

Federal Court



Cour fédérale

Date: 20230804

Docket: T-713-22

Citation: 2023 FC 1077

Edmonton, Alberta, August 4, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

LILIANA KOSTIC - NATIOYIIPUTAKKI;

Applicant

and

**HIS MAJESTY THE KING IN RIGHT OF
CANADA, THE ATTORNEY GENERAL OF
CANADA (“CANADA AND/OR INAC”)
THE MINISTER OF INDIAN AFFAIRS
AND NORTHERN DEVELOPMENT
CANADA AND ITS AGENTS
 (“AGC ET AL”)**

Respondents

and

**LAPSED PIKANI CHIEF STANLEY C. GRIER-KIAAYO TAMISOOWO;
LAPSED PIKANI COUNCILLORS DOANE K CROWSHOE (“DCS”);
ERWIN BASTIEN (“EB”); TROY KNOWLTON; WESLEY CROWSHOE;
RIEL PROVOST-HOULE; THEODORE PROVOST;
CHE LITTLE LEAF-MATUSIAK;**

Respondents

and

**CIBC TRUST CORPORATION, CIBC (“CIBC”) CIBC WEALTH MANAGEMENT –
WORLD MARKETS/WOOD GUNDY;**

Respondents

and

**GOWLING WLG (CANADA) LLP;
CAIREEN HANERT (“CH”); &
ITS NAVIGANT DIVISION FROM 2005/6 ONWARDS**

Respondents

ORDER AND REASONS

[1] The Respondents, Stanley Grier, Doane Crow Shoe, Erwin Bastien, Troy Knowlton, Wesley Crow Shoe, Riel Provost-Houle, Theodore Provost, Che Little Leaf-Matusiak, CIBC Trust Corporation, CIBC, CIBC Wealth Management – World Markets/Wood Gundy, Gowling WLG (Canada) LLP and Caireen Hanert, (the “Respondents”) and His Majesty the King in Right of Canada, the Attorney General of Canada, and the Minister of Indian Affairs and Northern Development Canada (collectively, “Canada”) each seek an order pursuant to section 18.4 of the *Federal Courts Act*, RSC 1985, c F-7 [“Act”] striking out the Notice of Application (the “Application”) filed in this proceeding , without leave to amend.

[2] As alternative relief, the Respondents and Canada (the “Moving Parties”) seek to strike the Affidavit of Liliana Kostic, sworn May 4, 2022, pursuant to Rule 81 of the *Federal Courts Rules*, SOR/98-106 [“Rules”].

[3] The Respondents filed a joint motion record. Canada filed a separate motion record but largely adopted the written submissions of the Respondents. At the request of the Applicant, Ms. Liliana Kostic, the motion was heard at a Special Sitting convened on June 13, 2023 at the Federal Court located at Canadian Occidental Tower—3rd floor, 635 Eight Avenue S.W., in the City of Calgary, Alberta.

I. Procedural Background

[4] At the outset, it must be noted that while Ms. Kostic is self-represented on this motion, she is no stranger to this Court or to the litigation process. In fact, she has launched numerous actions or applications or otherwise attempted to make submissions in matters before this Court related to the Piikani Nation [“Piikani”]. Indeed, at the hearing of this motion, Ms. Kostic asserted that she has been “held hostage to 17 years of litigation.” That litigation was initially brought in the Court of King’s Bench of Alberta and involves many of the parties named as Respondents in the present matter.

[5] The factual underpinnings to that litigation are addressed in other decisions of this Court (see for example, Court File T-680-20 and the Order and Reasons issued on April 11, 2023, by Madam Justice Strickland) and need not be repeated here.

[6] For present purposes, Ms. Kostic together with Ms. Glenda Pard (Court File No. T-714-22) (the “Applicants”) filed identical Notices of Application (the “Applications”) seeking to judicially review what they described as a “[D]ecision made on March 29, 2022 to proceed with a judicial review/appeal” made by the “lapsed Piikani Council” in Court File No. T-1224-21. Despite the narrow focus of the Applications, the Applicants sought broad relief as summarized in the Respondents written representations and set out below:

- (a) An order or declaration or writ of prohibition prohibiting the named members of Piikani Council from purporting to act on behalf of Piikani Nation;
- (b) An order or declaration allowing the Applicants to access and obtain legal funds out of the Piikani Trust in the amount of at minimum \$1,000,000;
- (c) An order or declaration to obtain an independent forensic audit from 2003 onwards;
- (d) An order replacing CIBC Trust Corporation as trustee of the Piikani trust;
- (e) An order or declaration prohibiting legal representation by the Gowling Respondents on behalf of Piikani Nation and its members;
- (f) An order or declaration that the Gowling Respondents have not been lawfully retained or paid to act for Piikani Nation and its members;
- (g) An order or declaration that the Gowling Respondents have acted improperly, illegally and in a conflict of interest;
- (h) An order or declaration prohibiting the Respondents from “continued and repeated defamation and slander” of Ms. Kostic and Ms. Pard;
- (i) An order striking out the injunctive relief obtained by Piikani Nation and Piikani Council in the Court of [King’s] Bench of Alberta;
- (j) A declaration that sections of the *Criminal Code* and *Trustee Act* be invoked as against the Respondents in this judicial review;

- (k) A declaration that the Respondents have brought the “Piikani Nation Custom Code” and bylaw into disrepute; and
- (l) A declaration that the Piikani Respondents’ term in office officially expired on January 7, 2022.

[7] Counsel represented Ms. Pard, a member of the Piikani Nation. By Order dated January 11, 2023, Ms. Pard discontinued her application.

A. *T-1224-21*

[8] Court File No. T-1224-21 involved a judicial review application brought by Mr. Erwin Bastien and the Piikani Chief and Council in respect of the Piikani Nation Removal Appeals Board’s (“Appeals Board”) decision not to remove a Councillor from the Piikani Nation Council. Mr. Bastien, a Councillor on the Piikani Nation Council, petitioned for the removal of another Councillor, Mr. Brian Jackson, but the Appeals Board did not support the removal. Mr. Bastien and the Piikani Chief and Council then filed an application for judicial review of the Appeal Board’s decision on August 6, 2021. On September 10, 2021, by Order of the Chief Justice, I was assigned to case manage that judicial review application.

[9] Also by Order of the Chief Justice dated March 15, 2022, the judicial review was scheduled to be heard on March 29, 2022, at a Special Sitting of the Court.

[10] By letter dated March 24, 2022, Mr. Gabor Zinner, a lawyer acting for Ms. Kostic sought to have the hearing postponed until such time as Ms. Kostic’s standing to intervene brought in other proceedings had been determined.

[11] On March 25, 2022, the Court received further correspondence from the parties responding to Mr. Zinner's request as well as correspondence directly from Ms. Kostic. On that same date, I issued a Direction advising the parties and others that the Court would not entertain or respond to requests for relief that did not conform to the *Rules* or the Consolidated General Practice Guidelines.

[12] On March 28, 2022, Ms. Kostic and Mr. Rick Yellow Horn attempted to file a motion record seeking to be added as parties or interveners at the hearing and to stay the hearing. They asserted that the Applicants had no standing to pursue the judicial review. Their motion was rejected for filing and the hearing proceeded before Mr. Justice Grammond as scheduled.

[13] On April 5, 2022, Ms. Kostic and Ms. Pard filed their respective Applications for judicial review.

[14] On April 22, 2022, Mr. Justice Grammond released his decision dismissing the judicial review application. The matter is now under appeal.

B. *T-713-21/T-714-21*

[15] On June 30, 2022, I convened a case management conference with the parties. In a scheduling Order dated the same day, I granted the Respondents and Canada leave to serve and file motions to strike the Applications. I deferred the preliminary relief sought by the Applicants until after the motions to strike were determined. That relief included advanced costs, consolidation of the two Applications, amendments to the Applications, delivery of the certified

tribunal record, an intervener motion to be added as a party in appeal A-115-22, or alternatively, a stay of the appeal and an interim order prohibiting the continued defamation and criminal libel of the Lapsed Council. I set timelines for service and filing of the motion materials and reserved my decision to grant an oral hearing until after the motion materials were served.

[16] On July 14, 2022, Ms. Kostic filed a Rule 51 appeal from my scheduling Order, making it returnable at a General Sitting of the Federal Court in Calgary, Alberta on December 5, 2022.

[17] In Order and Reasons dated December 9, 2022, Madam Justice McDonald dismissed Ms. Kostic's Rule 51 motion with costs to the Respondents.

[18] Notwithstanding the clear terms of my June 30, 2022 Order, which was limited to hearing the Moving Parties' motions to strike, Ms. Kostic attempted to file a responding motion record which included a cross-motion purporting to address the preliminary relief she raised at the June 30, 2022 case management conference. Ms. Kostic's motion record was rejected for filing but I permitted her an extension of time to file a compliant motion record a month after the deadline. Despite my Direction to tender a compliant motion record, Ms. Kostic's motion record continued to seek relief beyond the clear terms of my June 30, 2022 Order.

[19] On December 13, 2022, in response to correspondence from counsel for CIBC, I confirmed that notwithstanding the contents of Ms. Kostic's responding motion record, the only matter for hearing was the Moving Parties' motions to strike as confirmed by Justice McDonald's Order.

[20] Because Ms. Kostic's was unavailable for an earlier hearing, the hearing of this matter was scheduled for April 26, 2023, in-person at the Federal Court in Calgary, Alberta. Due to exceptional circumstances arising from the federal public service strike, and over the objection of Ms. Kostic, the hearing was rescheduled for June 13, 2023.

II. Legal Framework

[21] It is beyond doubt that this Court has jurisdiction to strike a notice of application by virtue of its plenary jurisdiction to restrain the misuse or abuse of the Court's processes. However, the threshold for striking an application for judicial review is high. The Court will only strike out a notice of application where it is so clearly improper as to be bereft of any possibility of success. In other words, "there must be a 'show stopper' or a 'knockout punch' - an obvious, fatal flaw striking at the root of this Court's power to entertain the application": *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA)(QL) at page 600 ["*David Bull*"]; *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47-48 ["*JP Morgan*"].

[22] In the same vein, that plenary power also provides the Court with jurisdiction to strike a proceeding for mootness: *Lee v Canada (Correctional Service)*, 2017 FCA 228 at paras 6-80; *Hässle v Apotex Inc*, 2008 FCA 88 at paras 12-13; *Mudie v Canada (Attorney General)*, 2021 FC 839 at para 10.

[23] Where the issue raised by the moving party as the basis for dismissing the Application is determined to be a debatable issue, the circumstances do not warrant dismissal of the Application

at a preliminary stage. Rather, the issue should be determined by the Applications Judge: *David Bull, supra* at para 15.

[24] The Application should be read as generously as possible, in a manner that accommodates any inadequacies in the allegations that are merely the result of deficiencies in the drafting of the document: *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)*, 2018 FC 991 at para 26.

[25] The Court must also read the Application “holistically and practically without fastening onto matters of form” in order to gain “‘a realistic appreciation’ of the application’s ‘essential character’”: *JP Morgan, supra* at para 50.

[26] On a motion to strike an application for judicial review, the facts asserted by the applicant in the notice of application are presumed to be true unless manifestly incapable of being proven: *Toyota Tsusho America Inc v Canada (Canada Border Services Agency)*, 2010 FC 78 at para 13, *aff’d* 2010 FCA 262; *Turp v Canada (Foreign Affairs)*, 2018 FC 12 at para 20.

[27] As the Federal Court of Appeal has cautioned, the Court ought to focus on the essential character of the Application; this provides helpful context: *Wenham v Canada*, 2018 FCA 199 at para 34.

III. Issues

[28] The issues before this Court properly stated are:

1. Does the Applicant have standing?
2. Is the issue moot?
3. Is the Application an abuse of process?
4. Is the Application so clearly improper as to be bereft of any possibility of success?

[29] For the reasons that follow, I am satisfied that the Application must be struck. In my view, Ms. Kostic has no standing to bring the within Application. Further, and in any case, the Court having heard the application in Court File No. T-1224-21 on March 29, 2022, and having issued a decision shortly thereafter, renders this Application moot.

[30] Standing and mootness are threshold issues. Once they are determined, there is no need to determine other arguments raised by the Moving Parties.

[31] However, if I am wrong in my assessment of those preliminary matters, I am satisfied that the Application is nonetheless an abuse of process and clearly bereft of any possibility of success. Put another way, it is doomed to fail. In coming to this conclusion, I note that Ms. Kostic, in both her written and oral submissions, scarcely addressed the issues before the Court and instead, fastened onto the issues that she sought to have determined at the June 30, 2022 case management conference. That deliberate defiance of the Court's Direction does not assist her case.

A. Standing

[32] The Moving Parties argue that the Application should be struck because Ms. Kostic has no standing to seek the relief that she does. Referring to *Apotex Inc v Canada (Governor in Council)*, 2007 FC 232 at para 33, the Moving Parties note that on a motion to strike, standing is a preliminary matter; where an applicant has no standing to initiate the application, it should be struck.

[33] Standing may arise through a direct interest in the matter under review or may, in appropriate circumstances, be granted to a party as “public interest standing”: *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 [*Borowski*].

[34] Here, I agree with the Moving Parties that the Ms. Kostic’s pleading, generously read, does not disclose that she is “directly affected” by the March 29, 2022 decision as that term is used in subsection 18.1 of the Act. The mere fact that a hearing proceeded in a matter to which she was not a party and for which no relief was sought against her, cannot be said to have affected her legal rights, imposed legal obligations on her or prejudicially affected her in some way: *League for Human Rights of B’Nai Brith Canada v Odynsky*, 2010 FCA 307; *Rothmans of Pall Mall Canada Ltd v Canada (MNR)*, 1976 CanLII 2258 (FCA), [1976] 2 FC 512 (TD); *Irving Shipbuilding Inc v Canada (Attorney General)*, 2009 FCA 116.

[35] Ms. Kostic is not a Piikani member and while she asserts that she is a party “whose legal interests, integrity and reputation are directly affected by the March decision”, there is nothing before the Court, including in her Application, which supports that contention.

[36] Ms. Kostic asserts that she has an interest because the Petition, which sought the removal of Mr. Jackson as a Councillor, included multiple references to her by name. However, she was not named as a party in Court File No. T-1224-21 and did not make a proper motion to intervene in that application. It follows then, that she has no standing to bring the present Application to challenge the hearing in T-1224-21.

[37] I am also satisfied that Ms. Kostic does not meet the test articulated in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524 at para 37 for public interest standing.

B. Mootness

[38] In *Borowski* at pages 344-345, the Supreme Court of Canada set out a two-step approach to be applied in a mootness analysis:

- (1) Does a live dispute that affects the rights of the parties continue to exist?
- (2) Should the Court exercise its discretion to decide the merits of the case, even in the absence of a live controversy?

[39] With respect to the first step, the Moving Parties assert that there is no live controversy. They argue that as the hearing proceeded as scheduled on March 29 2022, and a decision was released thereafter, there is no live dispute between the parties with respect to the March 29, 2022 hearing. I agree. The first stage of *Borowski* has not been met.

[40] Under *Borowski's* second stage, once mootness has been established, the onus shifts to the Applicant to show, on a balance of probabilities, that a decision on the Application will have a practical effect on the rights of the parties. In exercising its discretion to decide a matter on its merits “despite the absence of a live controversy”, the Court may be guided by underlying policy rationales including respect for the adversarial system; concerns for judicial economy; and the judiciary’s proper law-making function: *Borowski* at page 345.

[41] As set out above, the Application seeks an order of *certiorari* quashing and setting aside the Piikani Council’s decision to proceed with the March 29, 2022 hearing. Since the hearing proceeded as scheduled, there is no practical purpose served in permitting this moot matter to proceed. Ms. Kostic has not met her burden to show the Application will have a practical effect on the rights of the parties. Indeed, given my view that Ms. Kostic lacks standing, she is not even in a position to address the rights of the parties in T-1224-21.

C. Abuse of Process

[42] In view of my decision with respect to standing and mootness, it is unnecessary to address the Moving Parties’ arguments on abuse of process. Nevertheless, for the sake of completeness, I will briefly consider the arguments advanced by the Moving Parties.

[43] The Moving Parties advance several arguments asserting the Application is an abuse of process and must be struck.

[44] First, the Moving Parties argue that pursuant to section 18.1(3) of the Act, much of the relief sought in the Application is outside the jurisdiction of this Court to grant. As the Moving Parties correctly argue, the essential character of the Application is not a review of the March 29, 2022 decision (if in fact it is a decision at all) but a challenge to the legitimacy of the currently elected Chief and Council. Certainly, Ms. Kostic does not deny that. Indeed, at paragraph 60 of her affidavit, she deposes that one of the grounds of her Application is “To prohibit its continued, unlawful and ongoing Trust embezzlement and to prohibit and remove from office its continued role acting as the Piikani Lapsed Chief and Councillors which Role has been objected [to] by the members since at least October 2020 and [the] term ends on January 7, 2022.”

[45] Second, the Moving Parties argue that the Application is an abuse of process because it is a collateral attack on decisions made in respect of Court File No. T-1224-21, specifically, my Direction that prohibited Ms. Kostic and Mr. Yellow Horn from participating in the hearing of the judicial review.

[46] Third, the Moving Parties argue that the March 29, 2022 decision is not a decision capable of being judicially reviewed. Rather, the fact that a hearing took place on March 29, 2022 is a function of the judicial scheduling process and is not a “decision” with the meaning of section 18.1 of the Act. Furthermore, Ms. Kostic is not a party directly affected by the March 29, 2022 hearing

because she was not a party to those proceedings and the decision rendered by Justice Grammond does not affect her legal rights or obligations.

[47] Fourth, the Moving Parties contend that Ms. Kostic has not named proper respondents as required by section 2 of the Act. That section defines “federal board, commission or tribunal” as “any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown....” The Moving Parties argue that a band council may be a “federal board, commission or other tribunal” but only the Piikani Council as a collective can represent, make decisions or otherwise act on behalf of the Nation. Individual members are not proper respondents. Nor is Canada or the various other named Respondents, including the CIBC and Gowling Respondents.

[48] Finally, the Moving Parties assert that the Application is prolix, vague and confusing.

[49] In response, Ms. Kostic argues that the matters are cumulative and complex. At paragraph 38 of her written representations, she asserts that she is a directly affected party “whose legal rights and human rights have been violated and repeated, she has every right at law to seek declaratory relief as against the parties attached to the Federal Board, to then be able to seek redress for quantum of damages in the future claim.”

[50] Further, at paragraph 51 of her written representations, she argues that she is directly affected “with the Decisions of the Lapsed C and C and specifically seeks Declarations because the Respondents or some of them or their privies have retriggered and repeated the scandalous and

vexatious defamation and slander in respect to false fraud allegations struck by th[e] [C]ourt of [King's] Bench on April 7, 2014....”

[51] As noted earlier, Ms. Kostic fails to address the legal issues raised by the Moving Parties in anything other than a merely superficial manner.

[52] Having reviewed the materials filed on this motion as well as the oral submissions made at the hearing, I agree with the arguments advanced by the Moving Parties. Much of the relief sought by Ms. Kostic is not available on an application for judicial review. Indeed, much of the relief sought is simply outside the jurisdiction of the Federal Court. For example, the relief sought at paragraph 6 (h), (i) and (j) set out above is beyond this Court's jurisdiction to grant even on a properly constituted pleading.

[53] Further, I am not satisfied that the March 29, 2022 “decision” is a decision at all and it certainly is not a decision capable of being reviewed by the Court. Rather, the fact that the parties attended a scheduled hearing is simply a function of the judicial process. To suggest otherwise is meritless.

[54] In any event, Ms. Kostic is not a person directly affected by the March 29, 2022 hearing and has no direct interest in the outcome. To the extent that Ms. Kostic has concerns about alleged defamation, those are matters for another court.

[55] I am satisfied that the Application suffers from innumerable deficiencies and is doomed to fail. Given my determination that Ms. Kostic has no standing to bring the Application, there is no need for me to consider whether amendments might cure the defects.

IV. Costs

[56] The Moving Parties seek an order of enhanced costs of a lump sum of \$10,000 citing the following factors:

1. The amount of work required to respond to the Applicant's submissions;
2. The fact that the Applicant's materials were lengthy and difficult to follow;
3. The failure of the Applicant to meaningfully respond to the Moving Parties written representations;
4. The fact that the Application was simply a collateral attack on my Direction;
5. The abusive allegations of breach of fiduciary duties levelled at some of the respondents; and
6. The inclusion of improperly named Respondents.

[57] In awarding costs, the Court must bear in mind the three-fold objective of providing compensation, promoting settlement and deterring abusive behaviour: *Air Canada v Thibodeau*, 2007 FCA 115. The Moving Parties rely on this Court's decision in *Gordon v Canada*, 2019 FC

1348 for the proposition that enhanced costs may be appropriate in instances of meritless allegations of bad faith, fraud and dishonesty.

[58] In this case, Ms. Kostic's Notice of Application, which is 108 paragraphs, contains numerous instances of allegations of impropriety levelled against the Moving Parties. For example, at paragraph 100, she asserts that Council and the Minister of Crown-Indigenous Relations and Northern Affairs were biased, acted in a conflict of interest and/or breached their fiduciary duties. At paragraph 41, she seeks an order or declaration "Preserving the status quo and restraining the Respondents from executing and/or further embezzlement in whole or in part, the Settlement and or Trust Agreement." At paragraph 42, the Applicant seeks a declaration that sections of the *Criminal Code* be invoked against the Respondents.

[59] As indicated earlier, much of this relief is not available in this Court. In any case, to plead in such a high-handed manner is not be condoned by this Court. That is not to suggest that litigants must be genteel in their pleadings, but wholesale allegations of impropriety levelled against a broad group of entities and individuals rises to the level of abusive.

[60] In her oral submissions on costs, Ms. Kostic suggested that the issues are debateable and hence an award of costs should not be made. Additionally, she asserted that only the Applications Judge could determine costs. Finally, she argued that Canada has not demonstrated any entitlement to costs.

[61] Costs are a matter entirely within the discretion of the Judge hearing that matter. I am satisfied that an enhanced award of costs is warranted in this case. I exercise my discretion to award the Moving Parties a single lump sum of \$ 7,500 payable forthwith and in any event of the cause.

ORDER in T-713-22

THIS COURT ORDERS that:

1. The motion is allowed.
2. The Application is struck without leave to amend.
3. Costs of \$7,500 inclusive of tax and disbursements are payable to the Moving Parties, forthwith and in any event of the cause.

"Catherine A. Coughlan"

Associate Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-713-22

STYLE OF CAUSE: LILIANA KOSTIC - NATIOYIIPUTAKKI; v HIS MAJESTY THE KING IN RIGHT OF CANADA ET AL

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: JUNE 13, 2023

REASONS FOR ORDER AND ORDER: COUGHLAN A.J.

DATED: AUGUST 4, 2023

APPEARANCES:

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