

**Date: 20081212**

**Docket: T-1516-08**

**Citation: 2008 FC 1369**

**BETWEEN:**

**COUNCILLOR ALBERT DEAN LAFOND and  
COUNCILLOR CLIFF TAWPISIN, JR**

**Applicants**

**and**

**CHIEF GILBERT LEDOUX, MCKERCHER LLP,  
EMERY JAMIESON LLP and MYERS NORRIS PENNY LLP**

**Respondents**

**REASONS FOR ORDER**

**PHELAN J.**

**I. OVERVIEW**

[1] The motions before the Court are interrelated proceedings and as such it is more efficient to issue a single set of reasons with specific orders to follow in respect of each motion.

[2] The motions are as follows:

- (a) the Applicants' motion to require the Respondents to produce certain records in accordance with Rules 317 and 318;
- (b) the Respondents', McKercher LLP, Emery Jamieson LLP and Myers Norris Penny LLP, motion to strike the application for judicial review as against them for want of jurisdiction; and
- (c) the Respondent Chief Gilbert Ledoux's motion to strike on similar grounds.

[3] Given the nature of this litigation and the need for it to be managed in an orderly fashion, the Court will issue an order that this case be "specially managed" (sometimes referred to as case managed).

[4] The hearing of the issues in respect of Rules 317 and 318 was specifically directed by Order of Justice Campbell to be heard after the Court had an opportunity to review the documents in issue. These documents were provided to the Court in confidence and have been so reviewed.

## II. BACKGROUND

[5] The Applicants, two band councillors of the Muskeg Lake Cree Nation (Band), brought an application for judicial review of a vote of the Band members and seek relief in the nature of an order quashing that vote conducted between September 19 and 27, 2008. The subject matter of the vote in question was the proposal to permit certain businesses (including a Tim Hortons franchise and Royal Bank of Canada financing) to be established on Band land. The first vote on this proposition had been defeated.

[6] The Applicants allege that the Respondent, Chief Gilbert Ledoux, acting without Council approval, and in league with consultants, established a voting procedure and conducted a “re-vote” of the same issue, with the assistance of the other Respondents. It is this re-vote which apparently supported the business proposal referred to above, which is the subject of this judicial review.

[7] The other Respondents are two law firms, McKercher LLP and Emery Jamieson LLP, and an accounting firm, Myers Norris Penny LLP. McKercher LLP is described as counsel to the Band and in that capacity provided legal advice and other assistance on the votes conducted on behalf of the Muskeg Lake Land Advisory Committee (Committee). The other law firm was apparently retained to assist McKercher LLP and the accounting firm was retained by or on behalf of the Band or Committee by McKercher LLP to tabulate the results of the re-vote.

[8] There are allegations that the first vote was fraught with problems and that these problems resulted in the re-vote. There are further allegations that the re-vote was also fraught with problems, improper procedures and improper conduct. The gist of the judicial review is that the re-vote was illegal and did not reflect the will of the people.

[9] The Applicants requested as part of this application for judicial review that the Respondent advisors (the two law firms and the accounting firm) provide under Rule 317 the following documents:

- (a) all documents related to each of the votes in Edmonton, Saskatoon, Prince Albert and Muskeg Lake;
- (b) the record of the voters' list;
- (c) the record of the times the vote was held;
- (d) all records of voters who were refused;
- (e) all records of voters who were turned away or who waited in line but did not get to vote; and
- (f) such further and other records related to these votes.

[10] The Respondents have objected to the Rule 317 request being directed to them on the grounds that none of them are “a tribunal”; that they hold the documents subject to solicitor-client privilege; and that each of them was bound by a confidentiality, non-disclosure and independence agreement which bars their release of the documents.

[11] The Respondent advisors bring a motion to strike the judicial review as against them on the basis that none of them is a “federal board, commission or tribunal” and thus this Court has no jurisdiction over them; that the naming of these Respondents is an abuse of process designed to interfere with the client’s choice of counsel; and that they are not persons directed affected by the matters before the Court.

[12] The Respondent, Chief Gilbert Dedoux, also moves to be struck as a respondent on the grounds that the Court lacks jurisdiction; that he is not a “federal board, commission or tribunal”;

that the challenged procedures and votes were not his decision; and that the vote is under the jurisdiction of the Band's land code.

III. ANALYSIS

A. *Rule 318 Objection*

[13] Pursuant to the Order of Justice Campbell, the Court has examined the documents to which the Respondents object to production. These documents are contained in folders filed with the Court and the description of those folders is as follows:

Folder No. 1

Copy of the Muskeg Lake Voters' List dated September 2008. The list was used for the purposes of determining eligibility of the voters and for the recording of the votes.

Folder No. 2

Copy of the Muskeg Lake Voters' List with results after the September 19, 2008 vote. The notations under the "comments" section record how an individual voter voted on the three questions together with the voter's initials.

Folder No. 3

Copy of the Muskeg Lake Voters' List, voter's signature and copy of Muskeg Lake Voters' List which contains the cumulative voting results for the September 19 and 27, 2008 votes. This folder contains one list of voters without recording the votes and one list of voters with votes noted.

Folder No. 4

Copy of the Muskeg Lake Voters List with accumulated results for the September 19, 20 and 21, 2008 votes.

Folder No. 5

Copy of the Muskeg Lake Voters List with accumulative results for the September 19, 21 and 27, 2008 votes.

Folder No. 6

Copy of McKercher LLP attendance notes for September 21 and 27, 2008 listing voters who were turned away.

[14] The Court has been advised that the documents in its hands are the original versions. It is unknown if copies thereof also exist.

[15] These documents have been placed in the hands of McKercher LLP in their role as counsel. By their own admission, the firm is counsel to the Band, Chief Gilbert Ledoux and the Committee. The documents themselves are not communications with the counsel nor are they in themselves solicitor-client documents. As such, the firm holds them as agents for the client and they are properly producible if the client is subject to an order for production.

[16] The cloak of solicitor-client privilege is not an invitation to play “hide the pea” with the documents at issue. To the extent that the law firm(s) were concerned that they had no authority to

provide the documents without instructions from the client or by virtue of a Court order (a legitimate concern that any law firm would have), this Court's order will alleviate their concern.

[17] For reasons addressed later, Chief Gilbert Ledoux or whoever else may have given the documents to the advisors in carrying out the impugned vote would be a tribunal for purposes of Rule 317. In the absence of any evidence to the contrary, and for purposes of this motion only, I hold Chief Gilbert Ledoux to be such a tribunal. To the extent that Chief Gilbert Ledoux had control of the documents, he apparently held them on behalf of the Chief and Council, or on behalf of the Band, or as an *ex officio* member of the Committee. Any one of those other bodies may likewise be a tribunal but at this stage it is difficult to discern who precisely ordered the re-vote.

[18] The existence of the confidentiality agreement is no bar to the production under Rule 317. A tribunal cannot contract itself or others out of its obligation to produce documents in accordance with this Court's Rules. The confidentiality agreement is a curious document to require advisors, especially counsel, to execute. It is noteworthy that one party to the agreement is the Band yet the document is not executed by the Band or any representative thereof. This agreement raises more questions than it answers except it may assist in determining who the proper tribunal may be.

[19] The Court concludes that the Rule 318 objection is unfounded. The voters' lists are clearly producible. There remains the issue of the disclosure of the actual vote by a particular voter, the requirement for confidentiality and the use of the information for purposes of this litigation.

[20] As this matter will be specifically case managed, in the event that the parties cannot agree as to the form of disclosure, the Applicants are to seek an order setting out the disclosure regime for those documents including the possibility of the use of redacted versions to protect legitimate confidentiality.

[21] Folders 2, part of 3, 4 and 5 inclusive which record the votes of each voter are to remain confidential pending further order of this Court. Folders 1, 6 and the voter list in Folder 3, which does not list how an individual voted, are to be produced forthwith.

B. *Motion to Strike*

[22] On these respective motions, the Respondents proceed in part on an incorrect assumption that to be a respondent in these proceedings, they must be a federal board, commission or tribunal.

[23] Rule 303(1)(a) requires an applicant to name as a respondent every person “directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought”.

[24] Given the circumstances to date, I concur with the Applicants that it is difficult to determine precisely who is the tribunal, who is the decision maker and who are the necessary respondents. However, it is clear that neither the law firms nor the accounting firm are a tribunal or a person directed affectly by the application. Their role is more likely that of a witness. That fact may impact



their ability to represent one or more of the current or future Respondents. However, the ability of the firms to act in this matter is an issue for another day.

[25] The Chief is evidently a person affected by the application which seeks to quash a vote by the Band. The Band and the Committee are also persons clearly affected by the application and Band Council may also be a party affected. The matter of proper respondents should be left to the case management judge or prothonotary upon application by the Applicants to amend the style of cause.

[26] It is sufficient for these purposes to strike the Respondent advisors as parties with leave to the Applicants to amend the style of cause and to add proper respondents.

[27] The Applicants shall have their costs of the Rule 318 objection motion; no costs will be ordered in respect of the motion to strike as results thereof are mixed.

“Michael L. Phelan”

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Judge

Ottawa, Ontario  
December 12, 2008

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1516-08

**STYLE OF CAUSE:** COUNCILLOR ALBERT DEAN LAFOND et al  
and  
CHIEF GILBERT LEDOUX et al

**PLACE OF HEARING:** Edmonton, Alberta

**DATE OF HEARING:** December 8, 2008

**REASONS FOR ORDER:** Phelan, J.

**DATED:** December 12, 2008

**APPEARANCES:**

Ms. Priscilla Kennedy FOR THE APPLICANTS

Mr. Curtis Onishenko FOR THE RESPONDENT  
(CHIEF GILBERT LEDOUX)

Mr. Christopher Boychuk FOR THE RESPONDENTS  
(MCKERCHER LLP, EMERY JAMIESON  
LLP, MYERS NORRIS PENNY LLP)

**SOLICITORS OF RECORD:**

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