memorandum of Fact and Law, paragraph 58). The problem with this position is that the failure to consult up to the time of the decision to transfer the Barracks Lands to the Canada Lands Company has been considered by the Federal Court in *Long Plain* and will be considered again in the course of the appeal of *Long Plain*. The only "decision" that could possibly be reviewable in this application for judicial review would be a refusal to consult after that time; and, in this regard, the PFN cannot point to any decision not to consult.

B. *Indirect way to supplement appeal record*

[24] As admitted by the PFN, one of the key reasons for bringing this application for judicial review is to ensure that the Court of Appeal has before it the PFN Treaty Entitlement Agreement. This is certainly not grounds for judicial review. Moreover, it is pure speculation that the Court of Appeal would even consider joining an appeal of a decision in this matter to the appeal of *Long Plain*.

C. *Conflict with Long Plain*

[25] As stated in the relief sought, the PFN seeks an order that the Respondent must sell the Barracks Lands to the PFN on the same terms and conditions as those agreed with the Canada Lands Company, subject to any overlapping claims by other Treaty One First Nations as set out the PFN Treaty Entitlement Agreement. I accept that the PFN recognizes the rights of other First Nations. However, such an order would, in my view, fly in the face of the Judgment in *Long Plain* that enjoins the sale of the Barracks Lands until adequate consultation with all four of the successful Treaty One First Nations has taken place. Even if not in direct conflict, it would set up a separate and very inefficient process for dealing with the Barracks Lands which may lead to a conflicting result.

[26] Furthermore, in this Application, the PFN are seeking an order that necessarily results in a sale of the Barracks Lands to the PFN (subject to the rights of the other First Nations). That is most definitely not a necessary consequence of the consultations contemplated by *Long Plain*.

Under the Judgment in *Long Plain*, the results may be that, following adequate consultation, the Barracks Lands are still transferred to the Canada Lands Company or another third party. Absolutely nothing in the Judgment in *Long Plain* mandates a transfer of the Barracks Lands to the PFN or any other Treaty One First Nation. Thus, the order requested by the PFN in this application would be in conflict with or effectively amend the Judgment in *Long Plain*.

D. *Contempt*

[27] In the Application, the PFN seeks an order of contempt against the Respondent on the basis that the Respondent is in breach of the Judgment in *Long Plain*. Putting aside the merits of this position, which I do not accept, contempt proceedings must be brought under Rules 466 to 472 of the *Federal Courts Rules*.

[28] In *Orr v Fort Mckay First Nation*, 2012 FC 1436 at paragraph 13, [2012] FCJ No 1650, Justice Noël emphasized the seriousness of allegations of contempt:

> A contempt procedure is very serious. It requires strict compliance with the different steps that the Rules stipulate. The outcome of this type of procedure can have great consequences on the person alleged to be in contempt. Indeed, if found in contempt, the person may be imprisoned for a period of less than five years or until compliance with the Order. The person may also have to pay a fine, be obliged to do or refrain from doing any act and pay costs (see Rule 472 of the *Federal Courts Rules*). [Emphasis added.]

[29] The seriousness of contempt charges and of the penalties requires a very special procedure. That procedure is provided for in the *Rules*. An allegation of contempt cannot be buried in an application for judicial review.

E. *Proper Respondents*

[30] The Respondent also asserts that Rule 303 of the *Federal Courts Rules* requires that every person directly affected by the order should be named as a respondent. In this case, there are seven Treaty One First Nations. Three of these First Nations (in addition to the PFN) were found by Justice Hughes to have an arguable claim to the Barracks Lands. Therefore, at least these three First Nations, and perhaps the two unsuccessful First Nations who are cross appealing the decision, should be parties to this application as well.

[31] While the PFN does not object to the addition of Treaty One First Nations to the application as Respondents or Intervenors, they submit that the participation of those third parties to this judicial review should be subject to certain conditions that they can only obtain costs from the Respondent and that their participation does not delay the resolution of the proceedings.

[32] Rule 303 of the *Federal Courts Rules* sets out who must be named as a respondent on applications. Quite simply, a person who is "directly affected" by any decision arising from the application for judicial review must be named as a respondent. The PFN appears to acknowledge that the other Treaty One First Nations would be directly affected by any decision arising from their application. Indeed, it is obvious that all of the Treaty One First Nations who were successful before Justice Hughes would be directly affected. In addition, whether the two unsuccessful First Nations in Justice Hughes's decision are or are not directly affected will be dependent on their cross appeal. There is no ability of the PFN to dictate on what terms the other Treaty One First Nations will participate in the application for judicial review. As far as I am

concerned, they would have all such rights, as Respondents, as are permitted by the *Federal Courts Rules*.

V. Conclusion

[33] For the above reasons, I am prepared to strike the Application as an abuse of process. The overriding problem with the Application is that it does not disclose a decision. I believe that certain of the other problems could possibly be remedied through amendments. For example, the Applicants could add the other Treaty One First Nations as Respondents and could remove certain of the relief requested. However, the fatal flaw in the Application is that there has not been a decision or action or failure that could form the foundation for a successful judicial review. The Application is, accordingly, doomed to failure. Wasting any more judicial resources on what would have become an exceedingly protracted battle is simply not warranted. This is particularly so when the parties are involved in litigation of almost all of the same issues in the appeal of *Long Plain*.

[34] There is no need to address the alternative request of the Respondent for a stay until the final determination of the appeal in *Long Plain*. However, I would comment that the case for a stay is very compelling indeed.

[35] There is nothing in my decision that would prevent the Applicants from pursuing another application for judicial review if and when a reviewable action or decision is made by Canada. However, I hope that the Applicants, in any such future application, are much more

knowledgeable of the *Federal Courts Rules* and what relief can or cannot be sought. The Application for Judicial Review on this motion was woefully inadequate. I expect more from counsel as experienced as Mr. Rath.

ORDER

THIS COURT ORDERS that:

1. the style of cause is amended to name the Attorney General of Canada as Respondent in place of Her Majesty the Queen;

2. the Application for Judicial Review is dismissed; and

3. costs are awarded in favour of the Respondent.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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