Date: 20030630

Docket: T-2160-02

Citation: 2003 FCT 815

BETWEEN:

MARGARET ANDREA EDGAR

Applicant

and

KITASOO BAND COUNCIL: PERCY STARR, CHIEF;
ARCHIE ROBINSON, COUNCILLOR;
ROSS NEASLOSS;
BRIAN MASON, COUNCILLOR

Respondents

REASONS FOR ORDER

HARGRAVE P.

[1]

This judicial review application, commenced 23 December 2002 and which has now proceeded as far as the serving and filing of affidavits, involves the challenge of an in-camera Band Council Resolution of 21 November 2002 ("Resolution"). That Resolution banned the Applicant from the central coast British Columbia Community of Klemtu, by reason of an as yet unproven charge involving $20 worth of marihuana. The Applicant wishes to convert the application to an action pursuant to section 18.4(2) of the *Federal Court Act*.

CONSIDERATION

[2] The grounds for the application for judicial review are, to paraphrase:

(i) an arrest at Klemtu, by or on the instruction of the Kitasoo-Xaixais Police Board on 22 November 2002, the day after the Band Council banishment Resolution was issued and an immediate removal from Klemtu;

(ii) the Band Council acted without jurisdiction and beyond its jurisdiction, or refuse to exercise its jurisdiction;

(iii) the Band Council failed to observe the principle of natural justice by issuing the Band Council Resolution without notice, without disclosure of the case against the Applicant and without affording the Applicant an opportunity to respond; and

(iv) the Band Council erred in law by finding, in their Resolution, that the Applicant had committed an indictable offence, whereas the Applicant was merely charged, a matter not yet having gone to trial, thus being presumed guilty.

[3] The Applicant seeks to have this judicial review application converted to an action on various grounds which include: (1) that the affidavit evidence is polarized and that a proper determination consideration can only be made by an assessment of each piece of evidence based on *viva voce* testimony; (2) that all of the evidence is, by its nature, such that it depends upon findings of credibility, which in turn requires the witnesses to appear in person, so that the court may assess their demeanour and credibility; (3) that the facts are sensitive by reason of the small and remote nature of the community, the history and culture fo the community and the roles of individual members of the community and how their relationships intertwine, the assessment of which, as to relevance and weight, cannot adequately be established by affidavit evidence; (4) that since the Court Order of 14 February 2003, staying her banishment, the Applicant, having returned to Klemtu, has been

subject to harassment, including being prevented both from working and from visiting the community school; (5) that her family has been approached in an unfair manner by local officials; (6) that the affidavit evidence does not address the ongoing nature of the effects of the Band Council Resolution; and (7) that these issues, which are of importance to the aboriginal community of Klemtu, are particularly difficult to assess in affidavit form, because oral traditions have been recognised as a generally preferred manner in which to collect and compile evidence for legal proceedings. Counsel for the Applicant, as a result of all of this, submits that affidavit evidence is inadequate to fully inform the Court.

[4] The standard to apply, in determining whether a judicial review proceeding ought to be converted into an action pursuant to Rule 18.4(2) of the *Federal Court Act*, is whether evidence by affidavit will be inadequate, not that viva voce evidence at trial might be superior; and even then the conversion should only be allowed in the clearest of circumstances: see *Macinnis v. Canada (Attorney General)* (1994), 166 N.R. 57 (F.C.A.) at 60. The Court of Appeal in *Macinnis* set out various elements which might and might not meet this standard, but made the observation that:

> It is, in general, only where facts of whatever nature cannot be satisfactorily established or weighed through affidavit evidence that consideration should be given to using subsection 18.4(2) of the Act. (loc. cit.)

The Court of Appeal also observed that a conversion might occur "... where there is a need for viva voce evidence, either to assess demeanour and credibility of witnesses or to allow the Court to have a full grasp of the whole of the evidence whenever it feels the case cries out for the full panoply of a trial..." (loc. cit.). What I take from *Macinnis* is that if sufficient facts to enable the Court to decide the issue or issues can be generated by affidavit evidence, the conversion ought not to occur. In the present instance Mr Justice Lemieux seemed to easily find sufficient facts to enable him to issue strongly worded reasons arising

out of the successful application for an interlocutory injunction staying the impugned Band Council Resolution.

[5] The Court of Appeal in *Drapeau v. Canada (Minister of National Defence)* (1995), 179 N.R. 398 (F.C.A.) did add to *Macinnis* by pointing out that section 18.4(2) "places no limits on the considerations which may properly be taken into account in deciding whether or not to allow a judicial review application to be converted into an action." (page 399). There, among the factors which the trial judge had properly taken into account, included the desirability of facilitating access to justice and also in converting judicial review, which could deal with only one decision, into an action, which might deal with a series of decisions which caused damage to the plaintiff, thus allowing the plaintiff to proceed by way of one action, instead of by way of a multiplicity of judicial review proceedings. In the present instance, while the Band Council and the Kitasoo-Xaixais Police Board appear to have made subsequent unilateral decisions prejudicial to Ms Edgar, she raises only one issue for judicial review.

[6] In the present instance at issue is a Band Council Resolution of 21 November 2002:

> WHEREAS due to the actions of Margaret Edgar as brought before the Kitasoo Band Council by the Kitasoo-Xaixais Police Board.
>
> WHEREAS on the 9th day of September, 2002 you did traffic marihuana to an undercover police officer, an indictable offence under the Controlled Drug and Substances Act.
>
> WHEREAS as a result of your actions and upon the recommendation of the Kitasoo-Xaixais Police Board you are hereby banished from the village of Klemtu and prohibited from returning to the village of Klemtu for any reason.
>
> WHEREAS if you enter the village of Klemtu in violation of this Band Council Resolution you are subject to arrest and charges as a trespasser.
>
> THAT this Band Council Resolution will be subject to review by the Kitasoo Band Council in October 2004.

At issue is whether the making of this Resolution, in camera, both without notice to and without the participation of Ms Edgar, either breached the principle of natural justice or infringed upon her liberty and security of the person in accordance with the principles of fundamental justice as provided for in section 7 of the *Charter*.

[7] Counsel for the Respondents submits that this is a narrow issue involving the legality of the Band Council Resolution.

[8] Counsel for the Applicant submits that there are a multitude of complex and sensitive issues which relate to historically and culturally specific relationships in the small community of Klemtu which cannot be adequately considered and assessed without *viva voce* evidence. Counsel goes on to point out that it is well-established legal and anthropological knowledge that the preferred method of communication of evidence, for many aboriginal peoples, is oral testimony. Counsel feels that the irrelevant animosities were involved in making the decision and that those involved ought to give their evidence in a trial setting, subject to cross-examination, thus allowing the judge to view the demeanour, substance and credibility of the witnesses.

[9] Counsel for the Respondents questions the need for *viva voce* evidence to explain to the judge the organization of aboriginal communities, relying upon the unreported decision of Mr Justice Lemieux in *Misquadis v. Canada (Attorney General)*, 12 September 2002, docket T-1274-99, [2000] F.C.J. No. 1488 (QL), at issue being the delivery of educational and training services to urban aboriginal communities. In *Misquadis* the applicants wished to have oral testimony not only to resolve contradictions in the affidavits, but also on the basis that “the nature of aboriginal communities are oral societies and that the history and politics of aboriginal communities is not found in books or in written

materials but passed on through oral tradition." (paragraph 11). This submission was rejected for the Court not only felt that conflicting affidavit evidence was not a special circumstance, but also that oral testimony was not needed "... to explain how urban aboriginal communities are organized today and how they make decisions." (paragraph 15). However Mr Justice Lemieux went on to grant the applicant leave to file further affidavit evidence on how urban aboriginal communities functioned in Winnipeg, Toronto and Niagara Falls. This case is helpful, but not particularly on point, for at issue is not the way in which the community of Klemtu is structured, but rather the basis for the allegedly unfair approach taken in promulgating the Band Council Resolution. However, Mr Justice Lemieux also had to consider whether oral evidence was necessary in order to explain interrelationships in the communities.

[10] In the present instance a major concern is the existence of two letters, both written after this judicial review proceeding was commenced. The first is dated 5 April 2003 and is signed by Members of the Kitasoo-Xaizais Police Board. It is directed to someone at the Kitasoo Community School, raising concerns about Ms Edgar being in attendance at the School and the immediate area during school hours, Ms Edgar having been asked to attend at the Community School to assist with an event. That letter refers to Ms Edgar presently being before the courts for trafficking in a narcotic. In effect the letter bans Ms Edgar from attending at the School or in the immediate area during school hours. Counsel for Ms Edgar tenders the letter as evidence of ongoing harassment.

[11] More insidious, is a letter of 14 May 2003 from the Kitasoo Band Council, signed by Percy Starr, who styles himself as Chief Councillor/Band Manager, and also swears affidavit material in this action as "Chief of the Kitasoo Band Council, Hereditary Chief of the Kitasoo-Xaizais Band and Member of the Order of Canada". The effect of the 14 May

2003 letter is to order a termination of her employment with an entity called Co-Management. Here we have a decision going beyond mere harassment, a decision which cuts away the income of Ms Edgar, a step taken without her being able to have any input or to address the decision-maker, a point made by Mr Justice Lemieux in his reasons staying the initial banishment Resolution. The letters certainly broaden the scope of the judicial review beyond that as characterize by counsel for the Respondents: indeed, both letters can be read in terms of ongoing harassment and in breach of the sort of fairness referred to by the Supreme Court of Canada in *Nicholson* v. *Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 S.C.R. 311 and *Martineau* v. *Matsqui Institution*, [1980] 1 S.C.R. 602, cases relied upon by Mr Justice Lemieux.

[12] In that a consideration of section 18.4(2) is, by *Drapeau* (*supra*), open-ended so far as factors are concerned, I have also thought about the effect that full discovery of documents, proper examination for discovery and the likelihood of eventual and thorough cross-examination before a judge might have on settlement. This is a proceeding which given the views of Mr Justice Lemieux, ought to be settled by the parties. Mr Justice Lemieux was particularly scathing, in commenting upon the banishment Resolution, in his reasons of 13 February 2003, following which he granted an injunction staying the banishment Resolution:

> [30] ... The applicant in my view has a very strong case that a breach of fairness invalidates the Resolution. She was banned from her community without being able to address the decision-maker (the Band Council). One simply has to refer to the decisions of the Supreme Court of Canada in *Nicholson* v. *Haldimand-Norfolk Regional Police Commissioners,* [1979] 1 S.C.R. 311 and *Martineau* v. *Matsqui Institution,* [1980] 1 S.C.R. 602.

The two Supreme Court of Canada cases to which Mr Justice Lemieux refers make reference to a well-known passage from *Furnell v. Whangarei High School Board* [1973] A.C. 660 (P.C.) at 679:

> Natural justice is but fairness writ large and juridically. It has been described as "fair play in action." Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109, 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.

[13] The absence of fairness and natural justice, which the Applicant alleges in her Notice of Application, would seem to be ongoing. This is one of the reasons why the Plaintiff wishes to convert this judicial review proceeding into action and to proceed through the complete array of procedure leading to the trial of this matter as an action. Given the views of Mr Justice Lemieux this matter ought to be settled I would also observe that only a small percentage of actions commenced actually conclude with a trial before a judge, but rather are settled and that the vast majority of settlements occur once each side has examined and has been examined for discovery, for then there may be full assessments by counsel and clients. Now this excursion into settlement while not a direct benefit in the sense of showing that affidavit evidence is inadequate, is certainly an overall benefit to the Court which has finite judicial resources: affidavit evidence and cross-examination on affidavits may be inadequate in order to bring about a settlement.

[14] Counsel for Ms Edger made a number of points in argument, some of which might have been important, relevant and real, however they were not founded on evidence and thus I did not take notice of them.

[15] Taking appropriate notice of the submissions and evidence, I do not find that the present situation is one which embodies the clearest of circumstances demonstrating that affidavit evidence will be inadequate. Certainly live evidence would in all likelihood be far superior but, as I say, affidavit evidence should be adequate, with a proviso.

[16] In *Misquadis* (*supra*) Mr Justice Lemieux gave leave to file affidavit evidence dealing with the function of aboriginal communities in various cities. In the present instance Ms Edger has leave to file affidavit evidence exhibiting the 5 April 2003 letter from the Kitasoo-Xaixais Police Department and the 14 May 2003 letter from the Kitasoo Council, together with any other evidence, including fresh facts, addressing the ongoing effect of the Band Council Resolution and the nature of that effect, since her return to the community following the 14 February 2003 resolution of the Band Council Resolution. This material would be of assistance in providing an adequate pool of evidence thus allowing the Court to have a more full grasp of the overall evidence and situation. Such after- the-event material is also relevant: see for example *Tahsis Co. Ltd. v. Vancouver Tug Boat Co.*, [1969] S.C.R. 12 at 34, where Mr Justice Pigeon considered recommendations and loading instructions issued well after a barge loading accident.

[17] In rejecting the submissions of counsel for Ms Edgar as to need to oral testimony, in a trial setting, in order to deal with voice to the evidence of underlying animosities and ongoing discrimination, I am aware of the importance of flexible rules of procedure and evidence, such as those referred to by Mr Justice Gibson in *Kingfisher v. Canada*, 2001 FCT 858, an unreported 8 August 2001 decision in file T-518-85. Oral history related to historical matters, may be required where there is insufficient documentary evidence to provide the aboriginal perspective on rights claimed, in order to promote truth finding and fairness: see *Kingfisher* at paragraphs 51 through 58. However, in the present instance, I am not convinced that affidavit evidence, augmented as I have ordered, will be inadequate.

[18] The time for completion of cross-examination on affidavits is extended until close of business on 22 July 2003. Costs will be in the cause.

(Sgd.) “John A. Hargrave”
Prothonotary

Vancouver, British Columbia
30 June 2003

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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