Federal Court  Cour fédérale

Date: 20161007

Docket: T-1254-16

Citation: 2016 FC 1127

Ottawa, Ontario, October 7, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

COWESSESS FIRST NATION NO. 73

Applicant

And

GARY PELLETIER, STAN DELORME, PATRICK REDWOOD, CAROL LAVALLEE, MALCOLM DELORME, CURTIS LEBRAT and TERRENCE LAVALLEE

Respondents

ORDER AND REASONS

[1] Terrence Lavallee makes a motion in writing, in accordance with Rule 369 of the *Federal Courts Rules*, SOR/98-106, seeking:

1. to be added as a respondent in the judicial review application initiated by the applicant;

2. an order pursuant to s 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, to extend by a further seven (7) days after the issuance of the order the period of time for a separate judicial review application to be filed by him, in case he were allowed to file a new judicial review application of the decision of the Cowessess First Nation Election Appeal Tribunal rendered on June 27, 2016.

I. Mr. Lavallee as a respondent

[2] The underlying matter consists of a judicial review application launched by the Cowessess First Nation No. 73 against a decision of the Cowessess First Nation Election Appeal Tribunal. The details of the decision are not relevant to the matter at hand. Suffice it to say that Terrence Lavallee presented a large number of grievances concerning the election of the Chief and Council of the Cowessess First Nation No. 73. He appealed alone and there is no discussion in the decision as to what was his standing to challenge the election to positions other than the one he stood election for. Mr. Lavallee was Chief between 2013 and 2016 and he sought election as Chief on April 27, 2016. He was defeated.

[3] However, there is no doubt that he was the engine behind the appeal which concluded with a 38-page ruling replete with allegations made by Mr. Lavallee. Each allegation by Mr. Lavallee is presented, counter arguments are discussed and a decision reached by the three-member panel of the Cowessess First Nation Election Appeal Tribunal.

[4] In the result, the Appeal Tribunal found that out of seven individuals elected to the position of Resident Councillor, three had to be disqualified for one reason or another. In accordance with the *Cowessess First Nation No. 73 Custom Election Act*, the next three candidates with the most votes were elected.

[5] The judicial review application launched by the Cowessess First Nation No. 73 has as respondents the three disqualified candidates and the next three candidates with the most votes. Mr. Lavallee is not named as a respondent. In my view, he should have been included.

[6] The first reason for reaching that conclusion is that Mr. Lavallee is one of the parties in the appeal heard by the Election Appeal Tribunal. Without his appeal, there is no appeal. It is with respect to some of his allegations that some candidates were disqualified *ex post facto*. It is those very disqualifications that are the object of the judicial review application. I fail to see how he can be ignored at this stage. The parties to the proceeding subject of an application for judicial review should be named as respondents (*DF v Human Rights Tribunal of Ontario*, 2012 ONSC 1530 (Divisional Court); *Tetzlaff v Canada (Minister of the Environment)*, [1992] 2 FC 215 (FCA) [*Tetzlaff*]; and more recently *Douglas v Canada (Attorney General)*, 2013 FC 451, [2014] 4 FCR 494). In *Tetzlaff*, the Federal Court of Appeal wrote: "By the same token, parties to proceedings before a federal board, commission or tribunal are always properly (and usually necessarily) made parties when those proceedings, or the results thereof, are the subject of an attack under s. 18 of the Federal Court Act." (para 20)

[7] But there is more. The Cowessess First Nation No. 73 concedes in its memorandum of facts and law that the judicial review application will not be opposed by the six named respondents, as "[e]ach of the Respondents has filed an affidavit stating that he or she either supports, or takes no position, with respect to the Application filed by the Cowessess First Nation." (para 67)

[8] Thus, not only ought Mr. Lavallee to have been named as a respondent, but his presence is now necessary (*Tetzlaff, supra*) to ensure that there will be a debate or, in the words of Rule 104, "to ensure that all matters in dispute in the proceeding may be effectually and completely determined". The judicial review application is in effect deliberately constructed by the applicant in order to exclude the person who initiated the appeal to leave as respondents those who will not oppose the judicial review application. Mr. Lavallee shall be added as a respondent and the style of cause adjusted accordingly.

II. Extension of time to file a separate application for judicial review

[9] Mr. Lavallee did not file his own judicial review application according to the requirements of s 18.1 of the *Federal Courts Act*. In order to be granted an extension of time (ss 18.1(2)), he must satisfy the *Hennelly* factors:

a) continuing intention to pursue the application

b) potential merit of the application

c) prejudice to the other party

d) reasonable explanation for the delay

(*Canada (Attorney General) v Hennelly* (1999), 244 NR 399).

[10] In my view, the prejudice that would be suffered by the applicant would be minimal if an extension of time was to be granted. However, the other three factors favour the Cowessess First Nation No. 73.

[11] There is no doubt that Mr. Lavallee was alive to the need to satisfy the *Hennelly* factors. His memorandum of facts and law seeks to address the factors *seriatim*. Thus, he claims that he has indicated throughout his intention to pursue the application. That is not the case.

[12] Mr. Lavallee states that he waited until the end of the 30-day period to see if an application would be launched by someone else. He said that "he did not want to incur the cost and engage in a legal dispute that would cause uncertainty to the governance of the Cowessess First Nation by engaging in a judicial review proceeding to set aside the other four Resident Councillor positions." Waiting to see is not showing a continuing intention to pursue the matter; in fact, that looks like the opposite.

[13] More importantly, the motion fails the criterion of the potential merit of his own application. Other than presenting generally that he would want to disqualify the seven councillors in order to have a new election ordered, there is no indication of the argument that could be advanced in support of such proposition. As noted by counsel for the Cowessess First

Nation No. 73, this contention flies in the face of Article 11.05 of the *Cowessess First Nation No. 73 Custom Election Act* which governs the conducting of appeals. The Act provides specifically for the election of candidates in case some other candidates are disqualified. It was incumbent on Mr. Lavallee to show more than there is "an arguable case for this relief." A statement will not do. That does not establish the merit; it is merely a general allegation. Is of the same ilk the statement that the Appeal Tribunal is wrong in not setting aside the election of the seven councillors. That does not establish any potential merit. It establishes nothing. There is no draft of a judicial review application that could be reviewed to assess the possible merits. Instead, the Court is left with general assertions. These miss the mark.

[14] The factor requiring a reasonable explanation for the delay is not satisfied either. Here, Mr. Lavallee states that he has been waiting in the weeds for more than 40 days. He was perfectly aware of the decision rendered, being one of the main protagonists, yet he wanted to be in a position to react to what his opponents were going to do. A strategy for litigation does not constitute an explanation for not bringing one's own application in due course. He puts it thus in his memorandum of facts and law, at para 25: "Subsequent to becoming aware of this proceeding, I have taken every step possible to oppose the proceeding and initiate my own application for judicial review. I have not delayed in taking these steps." But that is not the issue. There was a need to account for the first 30 days. In fact, the most important period of time was the initial 30 days. Mr. Lavallee had to explain why he did not initiate his own proceedings during that period. As pointed out earlier, strategic considerations are not a reasonable explanation.

[15] The combination of lack of reasonable explanation, lack of demonstration of continuing intention to pursue the application and the lack of showing of the potential merit of the application will generate only one possible conclusion. The motion for an extension of time to file a separate application for judicial review must be dismissed.

[16] The Cowessess First Nation No. 73 requested by letter dated September 15, 2016 that in case Mr. Lavallee's motion were successful in any part, a case management conference be arranged. This is premature. The parties should have their material prepared such that the judicial review application is perfected. The Rules of the Federal Courts exist that will assist with the resolution of most matters. Once the circumstances change that warrant a new request, it can then be considered in light of the facts.

ORDER

Accordingly, THIS COURT ORDERS that

1. Mr. Terrence Lavallee shall be added as a distinct party respondent and the style of cause shall be amended to reflect that fact in the judicial review application in the Court file T-1254-16;

2. the motion for an extension of time in which a separate application for judicial review can be filed is dismissed;

3. the parties having been equally successful and unsuccessful, there will not be a cost award in this matter.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1254-16
STYLE OF CAUSE:	COWESSESS FIRST NATION NO. 73 v GARY PELLETIER, STAN DELORME, PATRICK REDWOOD, CAROL LAVALLEE, MALCOLM DELORME, AND CURTIS LEBRAT

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	ROY J.
DATED:	OCTOBER 7, 2016

WRITTEN REPRESENTATIONS BY:

Joshua Morrison	FOR THE APPLICANT
No written representations	FOR THE RESPONDENTS
Terrence Lavallee	THE POTENTIAL RESPONDENT ON HIS WON BEHALF

SOLICITORS OF RECORD:

McPherson Leslie & Tyerman LLP Barristers and Solicitors Regina, Saskatchewan	FOR THE APPLICANT