Federal Court  Cour fédérale

Date: 20110119

Docket: T-434-06

Citation: 2010 FC 1244

Vancouver, British Columbia, January 19, 2011

PRESENT: Roger R. Lafrenière, Esquire
Case Management Judge

BETWEEN:

MAGGIE MYRNA LORRAINE GAMBLIN

Applicant

and

NORWAY HOUSE CREE NATION
BAND COUNCIL

Respondent

REASONS FOR ORDER AND ORDER

[1] On March 9, 2006, the Applicant, a member of the Norway House Cree Nation (NHCN), filed a Notice of Application seeking an order declaring a Resolution by the Respondent, NHCN Band Council (Band Council) dated July 21, 2005 (BCR) void and without force and effect, as well as an order quashing the Band Council's decision of February 7, 2006 purporting to ratify the BCR.

[2] The Attorney General of Canada (Canada) seeks an order to be added as a respondent or, alternatively, for leave to intervene in the present proceeding. For the reasons that follow, I conclude that Canada should be joined as a respondent because it is directly affected by the declaration and orders sought by the Applicant. Further, Canada's participation is necessary because the current Band Council does not appear to be a genuine contradictor that is prepared to properly defend its predecessor's decisions.

Background Facts

[3] It is essential to set out in detail the context and history giving rise to the BCR and the subsequent ratification decision in order to understand Canada's interest in this proceeding.

[4] On December 16, 1977, Canada, the Province of Manitoba, Manitoba Hydro and the Northern Flood Committee Inc., representing five First Nations, including the NHCN, executed the Northern Flood Agreement (NFA). The NFA was designed to compensate the said First Nations for adverse effects of flooding caused by Manitoba Hydro projects.

[5] Under Article 6.1 of the NFA, Canada accepted responsibility to ensure the continuous availability of a potable water supply on each of the First Nations reserves. Under Article 6.2, Manitoba Hydro promised to reimburse Canada 50% of its reasonable potable water-related expenditures attributable to adverse effects of the Project.

[6] On May 10, 1988, Canada entered into an Infrastructure Agreement (IA) with the Northern Flood Committee Inc., the Northern Flood Capital Reconstruction Authority Inc. (NFCRA), and the five First Nations. The IA was intended to satisfy Canada's obligations to ensure a continuous availability of a potable water supply for the First Nations by enabling them to provide it for themselves.

[7] Under Article 15 of the IA, Canada agreed to attempt to recover the maximum amount possible from Manitoba Hydro pursuant to Article 6.2 of the NFA using arbitration, if necessary, and to transfer any amounts recovered to the NFCRA for potable water projects of the NFA First Nations, subject to the conditions contained in Article 15 of the IA.

[8] Canada filed arbitration Claim 138 against Manitoba Hydro on April 19, 1984, to determine Manitoba Hydro's liability under NFA Article 6.2 for Canada's potable water expenses. The First Nations subsequently intervened, at Canada's expense, in Claim 138.

[9] On November 19, 2003, Canada and Manitoba Hydro signed a letter of intent outlining the key components of a settlement of Claim 138. NHCN gave "interim approval in principle" to the amount of the settlement and terms of its payment as reflected in a Band Council Resolution (BCR) dated May 19, 2004.

[10] Canada and Manitoba Hydro formalized the settlement on August 27, 2004. Manitoba Hydro agreed to pay $40.5 million to Canada, in installments over 17 years from 2004 to 2021;

Canada had the express right to instruct Manitoba Hydro to pay one or more of the First Nations directly; and Canada and Manitoba Hydro agreed to seek a consent dismissal of Claim 138 from the NFA Arbitrator.

[11] On October 28, 2004, Canada signed the Claim 138 Settlement Agreement (Settlement Agreement) with NHCN and three other First Nations. Canada agreed that Manitoba Hydro would pay the $40.5 million directly to NHCN and the other signatory First Nations by installments. NHCN's share of each installment was 28%, totaling $11,340,000.00 of the $40.5 million.

[12] In the Settlement Agreement, NHCN consented to a dismissal of Claim 138 (Article 2.1); released Canada from any further liability under Article 6 of the NFA and section 15 of the IA (Article 3); agreed that NHCN Chief and Band Council had approved the terms and conditions of the Settlement Agreement as evidenced by a BCR prior to executing it (Article 5.1 and 6.1(a)); had received independent legal advice prior to executing it (Article 6.1(b); represented and warranted that it was not under any legal impediment that would prevent it from executing the Settlement Agreement (Article 9.1); and agreed that the Settlement Agreement was binding upon its members (Article 11.1).

[13] On November 26, 2004, the NFA Arbitrator dismissed Claim 138 with the consent of Canada and Manitoba Hydro. NHCN also gave its consent to the dismissal of Claim 138 through its own legal counsel.

[14] Manitoba Hydro made its first installment payment of $1.5 million to Canada on September 1, 2004. NHCN received $420,000.00 from Canada as its 28% share. On June 10, 2005, at the request of NHCN, Canada instructed Manitoba Hydro to pay NHCN's 28% share of further installments directly to NHCN. Manitoba Hydro accepted this direction.

[15] Subsequently, at NHCN's request, Manitoba Hydro agreed to pay the balance of NHCN's share ($10,920,000.00) by way of an accelerated lump sum payment of $6,365,000.00, which was the present value of that share as determined by NHCN's independent legal and accounting advisors.

[16] On July 21, 2005, NHCN produced the BCR being impugned in the present application. The BCR formally approved and acknowledged receipt of the accelerated lump sum payment of $6,365,000.00 from Manitoba Hydro and authorized NHCN to provide a full and final release to Canada regarding all future obligations under the Claim 138 Settlement Agreement. The BCR and Release were duly signed by a majority of Chief and Band Council.

[17] Manitoba Hydro subsequently paid the amount of $6,365,000.00 to NHCN in satisfaction of Canada's obligation to pay the balance of NHCN's share of the Manitoba Hydro monies.

[18] At a NHCN Band Council meeting held on February 7, 2006, Councillor Saunders moved to ratify the BCR dated July 21, 2005. Councillors Clarke, Muswagon and Saunders voted in favour of the motion, while Councillor Balfour was the sole vote against it.

Procedural History of the Application

[19] As stated earlier in these reasons, the Applicant commenced her application for judicial review on March 9, 2006. Canada immediately moved to be added as a party or for leave to intervene.

[20] On May 4, 2006, counsel for the Band Council wrote to advise that the parties had agreed to hold the proceeding in abeyance in order to allow more time for settlement discussions. A meeting was scheduled to take place on October 12, 2006 for the purpose of allowing Canada to present additional information regarding Claim 138 to the Applicant, the Band Council and members of the NHCN. By Order dated September 14, 2006, Madam Prothonotary Mireille Tabib stayed the proceeding until October 20, 2006.

[21] The October 12 meeting was cancelled as a result of several deaths in the community and was rescheduled for December 7, 2006. On direction of Prothonotary Tabib, the Band Council moved for an order that the motion filed by Canada, which had previously been adjourned by consent, be stayed or adjourned for a further period of time, and that all time periods prescribed by the *Federal Courts Rules* be extended until such time as Canada's motion was heard and adjudicated.

[22] By Order dated November 14, 2006, the application was allowed to continue as a specially managed proceeding. Canada's motion was adjourned *sine die* and the application was stayed. The

Applicant was also directed to submit a status report and a joint schedule for completion of the next steps in the proceeding by December 18, 2006.

[23] In her submissions dated December 18, 2006, the Applicant indicated that she had not received certified copies of the documents requested in her Notice of Application from the Band Council and that she could not pursue the application in a proper manner without the documents. The Applicant also wrote that, although she remained very determined to proceed with her application, she could not afford a lawyer, could not proceed without legal assistance, and intended to seek an advance cost order to obtain legal representation.

[24] On January 2, 2007, the Applicant was directed to bring a motion to compel production of documents by the Band Council, once the stay of proceedings had been lifted upon the joint request of the parties, or upon motion by any party. The need for a motion was obviated by the transmission of true copies of the requested documents by the Band Council on February 2, 2007.

[25] The proceeding subsequently lay dormant for almost three years. On January 10, 2010, the following directions were issued to the parties:

> By Order dated November 14, 2006, the action was stayed on consent of the parties. As there has been no activity on the file for over three years, the Applicant is directed to submit a letter by March 1, 2010 to advise whether she intends to proceed with the application and seek such orders or directions as may be required to either conclude the proceeding or move the proceeding forward pursuant to Rule 385 of the *Federal Courts Rules*.

[26] The Applicant responded on March 1, 2010 that she intended to pursue the matter represented by legal counsel. She submitted a copy of a retainer fee for her lawyer as provided to her by NHCN at the direction of the Band Membership. The Applicant indicated that the issue of continued funding of the application would need to be put to the next Chief and Council after the NHCN General Election scheduled on March 17, 2010.

[27] By Order dated March 8, 2010, the stay of proceedings was lifted and the Applicant was directed to serve and file a Notice of Appointment of Solicitor by March 31, 2010. Canada was directed to submit dates of mutual availability of counsel for the hearing of its outstanding motion within one week of the appointment of a solicitor of record by the Applicant.

[28] On March 30, 2010, the Applicant requested additional time to submit the name of her lawyer. The next day, the Registry received a letter from Mr. Vilko Zbogar with Orkin Barristers advising the Court that the law firm had been consulted by the Applicant but required more time to review the file and to be formally retained.

[29] In the absence of any further steps being taken by the Applicant, an Order was issued on June 15, 2010 pursuant to Rule 385(2) of the *Federal Courts Rules*, requiring the Applicant to show cause by written submissions why the application should not be dismissed for delay, and for failure to comply with the Order dated March 8, 2010.

[30] Following receipt of the written submissions from the Applicant and Canada, the proceeding was allowed to continue on the basis that the parties had acquiesced to the delay.

Position of the Parties

[31] Canada submits that it has an interest in the proceeding and is directly affected by the order sought by the Applicant. It maintains that its participation as a party is necessary to ensure that matters in the application may be effectually and completely determined.

[32] The Applicant contends that the only parties that will be affected by any order in this application for judicial review are the Band and its members. According to the Applicant, Canada will not be directly affected since its contractual rights are not at issue in the proceeding. She argues that Canada's concern that the Court's decision may be used in future legal proceedings concerning the validity or applicability of the Claim 138 Settlement Agreement or the release of Canada does not warrant joinder in this case.

[33] The Band Council takes no position on the motion.

Analysis

[34] Rule 303(1)(a) of the *Federal Courts Rules* provides that an applicant shall name as a respondent every person "directly affected by the order sought in the application".

[35] It is understandable that Canada has expressed an interest in these proceedings. If the order sought by the Applicant is made, the Applicant or other person may use that order to attack the validity of the consent dismissal of Claim 138 and release of Canada, the Claim 138 Settlement

Agreement with NHCN itself, or NHCN's agreement with Manitoba Hydro to accept a discounted lump sum rather than installments over time.

[36] The Applicant suggests that the application for judicial review is simply about whether a band council resolution, and its purported ratification, is valid or not. It remains, however, that at its root, the main purpose of the application appears to be to impugn the Claim 138 Settlement Agreement, by attacking the underlying authority of the Band Council to effectively execute the Claim 138 Settlement Agreement on behalf of NHCN, and its authority to negotiate an accelerated payment and to provide the Release. The potential consequences are not, in my view, a "local matter" or a simple issue of good governance.

[37] Canada clearly has an interest in confirming that documents relied on to provide the Band Council with authority to consent to the dismissal of Claim 138, execute the Claim 138 Settlement Agreement, accelerate the payments and execute the Release did, in fact, provide such authority. Whether such documents were sufficient authority or whether they have any bearing on the validity of the Claim 138 Settlement Agreement are questions which Canada would have to address should that issue arise in subsequent proceedings. In the circumstances, I conclude that Canada is directly affected and should be added as a respondent.

[38] In any event, even if Canada was not directly affected by the relief sought in the application, I am satisfied that it should be joined as a party to ensure that all matters in dispute may be effectually and completely determined. The Band Council has maintained, for unspecified reasons, a passive role over the past three years. It is not clear to me on what basis the application was

allowed to remain dormant for such an extended period of time, and why the Band Council acquiesced to the substantial delay by the Applicant in moving the proceeding forward.

[39] The Band Council's inaction seems to me consistent with a decision that it will take no position in this case and unload the entire responsibility of determining the issues in the application onto the Court with no *legitimus contradictor*[1] of what the Applicant says. In the circumstances, I conclude that the Court would benefit from hearing arguments by Canada in favour of the validity of the BCR and its ratification by the Band Council.

[1] A *legitimus contradictor* is a person who puts an opposing point of view before the court. See *Murdoch, Murdoch's Dictionary of Irish Law* (5th ed Tottel 2009) at 268 and 711.

ORDER

THIS COURT ORDERS that:

1. The Attorney General of Canada be added as a respondent to this application, so that the style of cause in these proceedings shall hereinafter read:

BETWEEN:

MAGGIE MYRNA LORRAINE GAMBLIN

Applicant

and

NORWAY HOUSE CREE NATION BAND COUNCIL AND THE ATTORNEY GENERAL OF CANADA

Respondents

2. The Attorney General of Canada shall be entitled to the costs and disbursements in respect of this motion in the cause as against the Applicant, Maggie Myrna Lorraine Gamblin. Costs shall be fixed at $2,500.00 plus GST of $125.00, with disbursements of $3,000.00.

"Roger R. Lafrenière"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-434-06
STYLE OF CAUSE:	MAGGIE MYRNA LORRAINE GAMBLIN v. NORWAY HOUSE CREE NATION BAND COUNCIL
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	November 25, 2010
REASONS FOR ORDER:	LAFRENIÈRE P.
DATED:	January 19, 2011

APPEARANCES:

Vilko Zbogar	FOR THE APPLICANT
Brent Kaneski	FOR THE RESPONDENT
Randal T. Smith	FOR THE PROPOSED RESPONDENT/ INTERVENER

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