**Date: 20080917**

**Docket: T-1305-07**

**Citation: 2008 FC 1041**

**Toronto, Ontario, September 17, 2008**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**MUSHKEGOWUK COUNCIL and STAN LOUTTIT**

**Applicants**

**and**

**THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF NATURAL RESOURCES (THE HON. GARY LUNN P.C., M.P.), and THE NUCLEAR WASTE MANAGEMENT ORGANIZATION**

**Respondents**

## REASONS FOR ORDER AND ORDER

[1] This is an appeal by the Applicants under Rule 51 of the *Federal Courts Rules* of the Order of Prothonotary Milczynski dated July 8, 2008 dismissing a motion to add paragraphs 3 and 45-54 (the "Alternative Relief") as part of the Consolidated and Revised Application. The Applicants also seek an Order granting them leave to amend the now consolidated application without being required to underline these amendments, an Order extending the time to serve this Notice of Motion appealing the Order of Prothonotary Milczynski; and its costs of this motion. The request to extend the time, is granted, on consent.

**Background**

[2] Two Notices of Application were issued on July 16, 2007 by the Applicants regarding separate but related decisions made by the Minister of Natural Resources and the Governor in Council under section 15 of the *Nuclear Fuel Waste Act*, S.C. 2002, c. 23. These applications sought writs of certiorari and general declaratory relief.

[3] Both applications were proceeding in parallel. They are based on similar facts and legal issues and given the nature of the applications the Applicants brought a motion for various procedural relief including the consolidation of these applications which was granted by the Prothonotary on consent. The Applicants also requested an amendment to plead the claim for declaratory relief with some specificity as well as to plead the material facts in support of that claim for relief. This is the only portion of the motion that was contested when it came on for hearing. Specifically, the amendment to the relief being sought was to add the following on paragraph 3 of the application:

> In the alternative, the Applicants make application for:
>
> a. an order declaring that the Minister's Decision cannot be implemented in areas of Ordovician sedimentary rock (including the areas that Mushkegowuk First Nations occupy around James Bay);
>
> b. an order declaring that the Cabinet Decision cannot be implemented in areas of Ordovician sedimentary rock (including the areas that Mushkegowuk First Nations occupy around James Bay);
>
> c. an order declaring that the Minister's Decision only permits the disposal of 3.6 to 4.4 million bundles of nuclear fuel waste;
>
> d. an order declaring that the Cabinet Decision only permits the disposal of 3.6 to 4.4 million bundles of nuclear fuel waste;

> e. an order declaring that the Minister's Decision only permits the disposal of nuclear fuel waste from existing nuclear facilities that use natural uranium fuel;
>
> f. an order declaring that the Minister's Decision only permits the disposal of nuclear fuel waste from existing nuclear facilities that use natural uranium fuel;

[4] The relevant portion of the Prothonotary's reasons for dismissing the motion for the Alternative Relief requested is as follows:

> The general principles on a motion to amend are fairly well settled. Rule 75 of the *Federal Courts Rules* provides that the Court may, at any time, allow a party to amend its pleadings on such terms as will protect the rights of the parties, does not give rise to prejudice that is not compensable by an award of costs and relates to or will assist in determining the real questions and controversy between the parties.
>
> On a motion to amend a pleading, a party is not expected or required to prove its case to the required standard of proof, and the Court must assume that the facts pleaded in the amendments are true. It is also proper on such motion (*sic*) to subject the proposed amendment to the same test as applies on a motion to strike, having regard in particular to the enumerated grounds in Rule 221, including consideration of whether the proposed amendments disclose no reasonable cause of action, are immaterial, frivolous, vexatious or are such as to prejudice a delayed a fair hearing of the proceeding on its merits.
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> …
>
> I agree with the Responding Parties, that this alternate relief is not available. It would have the Court making specific policy decisions regarding the disposal of nuclear fuel waste – the location of its disposal, amounts of fuel to be disposed of, and the type or source of nuclear fuel waste. Such decisions require consideration of a variety of scientific, social, economic and political factors come as well as the requirements of the *Nuclear Fuel Waste Act*.
>
> While the Court can inquire into whether a decision-maker, who make such a policy decision, has the authority to make that decision

> and has done so in compliance with the requirements of statutory and administrative decision-making, the Court cannot inquire or make determinations on the merits of the decision, (*MacMillan Bloedel Ltd. v. British Columbia*, [1984] B.C.J. No. 1472 (B.C.C.A.)).

**Issues**

[5] The Applicants submit that the Court in this appeal ought to consider its motion to amend *de novo* because the declaratory relief it wishes to claim is vital to the final issues in this application or alternatively, because the Prothonotary clearly erred in applying the test for a motion to strike, as set out in Rule 221, to motions to amend applications when Rule 221 applies only to actions.

**Analysis**

*Is the amendment vital to the final issue of the case?*

[6] In *Merck & Co., Inc. v. Apotex Inc.*, [2004] 2 F.C.R. 459 (C.A.), the Federal Court of Appeal set out the standard of review of discretionary orders made by a Prothonotary. It directed that the first question to be addressed is whether the question is vital to the final issue.

> ... [A] judge should logically determine first whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read: "Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts."

In *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425 (C.A.), at para. 97, MacGuigan J.A. described questions that are vital as "questions vital to the final issue of the case, i.e. to its final resolution".

[5] The Applicants submit that the proposed amendment is vital to its application. In this regard its position is that in dismissing the proposed amendment, the Prothonotary has closed off the Applicants' ability to obtain specific declaratory relief in the proceeding. First, that is not the case. It remains open to the hearing Judge to issue a declaration that the Respondents failed to comply with the legislation in regards to the consultations that the Applicants claim were not properly done.

[6] More importantly, as was conceded by counsel for the Respondents, if the Applicants can establish that the Respondents breached the Act, then it would be expected that the Court will issue an Order quashing the decisions and sending them back, perhaps with direction, to make the required decisions in accordance with the Act.

[7] Accordingly, as the question determined by the Prothonotary was not vital to the final issue of the case, a review *de novo* is warranted only if the Prothonotary's Order was clearly wrong, in the sense that it was based upon a wrong principle or upon a misapprehension of the facts.

*Was the Prothonotary's Exercise of Discretion based on a wrong principle?*

[8] As noted, the Applicants allege that the Prothonotary erred in applying the test for a motion to strike, as set out in Rule 221, to the motion to amendment an Application for Judicial Review, to which Rule 221 does not apply.

[9] There is no question that Rule 221 does not apply to applications; however, this was not a motion to strike and the Prothonotary makes it clear that in exercising her discretion to amend she is considering, as one of the factors, whether the relief claimed discloses something that the Court could award if the Applicants were successful. In my view, that is not an improper consideration when considering whether or not to exercise one's discretion to permit an amendment to an application, even at an early stage in the litigation.

[10] Amendments are always within the discretion of the Court as the party pleading is expected to define the issues and specify the relief requested in the first instance. Occasionally facts are discovered or the characterization of the *lis* between the parties changes such that an amendment is in the interests of justice. I would be hard pressed to be convinced that permitting an amendment to raise a claim for relief that cannot reasonably be awarded by the Court is ever in the interest of justice.

[11] Even if Rule 221 does not apply directly to applications the "plain and obvious" test developed in relation to motions to strike in an action can be relevant to whether or not a motion to amend under Rule 75 should be granted. In *Songhees Indian Band v. Canada (Minister of*

*Indian Affairs and Northern Development)*, 2005 FC 1464, an application not an action, Justice Harrington at paragraph 14 wrote as follows:

> I am satisfied the Prothonotary was correct in saying that "the general principle is that amendments to proceedings ought to be allowed if it will serve the interests of justice, unless doing so would cause injury or prejudice to other parties that cannot be compensated by costs. An amendment will not serve the interests of justice and will be refused if it is plain and obvious that the Applicants could not succeed on the proposed amendments." See *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (C.A.). Although the "plain and obvious test" as set out in such cases as *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 is used to strike out pleadings in accordance with rule 221, it is equally applicable to proposed amendments. The *Merck* case, *supra*, dealt with the proposed withdrawals of admissions and a dramatic departure from previous pleadings. Nothing of that sort applies here.

[12] I share his view.

[13] I also share the view expressed by Prothonotary Milczynski that what the Applicants are seeking with this amendment would require the Court to issue a declaration that, in effect, would replace the Minister and elected officials as the decision makers with this Court. That is not our role. While the Court can review the decisions that they make, our role is not to rule on the merits of the decisions made fairly and by way a process that follows the principles of natural justice.

[14] Accordingly, this motion must be dismissed.

## ORDER

**THIS COURT ORDERS that:**

1. The time for serving the Notice of Motion to appeal the Order of Prothonotary Milczynski is extended as required; and

2. This motion is otherwise dismissed with costs.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1305-07 |
| **STYLE OF CAUSE:** | MUSHKEGOWUK COUNCIL and STAN LOUTTIT v. THE ATTORNEY GENERAL OF CANADA, THE MINISTER OF NATURAL RESOURCES (THE HON. GARY LUNN P.C., M.P.), and THE NUCLEAR WASTE MANAGEMENT ORGANIZATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | September 15, 2008 |
| **REASONS FOR ORDER AND ORDER:** | Zinn J. |
| **DATED:** | September 17, 2008 |

**APPEARANCES:**

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| Murray Klippenstein and Basil Alexander | FOR THE APPLICANTS |
| Liz Tinker | FOR THE RESPONDENTS |

**SOLICITORS OF RECORD:**

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| Klippensteins<br>Barrister & Solicitor<br>Toronto, Ontario | FOR THE APPLICANTS |
| John H. Sims, Q.C.<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENTS |
| Gowling Lafleur Henderson<br>Toronto, Ontario | FOR THE RESPONDENTS |