Date: 20090415

Docket: T-1514-06

Citation: 2009 FC 374

Ottawa, Ontario, April 15, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

HARRY WAWATIE, TOBY DECOURSAY,
JEANNINE MATCHEWAN AND LOUISA PAPATIE,
IN THEIR CAPACITY AS MEMBERS OF
THE ELDERS COUNCIL OF MITCHIKANIBIKOK INIK
(also known as ALGONQUINS OF BARRIERE LAKE)

Applicants

and

MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT

Respondent

and

THE ELDERS OF MITCHIKANIBIKOK INIK
(ALGONQUINS OF BARRIERE LAKE)
LED BY CASEY RATT

Interveners

REASONS FOR ORDER AND ORDER

[1] All is not well among Mitchikanibikok Inik, known in English as the Algonquins of Barriere Lake. Since at least the mid-1990s this Band has stumbled from one leadership crisis to the next; its

relationship with the Department of Indian Affairs and Northern Development (DIAND) has soured; federal funding has been refused or interrupted; monies have been seized by creditors, and all the while its people suffer from extremely high unemployment (more than 60%), inadequate housing and education. Living conditions are deplorable and limited resources could be put to better use than funding one legal proceeding after another.

[2] Although the Band's traditional territory is some 10,000 square kilometres situated in western Quebec, north of Maniwaki, its Reserve which was established at Rapid Lake in 1961, is only some 24 hectares. The Band comprises approximately 600 members, has the highest unemployment rate within any Band in Quebec and is also the only Band not on the Hydro Quebec electricity grid.

[3] This is the judicial review of a decision of the Minister in July 2006 to impose Third Party Management on the Band. In accordance with funding arrangements, and the National Intervention Policy incorporated therein, if, among other things, the Band had a cumulative deficit of at least 8%, the Minister was entitled to take remedial action, the most severe of which was to take management of funds funnelled through DIAND and put them into the hands of a third party.

[4] Although s. 2 of the *Indian Act* specifically provides that a Band acts through its Council, in this case a Customary Council, the applicants are not members thereof. They are three members of what they call the Elders Council. Harry Wawatie, once Chief, and a member of the Elders Council, died during the course of the proceedings. They seek an order quashing the Minister's decision to appoint the Third Party Manager and ask that the matter be referred back to him with a

direction that the financial position of the Band be first clarified as a condition precedent to remedial action. The submission is that, had DIAND negotiated in good faith with respect to previous arrangements, the Band would not have been in an 8% deficit position. In so doing, these Elders want to right what they perceive to be previous wrongs, and to resurrect two applications for judicial review which were instituted in the 1990s and ultimately dismissed for want of prosecution.

[5] The applicants also submit that there was no proper consultation as demanded not only by procedural fairness but also by the Honour of the Crown in dealing with Aboriginal peoples.

[6] The Minister strongly defends the actions of DIAND in issue, which go back at least to 1991, and is in a fighting mood. He argues that DIAND has been unfairly vilified over the years. He submits that both the finding with respect to the 8% deficit and the decision to appoint a Third Party Manager were reasonable. Furthermore, the application should also be dismissed on the grounds that the applicants lack standing.

[7] About a month before the hearing, another group of Elders was given intervener status. Numbered among these are Casey Ratt, who claims to be the current Chief, and the members of his Council. They also support the proposition that the applicants lack standing and submit that in any event the application for judicial review is moot because they are negotiating with DIAND to get out of Third Party Management. However, another group which claims to be the true Band Chief and Council, currently represented by Benjamin Nottaway, has supported the applicants from the outset.

DECISION

[8] I have decided that in the circumstances of this case the applicants do not have standing to launch this judicial review. I have also decided that the Minister's decision to appoint a Third Party Manager stands up to scrutiny. It was reasonable both in the assessment of the Band's deficit being in excess of 8% and in the level of intervention, which was to move from Co-Management to Third Party Management. There was no breach of natural justice, be it a lack of procedural fairness or a violation of legitimate expectations. The Honour of the Crown was not engaged. The Band precipitated the decision by unilaterally firing its Co-Manager which put arrangements with creditors in extreme jeopardy. The Band had no right, constitutional or otherwise, to mismanage public funds.

STANDING

[9] Section 18.1 of the *Federal Courts Act* provides that an application for judicial review may be made by anyone "directly affected by the matter in respect of which relief is sought."

[10] At first blush the applicants make out a case that they do have standing. The Algonquins of Barriere Lake are a Band governed by custom, in which the Elders play a significant role. Furthermore, they assert that as individual members of the Band they have, or could have, suffered from the loss of services as the result of the imposition of Third Party Management. Finally, they assert a public interest standing as there was no other way to get this decision before the Courts.

[11] As aforesaid, s. 2 of the *Indian Act* provides that a Band acts through its Council, in this case a Customary Chief and four Councillors.

[12] When the decision was made to appoint a Third Party Manager, Harry Wawatie was undisputed Chief. He resigned in protest and thus only claimed standing in these proceedings as an Elder and as a Band Member. This led to another crisis with two factions claiming leadership. Chief Wawatie's replacement and his Council resolved, just after this application for judicial review was launched, to support it. There has been no satisfactory explanation as to why that particular Band Council did not itself take the application. Perhaps the answer is that, at the same time, another faction was writing to the Minister claiming to be the new Customary Chief and Council. Be that as it may, there was no reason to circumvent s. 2 of the *Indian Act*.

[13] To give these Elders standing would be to give every Elder standing. Indeed, I gave other Elders intervener status to contest the standing of these Elders. By not taking the application itself, the Council left open the possibility that it could claim not to be bound by an adverse decision or an order as to costs. If at a later time a new Band Council took office, as may or may not be the case, instructions could have been given for a substitution of solicitors on the record and to discontinue the application. In fact, this is the position of the interveners who assert that they are the only legitimate Band Council and who assert further that the application is now moot because they are in serious negotiations with DIAND to bring the temporary measure of Third Party Management to an end. For the most part, each of the two Band Councils acts as though the other did not exist. The process by which Chief Ratt and his Council was selected has not been challenged in Court. What is in Court under docket T-462-08, but not before me, is the decision of DIAND to register the results of a leadership selection process and to conduct its relationship with the Council led by Chief Casey Ratt (see *Council of Mitchikanibikok Inik v. Canada (Minister of Indian Affairs and Northern*

Development), 2009 FC 8, [2009] F.C.J. No. 12 (QL)), rather than the Council led by Chief Benjamin Nottaway.

[14] The Comprehensive Funding Arrangements were made with the Band Council, not the Elders Council. There is insufficient evidence to find that any Elder as such is directly affected by the appointment of a Third Party Manager. If any individual Band member, Elder or not, was affected, he or she was only indirectly affected by refusing the services which remained available, services which in all likelihood would have been interrupted if the Manager had not been appointed.

THE 8% DEFICIT

[15] Fortunately, we live in a society wealthy and well managed enough that we consider such matters as health care, education, housing and a minimum standard of living, essential. Under our federal system of government many of these programs are supplied and funded through the provinces. However, in the case of First Nations, s. 91 of the *Constitution* declares that the exclusive legislative authority of the Federal parliament extends to “Indians and Lands reserved for the Indians”. At one point, services were directly provided by DIAND. However, in the interests of the self-government of First Nations, funding arrangements have been in place with the various Bands for some time. The Comprehensive Funding Arrangement in effect at Barriere Lake in July 2006 sets forth a number of events which constituted defaults on the part of the Council. The one invoked herein is that the Council had incurred a cumulative deficit equivalent to 8% or more of its total annual revenues. In the event of a default, the Minister had a number of options available to him. The only three which require consideration are 1) his right to require the Council to develop and implement a Remedial Management Plan, which met his approval, within a delay not to exceed

60 days; 2) his right to require the Council to enter into a Co-Management Agreement and 3) his right to appoint, upon providing notice to Council, a Third Party Manager. All three had been in place at various times in the past. Indeed, the first two were in place just prior to the appointment of the Third Party Manager.

[16] Although DIAND's audit, and indeed the Council's own reports, indicate a deficit far in excess of 8%, the applicants argue that, had DIAND lived up to its past commitments, a far greater amount of funds would have passed through the Council's hands so that the deficit, expressed as a percentage, would be less than 8%. Furthermore, in virtue of a "Special Provision" which had been in place in annual funding arrangements going back to 1997, but improperly deleted from the arrangement in force following the appointment of the Third Party Manager, the 8% default provision was inoperable.

[17] In essence, funding from DIAND to the Band or for the benefit of the Band Members comes in three forms. The first is called Flexible Transfers. Despite the name, these funds cover such essential services as health care, education, housing and the like. The second are grants which might be used to support the Band's administration, such as payment of salaries. The third is special funding or contributions for specific projects. The applicants argue that DIAND failed to fund certain projects and it is this turpitude which brought forth the deficit.

[18] For example, if funds received from DIAND totalled $1 million and expenditures $1.1 million, the deficit would be $100,000 or 10%. On the other hand, if in addition a grant of $2 million was provided to build a school and spent, the income would have been $3 million and the

outgo $3.1 million. Expressed as a percentage, the $100,000 would only be 3.2%. To appreciate this argument, it is necessary to consider the relationship between the Band and DIAND from 1991 until the appointment of a Third Party Manager in 2006.

A FIFTEEN-YEAR RETROSPECTIVE

[19] The applicants focus on three events which they submit should relate to the calculation of the 8% deficit: 1) a Trilateral Agreement among the Band and the Governments of Quebec and Canada entered into in 1991; 2) Special Provisions in the aftermath of DIAND's decision to do business with an Interim Band Council in 1996, which Provisions formed part of subsequent annual contribution agreements; and 3) a Memorandum of Mutual Intent entered into in 1997. As previously mentioned, it is the applicants' position that had DIAND done what it should have done, there would not have been an 8% deficit. DIAND disputes this, adding that even if it were in breach of the Trilateral Agreement, which it strongly denies, any claim would be long time-barred; that the Special Provisions are a dead issue and that the Memorandum of Mutual Intent never created legal relations. Apart from asserting that the applicants have no standing and that the application is now moot, the interveners take no position with respect to these events, although in the past they had informed DIAND that they were concerned about the appointment of the Third Party Manager.

[20] The Trilateral Agreement hoped to ensure, within the Band's traditional territory, the rational management of renewable resources and the pursuit of the Band's traditional activities. The Band and Quebec declared that they wished to engage in the preparation of a draft Integrated Management Plan, and "…whereas Canada having a special fiduciary responsibility towards the Algonquins of Barriere Lake, wishes to support them in this undertaking." The process comprised

three phases, with certain funding coming from both Quebec and Canada. The Agreement stated it would terminate in 1995. By that time the three phases were not complete. The applicants assert that the contract continued. DIAND takes the position that it only continued as an agreement between the Band and Quebec. DIAND had not agreed to an extension but nevertheless did agree to fund the Band for another five years, as part of contribution funding. There was always an envelope, i.e. a ceiling, from DIAND's point of view. Once it contributed $5 million, it stopped.

[21] It is not for me to determine, within the context of this judicial review, whether the Band has any claim, and if so whether it is time-barred. I did mention during the hearing the case of *Saint-John Tug Boat Co. Ltd. v. Irving Refining Ltd.,* [1964] S.C.R. 614, which dealt with the continuation of services beyond an expressed contractual period and whether an agreement to continue could be implied from a party's acquiescence. The point is that it would be far too speculative to take the Trilateral Agreement into account. The decision of DIAND not to do so was within the range of reasonable possibilities and should not be disturbed (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[22] So too it is with respect to the Special Provisions which the applicants claim supersede and limit the right of the Minister to intervene in the Band's affairs by appointing a Third Party Manager. These arrangements arose from the 1996 leadership debacle in which DIAND decided to do business with an "Interim Band Council" and to appoint a Third Party Manager. The Interim Band moved in the Federal Court for recognition under file T-2590-95 and then-Customary Chief Matchewan moved against the decision of DIAND to recognize the Interim Band in file T-357-96. No ruling was ever made on these two court proceedings. There was mediation by Mr. Justice

Réjean Paul of the Quebec Superior Court and facilitation by others. Proceedings were never decided on the merits, but the net result was that custom was reduced to writing, and the Customary Band Council then led by Harry Wawatie was subsequently recognized. Chief Wawatie had refused to cooperate with DIAND from January 1996 through to April 1997. In fact, until September 1997 there was an interruption of service and funding, with much finger-pointing and demands by Chief Wawatie and his Council for an apology from DIAND for dealing with the Interim Band Council, an apology which has never been forthcoming.

[23] The parties agreed to disagree as to the effect of this 18-month interruption of services.

[24] Under the Special Provisions, the Minister and the Council agreed to enter into a process to clarify the Band’s financial situation and to reach a solution by the end of March 1998. Nevertheless, this disagreement was allowed to fester year after year until after the Minister appointed a Third Party Manager in July 2006. In the next Funding Arrangement, these Special Provisions disappeared. DIAND’s position is that the dispute was limited to a loan of about $250,000 which the then-Third Party Manager was obliged to take out in 1996, and which was charged to the Band. In a “Remedial Management Plan” submitted by the Band in January 2006, it was proposed that that amount be forgiven by DIAND at the successful conclusion of the five-year plan, a proposal to which DIAND agreed. Thus, according to DIAND, the issue was resolved. The applicants submit that the dispute was much broader. Again, I will not be baited into commenting as to the merits of the positions of the two parties. I am satisfied, based on the evidence of, and calculations by, Stephane Villeneuve, Audit and Remedial Action Plan Advisor, DIAND, that even taking the loan into account, the deficit was in excess of 8%.

[25] The Memorandum of Mutual Intent specifically provides that it is not legally binding and so again the decision not to take into account monies which the Band thinks might have been forthcoming thereunder was reasonable. In any event, there was funding which could be attributable to that Memorandum, including funds for the construction of a Band Council Office which was later burned down.

[26] It is worth noting that when Chief Wawatie was recognized as Chief in 1997 he inherited a $900,000 debt. With a Third Party Manager in place that debt was quickly reduced to half, and by 2000 there was no debt at all.

[27] However, at that point matters began to deteriorate. The Band regained management of its own affairs. It appointed an outside accountant who apparently failed to follow the accounting requirements of DIAND. Naturally, it took some time for these discrepancies to come out in audits. For example, if the Band overspent, that overspending was shown as a receivable from DIAND. This made no sense whatever. If DIAND allotted $100,000 for something, and $200,000 was spent, that excess could hardly be put down on the books as a receivable. In addition, certain programs were not delivered at all, with money spent elsewhere. Fire prevention and housing are examples. If money was not spent on what it was supposed to be spent, it should have been paid back to DIAND.

[28] Come 2003 and 2004 many creditors were complaining. The Band was not paying tuition to outside school boards who threatened to deny Band children access to their schools. DIAND had to intervene directly. The bank was owed money, which it set off against funds in the Band’s account

and cancelled the Band's line of credit. Two major creditors were threatening garnishment proceedings.

[29] This led, with some delays but by agreement, to the appointment of a Co-Manager. A Co-Manager is selected by the Band, but must meet criteria established by DIAND.

[30] Mr. Villeneuve's calculations show that the Band was in credit by some $208,683 or 2.52% as of 31 March 2000. The next year it had a cumulated deficit of $66,340, the year after $461,844 and as of 31 March 2003 $578,121, or a deficit of 9.43%. The situation continued to worsen so that by the end of the fiscal year in which the Third Party Manager was selected, the deficit had risen to $1,672,287 or 32.07%. Even on the Band's own calculations, leaving aside the arguments referred to above and dismissed, the deficit was $1,505,703 or 28.87%.

[31] The decision to appoint a Third Party Manager was precipitated by the Band's decision to fire its Co-Manager. The Band certainly had that right. In making that decision the Council took advice from Clifford Lincoln, who from time to time has acted as its Special Advisor. As a former member of the Quebec National Assembly, a Quebec cabinet minister, and a member of the Federal Parliament, Mr. Lincoln was well connected, widely known, and greatly respected.

[32] The Council, without notice to DIAND, dismissed the Co-Manager on the grounds that he was a number cruncher and not interested in broader issues such as resurrecting the Trilateral Agreement and expanding the Reserve by 10 square kilometres (which DIAND insists only requires a Council resolution). The Council failed to take into account that arrangements DIAND and the

Co-Manager had with creditors were that there had to be a Co-Manager in place. Without a Co-Manager it was greatly feared that garnishment proceedings would start again, a quite realistic fear I find. In this regard, monies, or certainly monies outside the Reserve, are subject to seizure if held by the Band, or even by a Co-Manager. However, funds in the hands of a Third Party Manager are still Government funds not subject to seizure by third parties (*McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846).

[33] The dismissal of the Co-Manager led to urgent, intense discussions. Mr. Lincoln proposed that the Band would appoint another outsider to help set up a proper accounting system. However, that person was never proposed as a Co-Manager and so I can only assume that it was known that he did not meet DIAND's requirements. The Band complains that it was only given six days, four working days, to come up with a new Co-Manager. This short delay is said to be procedurally unfair and contrary to the Band's legitimate expectations. I find on the contrary that DIAND, which may have been too sanguine in the past, was required to make a decision on an urgent basis not only in the interests of Band Members as a whole, but also as the guardian of public funds. It had every reason to believe that funds would be garnished both by Revenue Canada and by the Québec Commission de la santé et de la sécurité du travail. This would have left the Band without essential services.

[34] Furthermore, the appointment of a Third Party Manager is intended to be a stop-gap measure to enable a Band to organize itself and then go into Co-Management and finally to manage its own affairs, as indeed happened in the 1990s. Instead, the animosity between Chief Wawatie and his successors on the one hand, and DIAND on the other, has continued. DIAND has made it clear

that it prefers to deal with others, in this case Chief Casey Ratt. It may be that the past is destined to repeat itself.

[35] Section 74 of the *Indian Act* permits the Minister to call an election to determine leadership. However the policy of successive governments has been not to do so.

[36] The allegations of wrongdoings are no more justified if framed as giving rise to an apprehension of bias and improper motive. The decision was justified and properly disclosed. There was a significant financial deficit, the termination of the Co-Manager's contract threatened the delivery of programs and essential services to the community and there was a lack of willingness to address these financial difficulties.

HONOUR OF THE CROWN

[37] Section 35(1) of the *Constitution* provides:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.	35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

[38] The applicants allege that the respondent breached the Honour of the Crown, more particularly a duty to consult and accommodate, by imposing a Third Party Management regime that infringes their constitutionally protected Aboriginal right to practice customary governance.

[39] As held in *R. v. Van der Peet*, [1996] 2 S.C.R. 507, in order to qualify as an Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.

[40] The practices, customs and traditions which constitute Aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact with European society. I do not characterize the appointment of a Third Party Manager as interfering with such rights as the Band may have with respect to self-government and to choose its own leadership. To my way of thinking, there is no link between the appointment of the Third Party Manager and self-government. The consequence of appointing the Third Party Manager was to temporarily remove administrative responsibilities from the Band Council with respect to the delivery of programs and services to the community. The aim of the appointment was to protect public funds and to ensure that essential programs and services were not disrupted, as disrupted they were in years past. Assets and responsibilities falling outside the funding arrangements are not affected by the nomination of a Third Party Manager and remain under the control of the Band.

[41] If there was a duty to consult in this case, that duty was discharged. DIAND worked with the Band, had numerous face-to-face meetings with the Council and was obliged to urgently react to the Band's own decision to fire the Co-Manager.

[42] As stated by Chief Justice McLachlin on behalf of the unanimous Supreme Court in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, which dealt

with the duty to consult and accommodate Aboriginal peoples in connection with decisions that might adversely affect their yet unproven rights and title claims, at paragraph 39:

> The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed.

[43] The Band, through its Customary Council, was in breach of contract. The Minister fairly and reasonably took the very remedial action contemplated by that contract.

CONCLUSION

[44] The application for judicial review shall be dismissed. It was agreed during the hearing that the parties would prefer to discuss costs after the decision was rendered. The parties may move for directions within 20 days.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. Costs may be spoken to.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1514-06
STYLE OF CAUSE:	HARRY WAWATIE, TOBY DECOURSAY, JEANNINE MATCHEWAN AND LOUISA PAPATIE, IN THEIR CAPACITY AS MEMBERS OF THE ELDERS COUNCIL OF MITCHIKANIBIKOK INIK (also known as ALGONQUINS OF BARRIERE LAKE) AND MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT and THE ELDERS OF MITCHIKANIBIKOK INIK (ALGONQUINS OF BARRIERE LAKE) LED BY CASEY RATT
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 16-17, 2009
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	April 15, 2009

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