Date: 20071205

Dockets: A-69-07
A-71-07

Citation: 2007 FCA 392

CORAM: **DESJARDINS J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA and
THE MI'KMAQ CONFEDERACY OF PRINCE EDWARD ISLAND

Appellants

and

JAMIE GALLANT, STEPHANIE STANGER
and SHELLEY LEWIS

Respondents

Heard at Charlottetown, Prince Edward Island, on December 5, 2007.

Judgment delivered from the Bench at Charlottetown, Prince Edward Island, on December 5, 2007.

REASONS FOR JUDGMENT OF THE COURT BY: DESJARDINS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Charlottetown, Prince Edward Island, on December 5, 2007)

DESJARDINS J.A.

[1] This is an appeal from a decision of an Applications Judge of the Federal Court (*Gallant v. Canada (Attorney General)*, 2007 F.C. 1), who found that a decision of April 1, 2005 by Human Resources and Skills Development Canada (HRSDC or the Department) to enter into a single Aboriginal Human Resources Development Agreement (AHRDA or the Agreement) in the province of Prince Edward Island (PEI) was an unjustified violation of the Canadian Charter of

Rights and Freedoms, (the Charter) equality rights of the respondents, based on their status as off-reserve Aboriginal people of PEI. The Applications Judge found it discriminatory under section 15 of the Charter that the single PEI Agreement concluded with the representative organisation of the on-reserve Aboriginals of PEI (the Mi'kmaq Confederacy (Confederacy)) gave a benefit of "community control" over the Agreement to on-reserve Aboriginals, but not to off-reserve Aboriginals. The Applications Judge found that the discrimination was not justified under section 1 of the Charter.

[2] For the reasons that follow, we find that it was premature for the Applications Judge to make a finding of section 15 discrimination in this case, as there was no evidence that any of the respondents suffered any disadvantage they claimed. Moreover, he misread the claim made by the respondents in their application for judicial review and, consequently, he improperly applied the case law he referred to, namely the *Misquadis* decision (*Misquadis et al. v. Attorney General of Canada*, [2003] 2 F.C. 350, [*Misquadis*] also known as *Ardoch Algonquin First Nation v. Canada (Attorney General)*).

[3] The facts and the reasons for judgment of the Applications Judge can be found in the reported decision (*Gallant v. Canada (Attorney General)*, 2007 FC 1). It suffices to say for the purpose of this appeal that on April 1, 1999 the Department announced a program (Strategy) to increase employment opportunities for Aboriginal people. Phase I of the program ran from April 1 1999 to March 31 2005. The Department entered into Agreements with Aboriginal organisations across Canada.

[4] Three such Agreements were entered into with Aboriginal organizations in PEI during Phase I. The organizations were the Abegweit First Nation, the Lennox Island First Nation and the Native Council of PEI. The Abegweit First Nation and the Lennox Island First Nation are the only two Indian "bands" on PEI, as defined by the *Indian Act R.S.C., 1985, c. I-5*. The Native Council is a non-profit organisation that advocates for Aboriginal persons living off-reserve in PEI.

[5] Phase II of the program started on April 1, 2005. The Department decided there should be only one Agreement for PEI. This decision was dictated by reason of economies of scale and by past difficulties the Native Council had in meeting the requirements of the AHRDA (reasons for judgment of the Applications Judge, paragraph 73). After numerous consultations, the Department suggested that the Native Council and the Confederacy, formed of the chiefs and councils of both Indian bands, submit proposals of their own. The Native Council declined to do so stating that it did not have the mandate to represent on-reserve Aboriginal people. On or about April 1, 2005, the Department signed an Agreement with the Confederacy, making it the sole program holder on PEI. This was the decision under review before the Applications Judge.

[6] The respondents were seeking the following remedies in their application for judicial review:

> (a) "an Order quashing the decision of HRSDC; and
>
> (b) a Declaration that AHRDAs shall ensure the fair and equitable distribution of funds for human resource programming to all Aboriginal people on Prince Edward Island, including non-status and off-reserve Aboriginal people; or
>
> (c) in the alternative, an Order requiring HRSDC to enter into a further AHRDA, or further AHRDAs, to ensure the fair and equitable distribution of funds for human resource

programming to all Aboriginal people on Prince Edward Island, including non-status and off-reserve Aboriginal people; or

(d) in the further alternative, an Order requiring HRSDC to modify the terms of the AHRDA with the MCPEI to ensure the fair and equitable distribution of funds for human resource programming to all Aboriginal people on Prince Edward Island, including non-status and off-reserve Aboriginal people."

[My emphasis.]

[7] The respondents brought, however, no evidence on which to establish that the AHRDA funds under the authority of the Confederacy were not fairly and equitably distributed in PEI to Aboriginals, including off-reserve Aboriginals. The judicial review proceeding was commenced before the Confederacy AHRDA was fully operative.

[8] The respondents are therefore seeking a remedy for a dispute that does not exist. It may never exist considering that the Agreement makes all Aboriginal people in PEI eligible for the program and advisory committees are in place to allow for interface between the recipients, the AHRDA holder and the Department. The respondents' Charter claim was premature. The Applications Judge erred in a palpable and overriding way in disregarding this absence of evidence.

[9] This being said, the "community control" the Applications Judge found to exist as a benefit the respondents were deprived of is in fact created by the *Indian Act* as a result of Section 91(24) of the *Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5, and the historical relations between the Crown and the Indians. It is unrelated to the claim made by the respondents about a "fair and equitable distribution of funds".

[10] Notably, the Applications Judge had no difficulty finding that the decision to award the sole AHRDA to the Confederacy had not had the effect of preventing off-reserve Aboriginal people from accessing AHRDA funding (see reasons for judgment of the Applications Judge at paragraph 48). He felt, however, that this was not the claim brought by the respondents. "Like the claim in *Misquadis*", he wrote, at paragraph 48 of his reasons, "the discrimination claim here is that there is differential treatment between the two groups since the decision gives the reserve-based population the opportunity to exercise 'community control' over the AHRDA holder and the means to ensure accountability for the execution of the Strategy through their ability to vote for or against their councils and chiefs who control the AHRDA holder".

[11] Again, at paragraph 63 of his reasons, the Applications Judge misread the claim that was before him when he stated:

> Since the claim is based on community control of the AHRDA holder and not based on access to AHRDA funding, the needs of the applicants to be considered at this stage is the need of the off-reserve community to have "community control" over the AHRDA holder. The applicants did not submit any specific evidence to prove that this is indeed a need of the off-reserve community, but the applicants point to Misquadis […]
>
> [My emphasis.]

The case before him related indeed to "access to AHRDA funding"and not "community control".

[12] We find that the Applications Judge erred by rendering his decision on the basis that the facts found to exist in the *Misquadis* decision had been established before him (*Collins v. Canada,* [2002] FCA 82, per Sharlow J.A., at paragraph 34). Not only does the record not establish the

existence of these facts but the evidence pointed in the other direction. The respondents' needs and the evidence they adduced, to the extent that cogent evidence can be said to have been adduced, was not directed at "community control" but at the "fair and equitable distribution of funds". In doing so, the Applications Judge erred in law and his decision should be set aside.

[13] The appeal will be allowed with costs to the appellants, and the order of the Applications Judge of January 3, 2007, will be set aside.

"Alice Desjardins"

J.A.

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA and THE MI'KMAQ CONFEDERACY OF PRINCE EDWARD ISLAND and JAMIE GALLANT, STEPHANIE STANGER and SHELLEY LEWIS
PLACE OF HEARING:	Charlottetown, Prince Edward Island
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DELIVERED FROM THE BENCH BY:	DESJARDINS J.A.

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