Federal Court of Appeal | Cour d'appel fédérale

Date: 20250306

Docket: A-184-24

Citation: 2025 FCA 56

CORAM: **WEBB J.A.**
ROUSSEL J.A.
BIRINGER J.A.

BETWEEN:

BEARSPAW FIRST NATION AND BEARSPAW FIRST NATION COUNCIL (DARCY DIXON, PIERRE LEFTHAND, REX DANIELS, ROD HUNTER, ANTHONY BEARSPAW) ROB SHOTCLOSE AND MARVIN YELLOWHORN

Appellants

and

LAUREL-LEIGH LEFTHAND

Respondent

Heard at Calgary, Alberta, on February 12, 2025.

Judgment delivered at Ottawa, Ontario, on March 6, 2025.

REASONS FOR JUDGMENT BY: BIRINGER J.A.

CONCURRED IN BY: WEBB J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

BIRINGER J.A.

[1] This is an appeal from a decision of the Federal Court (*per* Blackhawk, J.) issued on May 14, 2024, in matter T-2635-22 dismissing an appeal from a decision of Associate Judge

Duchesne issued October 17, 2023. The Associate Judge dismissed the appellants' motion to strike the respondent's application for judicial review.

[2] The respondent sought judicial review of two decisions of the Chief and Council and Electoral Officer of Bearspaw First Nation (BFN). The first is a decision disqualifying the respondent from being a candidate for election as a councillor of BFN, based on the residency requirements in Bearspaw Nation Council Resolution No. 2022-Bearspaw FN-010 (Election Regulations). The second is a decision upholding the disqualification, following a protest hearing. In the judicial review application, the respondent alleged that the residency requirements in the Election Regulations discriminate against her, contravening section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] The appellants' motion to strike claimed that the respondent's judicial review application was premature and therefore doomed to fail. According to the appellants, the respondent had failed to exhaust all available internal remedies as she could have filed an appeal to the Stoney Tribal Council, pursuant to section 23 of the Election Regulations.

[4] The Associate Judge dismissed the motion, finding that it was not "plain and obvious" that the respondent's application was premature. The Associate Judge concluded that there was a live controversy as to whether the respondent had appeal rights to the Stoney Tribal Council under section 23 of the Election Regulations or whether the Bearspaw Nation Council protest hearing decision was "final and binding" as provided in section 10.2 of the Election Regulations.

The Federal Court Judge, finding no errors in the Associate Judge's decision warranting intervention, dismissed the appellants' appeal.

[5] In this appeal, the appellate standards of review apply as established in *Housen v. Nikolaisen*, 2002 SCC 33. Those same standards of review applied to the Federal Court Judge's review of the Associate Judge's decision: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras. 64 and 65.

[6] I would dismiss the appeal. This is the appellants' third kick at the can. Their submissions largely repeat those made in the Federal Court. Both the Associate Judge and the Federal Court Judge addressed them fully and rejected them.

[7] The parties do not dispute the general test for striking a notice of application for judicial review. A motion to strike should only be granted in those exceptional cases where the application is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc. (C.A.)*, [1995] 1 F.C. 588 at 600 (C.A.). There must be a "show stopper" or "knockout punch", an "obvious, fatal flaw striking at the root of [the] Court's power to entertain the application": *JP Morgan Asset Management (Canada) Inc. v. Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] at para. 47.

[8] Here, the appellants' motion to strike was based on an allegation of prematurity. As the Federal Court Judge observed, a party may not proceed to judicial review until all adequate remedial recourse available under the administrative process has been exhausted: *C.B. Powell*

Limited v. Canada (Border Services Agency), 2010 FCA 61 at paras. 30 and 31 and *JP Morgan* at paras. 84 and 85. Absent exceptional circumstances, judicial review is a remedy of last resort.

[9] As this Court elaborated in *JP Morgan*, if the Court is not certain whether: (1) there is recourse elsewhere, now or later; (2) the recourse is adequate and effective; or (3) the circumstances pleaded fit within the exceptional circumstances recognized in the caselaw, the Court cannot strike the notice of application for judicial review: *JP Morgan* at para. 91. This is consistent with the need to identify an obvious, fatal flaw in order to strike an application for judicial review.

[10] Guided by these authorities, the Federal Court Judge considered whether the respondent had failed to exhaust all available remedies after receiving the Bearspaw Nation Council protest hearing decision. The appellants submit that, pursuant to section 23 of the Election Regulations, an appeal to the Stoney Tribal Council was available.

[11] Section 10.2 of the Election Regulations provides that the decision of the Bearspaw Nation Council "shall be final and binding". The Federal Court Judge agreed with the Associate Judge's conclusion that a "fair reading" of this provision suggested a lack of appeal rights and that the respondent's only recourse was, in fact, judicial review.

[12] This led to a conclusion that it was not "plain and obvious" the respondent had failed to exhaust alternative remedies and that the Associate Judge did not err in dismissing the appellants' motion to strike. I agree with the Federal Court's conclusion.

[13] The appellants submit that the Federal Court Judge erred in following the guidance of this Court in *JP Morgan* (described above) regarding the threshold for striking an application for judicial review on the basis of prematurity. The appellants say that this Court's decisions in *Viaguard Accu-Metrics Laboratory v. Standards Council of Canada*, 2023 FCA 63 [*Viaguard*] and *Dugré v. Canada (Attorney General)*, 2021 FCA 8 [*Dugré*] effectively change that standard and that the Federal Court Judge failed to apply the modified standard.

[14] According to the appellants, *Viaguard* holds that if effective remedial recourse "might" be available, the notice of application for judicial review must be struck: at para. 5. They say that this is supported by *Dugré* where this Court stated (at para. 37) that the bar against premature judicial review is "next to absolute". I do not accept this submission. Neither case is incompatible with what this Court said in *JP Morgan* or undermines the Federal Court Judge's conclusions.

[15] In *Viaguard*, the applicant chose not to file a complaint challenging a decision of the Standards Council of Canada as provided under the Council's appeals policy. The applicant claimed that the process would not produce an effective remedy. The Federal Court determined that if an effective remedy "might" be available, the applicant was required to pursue the administrative complaint process to determine whether it would be, before seeking judicial review of the Council's decision. This Court agreed and upheld the Federal Court's decision to strike the application for judicial review on the ground of prematurity.

[16] The conclusion that an applicant must pursue an existing administrative process, even if the remedy is uncertain, before seeking judicial review is not inconsistent with *JP Morgan* and is not the issue here. The parties disagree not on whether a clearly available appeal process "might" have led to an effective remedy, but rather on whether an administrative appeal was available at all.

[17] *Dugré* does not assist the appellants either. In *Dugré*, the applicant sought judicial review of interlocutory decisions of the Canadian Judicial Council. This Court upheld decisions of the Federal Court striking out the applications for judicial review on the ground of prematurity. While the appellants submit that the protest hearing decision was interlocutory as well, that is precisely the issue that remains in dispute.

[18] The Federal Court Judge did not err in relying on the standard expressed in *JP Morgan*, concluding that the respondent's application should not be struck where there is uncertainty as to whether further recourse remained available under the Election Regulations.

[19] On the motion, both parties submitted motion records including affidavit and documentary evidence. The Federal Court Judge correctly noted that, as a rule, affidavit evidence is not admissible in support of a motion to strike an application for judicial review. This is because affidavit evidence may trigger a need for cross-examination and delay the judicial review application which is meant to be heard without delay. Further, a motion to strike requires identification of an obvious flaw, and a flaw that can be shown only with the assistance of an affidavit is not obvious: *JP Morgan* at paras. 51-53.

[20] There are exceptions to this rule, which the Associate Judge considered, determining that a portion of an affidavit of each party was admissible: *JP Morgan* at paras. 53 and 54. This was largely on the basis that the material was referred to and incorporated by reference in the notice of application for judicial review. The Associate Judge determined that the balance of the affidavits and documentary evidence was inadmissible, observing that it resembled what might be tendered in a proceeding regarding the merits of the prematurity issue.

[21] The appellants submit that the Federal Court Judge erred in failing to apply the law in *Picard v. Canada (Attorney General)*, [2019] F.C.J. No. 1600 [*Picard*] and cases following *Picard*, to support a conclusion that the Associate Judge ought to have admitted further affidavit evidence. In *Picard*, the Court determined that affidavit evidence may be relevant on a motion to strike a judicial review application for prematurity because a notice of application would not typically set out the facts on the existence of an adequate alternative remedy: para. 18. The appellants submit that the affidavit evidence of BFN Chief Darcy Dixon, determined to be inadmissible by the Associate Judge, goes to the very heart of the motion to strike, including evidence on BFN's "custom and practice" regarding administrative remedies under the Election Regulations.

[22] The Federal Court Judge did not err. *Picard* does not stand for the proposition that in circumstances where prematurity is alleged, all affidavit evidence must be admitted. Having considered *Picard*, the Federal Court Judge endorsed the Associate Judge's approach. The Associate Judge rejected the need for additional evidence in assessing the argument advanced by the appellants, determining that the Election Regulations would suffice. This was consistent with

the “plain and obvious” standard that was before the Associate Judge, and the conclusion that the merits of the prematurity issue were yet to be determined.

[23] Ultimately, as the Federal Court Judge observed, the Associate Judge’s decision to admit some, but not all, of the affidavit evidence was discretionary, to be afforded deference: *Sweet Productions Inc. v. Licensing LP International S.À.R.L.*, 2022 FCA 111 at para. 22, citing *Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53 at para. 145. I find no error in the conclusion to uphold the Associate Judge’s decision on the admission of affidavit and documentary evidence.

[24] The appellants also submit that the refusal to grant its motion to strike prevents the administrative decision maker, Stoney Tribal Council, from hearing an appeal in relation to BFN’s election. They say that where an Indigenous administrative process is at play, judicial intervention should be avoided, if possible, to encourage and respect Indigenous self-government, citing *Tallcree Tribal Nation v. Meneen*, 2024 FC 1184 at para. 21.

[25] As with many of the issues raised by the appellants, it is in the context of a hearing on the merits of the prematurity issue that this principle should be considered. As the Federal Court Judge observed, the presiding judge may find that the respondent did have recourse available to her under section 23 of the Election Regulations and must pursue the appeal to the Stoney Tribal Council before a judicial review application. The Federal Court’s refusal to grant the motion to strike does not preclude that outcome.

[26] For these reasons, I would dismiss the appeal, with costs in accordance with Tariff B, Column III of the *Federal Courts Rules*, S.O.R./98-106 awarded to the respondent.

"Monica Biringer"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-184-24
STYLE OF CAUSE:	BEARSPAW FIRST NATION AND BEARSPAW FIRST NATION COUNCIL (DARCY DIXON, PIERRE LEFTHAND, REX DANIELS, ROD HUNTER, ANTHONY BEARSPAW) ROB SHOTCLOSE AND MARVIN YELLOWHORN v. LAUREL-LEIGH LEFTHAND
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	FEBRUARY 12, 2025
REASONS FOR JUDGMENT BY:	BIRINGER J.A.
CONCURRED IN BY:	WEBB J.A. ROUSSEL J.A.
DATED:	MARCH 6, 2025

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