Federal Court  Cour fédérale

Date: 20220616

Docket: T-137-22

Citation: 2022 FC 918

Ottawa, Ontario, June 16, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DAKOTA PLAINS WAHPETON OYATE as represented by EVANGELINE TOWLE in her capacity as Hereditary Chief of Dakota Plains Wahpeton Oyate, CRAIG BLACKSMITH and ALVIN SMOKE in their capacity as representative Dakota Plains Wahpeton Oyate Council Members

Applicants

and

DONALD RAYMOND SMOKE

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants bring a motion in writing under Rule 369 of *Federal Court Rules*, SOR/98-106 (the "*Rules*") for leave to amend their Notice of Application filed on January 25, 2022, pursuant to Rules 75 and 302 of the *Rules*.

[2] The Applicants' Notice of Application seeks judicial review "in respect of which entity or person have the legal authority to govern the Dakota Plains Wahpeton Oyate". The Notice of Application identifies two Band Council Resolutions ("BCR") for review: one BCR made on September 27, 2021 (the "September BCR") and another made on December 16, 2021. The September BCR appoints the Respondent, Donald Raymond Smoke, as the Hereditary Chief of Dakota Plains First Nation ("Dakota Plains").

[3] The Applicants state that on March 25, 2022, they were served with the Respondent's affidavit material for the Application. The Respondent's Affidavit of Donald Raymond Smoke, affirmed on March 24, 2022, contained three BCR's dated September 27, 2021: the September BCR, a second BCR (the "Second BCR") and a third BCR (the "Third BCR"). The three BCRs were also included in the Affidavit of Joan Smoke and the Affidavit of Leslie Smoke. The Applicants state that at the time of filing their Notice of Application on January 25, 2022, they were only aware of one BCR from September 27, 2021, the September BCR, which formed a critical basis for their original application for judicial review. The Applicants state that they first became aware of the Second BCR and the Third BCR on March 25, 2022, when the Respondent's affidavit materials were served upon the Applicants' counsel.

[4] The September BCR bears Donald Raymond Smoke's signature as the Chief of Dakota Plains, and is also signed by Orville Smoke, Ronald Smoke and Leslie Smoke. The September BCR states, in part:

> DO HEREBY RESOLVE, At a duly convened meeting of the Chief and Council of the Dakota Plains Wahpeton Nation in the Council Chambers on the 27th day of September, 2021, the Dakota Plains Wahpeton Nation Chief and Council resolve; Dakota Plains Wahpeton Oyate will honor our inherent right to govern our nation via our hereditary system. As of this day, September 27, 2021, Orville Smoke has fulfilled his duties as Chief of Dakota Plains Wahpeton Oyate. The preceding chief and council of elders have chosen an acceptable replacement and will exercise their right to change authority through custom process.
>
> BE IT RESOLVED, That of this day, September 27, 2021 the former Chief Orville Smoke and Elder's Council of the Dakota Plains Wahpeton Oyate have named Donald Raymond Smoke DOB May 19th, 1971, as Chief of the Dakota Plains Wahpeton Oyate.

[5] The Second BCR names the Respondent, Donald Raymond Smoke, as Chief of Dakota Plains and purports to change the authority to govern Dakota Plains. It is signed by Orville Smoke, Ronald Smoke and Leslie Smoke. The Second BCR states in part:

> DO HEREBY RESOLVE, At a duly convened meeting of the Chief and Council of the Dakota Plains Wahpeton Nation in the Council Chambers on the 27th day of September, 2021, the Dakota Plains Wahpeton Nation Chief and Council resolve; Dakota Plains Wahpeton Oyate will honor our inherent right to govern our nation via our hereditary system. Donald Raymond Smoke DOB May 19th, 1971, was selected as the Chief of Dakota Plains Wahpeton Nation.
>
> BE IT RESOLVED, That of this day, September 27, 2021 Orville Smoke will act as elder advisor for Chief Donald Smoke of the

> Dakota Plains Wahpeton Nation in conjunction with the Dakota Plains council of elders.

[6] The Third BCR changes the custom governance system of Dakota Plains by introducing criterion for incumbent leadership. It is signed by Orville Smoke, Ronald Smoke and Leslie Smoke. The Third BCR states in part:

> DO HEREBY RESOLVE, At a duly convened meeting of the Chief and Council of the Dakota Plains Wahpeton Nation in the Council Chambers on the 27th day of September, 2021, the Dakota Plains Wahpeton Nation Chief and Council resolve the following: Dakota Plains Wahpeton Oyate will honor our inherent right to govern our nation via our hereditary system. Indian Act elections further erode age-old traditions and cultures by neutralizing the role of the traditionally elected leader. Our governing principles are anchored in our own cultural traditions as the Dakota Plains Wahpeton Oyate and our form of governance pre-dates the imposition of colonialism. Dakota Plains Wahpeton will remain recognized as having a hereditary system as is our custom. We reserve our inherent right to adopt, by way of custom our own method for naming a new chief on Dakota Plains Wahpeton Nation.
>
> BE IT RESOLVED, That Chief and Council of the Dakota Plains Wahpeton Oyate will protect the integrity of our hereditary system by requiring incumbent leadership in future years to have postsecondary education. Only those who attain a level of education such [as] an apprenticeship or trades certificate, diploma or degree from an accredited college, university or trade school will be considered as hereditary leaders on Dakota Plains Wahpeton Oyate. Incumbents will be required to have a clear criminal and child abuse registry check as well as be free and clean from any illicit substances. Proof of eligibility will be required. This is the irrefutable requirement made by the original members of the Dakota Plains Wahpeton Oyate and the current council of Elders in the Dakota Plains Wahpeton Nation.

[7] On March 28, 2021, counsel for the Applicants raised the issue of the additional BCRs at a Case Management Conference and requested leave of the Court to amend their Notice of Application to include the Second BCR and Third BCR. On March 29, 2022, Case Management Judge Coughlan ordered that the Applicants shall, by April 4, 2022, serve and file their amended Notice of Application with consent of the Respondent or otherwise by motion. The Respondent did not consent to the Applicants' proposed amendments to their Notice of Application.

I. **Issue**

[8] The issue on this motion is whether the Applicants should be granted leave to amend their Notice of Application pursuant to Rules 75 and 302 of the *Rules.*

II. **Analysis**

[9] Rule 75 of the *Rules* stipulates, "[T]he Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties." Whether an amendment should be granted is a matter of discretion. In *Enercorp Sand Solutions Inc. v Specialized Desanders Inc.*, 2018 FCA 215 ("*Enercorp Sand*") at paragraph 19, the Federal Court of Appeal reiterated the general rule set out in *Canderel Ltd. v Canada,* 1993 CanLII 2990 (FCA) at page 10:

> [19] […] an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve the interests of justice.

[10] At paragraph 20, the Court in *Enercorp Sand* also reviewed the broader context in which motions to amend should be assessed:

> [20] In *Continental Bank Leasing Corp. v. R.*, [1993] T.C.J. No. 18, (1993) 93 D.T.C. 298 at page 302 (*Continental Banking*), Bowman J., as he then was, set out the broader context in which motions to amend pleadings should be assessed:
>
> … I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately, it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

A. *The Applicants' position*

[11] The Applicants submit that their proposed amendments to the Notice of Application ought to be allowed for the following reasons:

a) The amendments have been proposed at an early stage of the Application;

b) The proposed amendments assist in determining the real question or controversy between the parties, as the three BCRs are inextricably linked and form the basis of the course of conduct in issue;

c) The proposed amendments will not result in an injustice or significant prejudice to the other side, since the Respondent introduced the three BCRs into evidence through their own affidavit materials;

d) The proposed amendments serve the interests of justice and secure the just, most expeditious and least expensive outcome, and will not cause the Applicants to file additional Applications for each discrete BCR;

e) This motion for leave to amend was brought on a timely basis and the issue was raised at the Case Management Conference at the earliest opportunity;

f) The proposed amendments will not delay the main Application and do not seek to abridge any timelines in the proceeding;

g) The proposed amendments do not alter the position taken originally by either party, nor do they lead another party to follow a course of action in the litigation, which would be difficult or impossible to alter, as the amendments do not substantially alter the original relief sought or the evidence that was presented by the Respondent to this Application; and

h) The amendments sought will facilitate the Court's full consideration of the true substance of the dispute on its merits by including all BCRs from September 27, 2021, which go to the heart of the matter in issue.

[12] The Applicants submit that if leave is granted to add the Second BCR and Third BCR to their Notice of Application, then it is also appropriate for this Court to dispense with Rule 302 of the *Rules* or find that it does not apply in the instant case. Rule 302 provides that an application for judicial review must be limited to a single order or decision, unless leave is granted by this Court. The Applicants submit that the jurisprudence has established that Rule 302 does not apply where it can be shown that the subject matter of the judicial review is a matter at issue that forms part of a "continuous course of conduct". The jurisprudence also justifies an exception to Rule 302 to permit judicial review of more than a single order where an applicant challenges continuing acts or a course of conduct (*Gagnon v Bell*, 2016 FC 1222 at para 35 ("*Gagnon*"); *David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 164 ("*David Suzuki*"). Where various impugned decisions are closely related and stem from the same series of events, Rule 302 may not apply, and in the event that it does, this Court may exercise its discretion under Rule 55 and dispense with compliance with Rule 302. In *Truehope Nutritional Support Ltd. v Canada (Attorney General)*, 2004 FC 658 ("*Truehope*"), this Court held at paragraph 6:

> [6] Continuing acts or decisions may be reviewed under s.18.1 of the *Federal Court Act* without offending Rule 1602(4) [now Rule 302], however the acts in question must not involve two different factual situations, two different types of relief sought, and two different decision-making bodies (*Mahmood v. Canada* (1998), 1998 CanLII 8450 (FC), 154 F.T.R. 102 (F.C.T.D.); reconsideration refused [1998] F.C.J. No. 1836) […]

[13] The Applicants submit that it is in the best interest of all community members that all facets of the dispute be deal with in a single decision, so that closure can be brought to the matter and the community can address important decisions that need to be taken in the short and medium term (*Anichinapéo v Papatie*, 2014 FC 687 at para 30). The Applicants also submit that the distinctions between the BCRs do not outweigh the similarities and are not so complex as to create confusion to require separate judicial review applications.

[14] With respect to the fact that the Notice of Application names the Respondent, Donald Raymond Smoke, as the sole respondent in the Application, the Applicants note that while the Second BCR is not signed by Donald Raymond Smoke, he remained instrumental to the creation of the three BCRs. Donald Raymond Smoke is also being named the new Chief of Dakota Plains, which is the subject matter of both the September BCR and the Second BCR. In addition, while the Third BCR is also not signed by Donald Raymond Smoke, the Applicants argue that the Third BCR does purport to change the Dakota Plains custom governance system by outlining a method for naming a new Chief, which the Applicants argue is factually similar to the other two BCRs that change the governance of the Dakota Plains. The Applicants rely on Rule 103 of the *Rules* to submit that a failure to name all of the signatories to the three BCRs as respondents does not defeat their Application and the proposed amendments. Rule 103 states:

> **Misjoinder and nonjoinder**
>
> 103 (1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of a person or party.
>
> **Issues to be determined**
>
> (2) In a proceeding in which a proper person or party has not been joined, the Court shall determine the issues in dispute so far as they

> affect the rights and interests of the persons who are parties to the proceeding.

B. *The Respondent's Position*

[15] The Respondent submits that the Applicants' proposed amended Notice of Application has no reasonable prospect of success. This is therefore a reason to refuse to grant the amendment and dismiss the motion for leave to amend (*Teva Canada Limited v Gilead Sciences Inc.*, 2016 FCA 176 at para 29). The Respondent submits that Donald Raymond Smoke, in his personal capacity, does not constitute a "federal board, commission or other tribunal", and therefore does not fall under the jurisdiction of this Court pursuant to subsections 18(1) and 18.1(3) of the *Federal Courts Act,* RSC, 1985, c. F-7 ("*Federal Courts Act*"). While the Applicants admit that the Dakota Plains governance structure is a "council of the band" in accordance with Subsection 2(1) of the *Indian Act,* no allegation is made in the grounds of the proposed amended Notice of Application that the Chief of Dakota Plains, on their own, constitutes the "council of the band" of Dakota Plains. The Respondent argues that the Applicants seek to use Rule 103 to confer jurisdiction upon this Court that it does not have, and Rule 103 cannot be relied on to correct the fatal flaw in naming Donald Raymond Smoke as the sole respondent in this matter. The Respondent's arguments on this point are quite similar to those made in their motion to strike, which are discussed at paragraphs 8 to 10 of the Order and Reasons in *Dakota Plains Wahpeton Oyate et al v Donald Raymond Smoke,* 2022 FC 911 ("*Dakota Plains – Motion to Strike*"). For the sake of brevity, I will not revisit them here. As discussed at paragraph 15 of *Dakota Plains – Motion to Strike,* I find that this Court does indeed have jurisdiction over the governance dispute at issue in this matter.

[16] The Respondent further submits that the Applicants' motion ought to be dismissed because there is an absence of evidence to support the facts relied on by the Applicants. The Applicants allege that they first became aware of the Second BCR and Third BCR on March 25, 2022, when they received the Respondent's affidavit materials. Yet the Applicants have not filed any affidavit evidence in support of their alleged lack of knowledge of the existence of the additional BCRs, nor is this lack of knowledge contained in any record within the Court file, in breach of Rule 363 of the *Rules.*

[17] The Respondent argues that the proposed amended Notice of Application also fails to identify on what grounds of review the Applicants are challenging the Second BCR and Third BCR, and fails to set out adequate grounds to support the request for relief in relation to the additional BCRs. Once again, the Respondent's arguments on this point are similar to those made in their motion to strike. As I concluded in *Dakota Plains – Motion to Strike* at paragraph 26, I am satisfied that the grounds of review identified by the Applicants are recognized grounds under paragraph 18.1(4)(a) of the *Federal Courts Act.* The same conclusion stands on this motion.

[18] Furthermore, the Respondent submits that, alternatively, each of the additional BCRs that the Applicants seek to include in the amended Notice of Application must be individually considered. In the event that the Court rejects the Respondent's above submissions, the Respondent would not oppose the addition of the Second BCR, as it is sufficiently connected to the September BCR.

[19] Finally, the Respondent opposes the addition of the Third BCR. He argues that he, 'Donald Raymond Smoke' was not a signatory to this BCR, and he is not named in it or otherwise the subject of it. There is thus no basis upon which he ought to be named Respondent in an application for judicial review of the Third BCR, and certainly not the only named Respondent. The Respondent submits that the Third BCR does not pertain to the "controversy between the parties" – being the lawfulness of his selection as the Hereditary Chief of Dakota Plains. Its inclusion would broaden the scope of the judicial review to introduce a new and wholly separate issue into these proceedings regarding the eligibility for the position of Hereditary Chief. In refuting the Applicants' arguments regarding Rule 302, the Respondent notes that the Applicants have made no allegation in the grounds of their Notice of Application or the proposed amended Notice of Application that the Respondent was ineligible for the position of Chief of Dakota Plains. As such, there is no need to introduce the issue of the eligibility criteria set out in the Third BCR, which are more onerous, in order to determine whether the Respondent was lawfully appointed as Chief of Dakota Plains.

C. *Analysis*

[20] In my view, the amended Notice of Application discloses a real and reasonable cause of action involving a governance dispute over the lawful governing person or entity of Dakota Plains. Read as generously as possible, holistically and practically, without fastening onto matters of form in order to gain a realistic appreciation of the essential character of the application (*Robert Aquilini Successor Trust v Canada (Attorney General)*, 2021 CanLII 46435 (FC) at paras 20-21), I find that the amended Notice of Application addresses this governance dispute. The September BCR, the Second BCR and the Third BCR are all relied on by the

Respondent to support his title as Chief of Dakota Plains. As such, in my view, it is relevant to include them in the Notice of Application.

[21] With respect to Rule 302 of the *Rules*, I find that this is such a case where the acts are of a continuing nature, and make it difficult for the Applicants to pinpoint a single decision to review and from which relief could be sought by this Court (*Truehope* at para 6). The evidence, timing and legal arguments related to each of the BCR are also closely connected (*Truehope* at para 9). As noted by the Applicants, the September BCR, the Second BCR and the Third BCR were all signed on September 27, 2021 at the same "duly convened meeting" where the same individuals were present. The BCRs also involve an ongoing situation related to the governance of Dakota Plains, which is the matter of the judicial review before this Court. I therefore agree with the Applicants that the three BCRs are factually similar and form part of a "continuous course of conduct" (*David Suzuki* at para 164).

[22] Furthermore, the Respondent relies on Rule 363 of the *Rules* to submit that there is an absence of evidence to support the facts relied on by the Applicants in the grounds alleged in their motion. However, as noted by the Applicants, the affidavits and exhibits filed by the Respondent and served on the Applicants on March 25, 2022 are deemed to be on the Court File, in accordance with Rule 307 of the *Rules*. As such, I agree with the Applicants that they were not required to file an affidavit to refer to these materials on this motion, as the evidence relied on was already before the Court. The issue of the additional BCRs from September 27, 2021 was also raised with the Case Management Judge promptly on March 28, 2022.

[23] While I find that it is in the interest of justice to allow the Applicants to amend their Notice of Application, I can appreciate the concern raised by the Respondent regarding the scope of the matter at issue. Nonetheless, the matter at issue does not involve one discreet decision, but instead addresses a "course of conduct" regarding the governance of Dakota Plains – this includes the appointment of a new Chief (the subject matter of the September BCR and Second BCR), as well as the criteria and method deployed for naming a new Chief of Dakota Plains (the subject matter of the Third BCR). I therefore find that the Applicants should be allowed to contest all of the BCRs within one application for judicial review because the impugned decisions stem from the same series of events and are closely related (*Gagnon* at para 36). Furthermore, I do not find that the inclusion of the Second BCR and Third BCR in the Notice of Application would prejudice the Respondent, since the BCRs were included as exhibits to the Respondent's own affidavit materials.

[24] Additionally, I turn to the issue surrounding the naming of the Respondent in the Notice of Application. Dakota Plains is a small community of less than 300 people. According to the Applicants, all Dakota Plains members over the age of 18 are considered representative Council members. It would thus not be logical to name the band council as the respondent, yet it is unclear why the other living signatories to the BCRs were not named in the Notice of Application. Nonetheless, I draw the same conclusion here as I drew in discussing the Respondent's motion to strike (*Dakota Plains – Motion to Strike*): the matter at issue involves a First Nations governance dispute regarding who has the authority to govern Dakota Plains. Donald Raymond Smoke is a member of the council of the band who purports to be the Hereditary Chief of Dakota Plains, but was not named as Chief in the Notice of Application for

the obvious reason that the Applicants do not recognize him as such. In my view, the naming of the Respondent is not fatal to the Application, as this Court can look to the position Donald Raymond Smoke currently takes up: He is holding himself out to be the Hereditary Chief of Dakota Plains.

[25] Finally, I disagree with the Respondent that the Third BCR does not pertain to the "controversy between the parties" (i.e. the selection of the Hereditary Chief of Dakota Plains). Indeed, while the Respondent may not be explicitly named in the Third BCR, it nonetheless lays out the criteria and method deployed for naming a new Chief of Dakota Plains, which the Respondent purports to be, and was signed on the same day as the two other BCRs. Viewed in this light, the Third BCR forms part of the "continuous conduct" subject to review and does not introduce a "new and wholly separate issue", as it relates to the matter of the Application for judicial review: "which entity or persons have legal authority to govern the Dakota Plains Wahpeton Oyate". It is also my view that it would be a waste of this Court's resources to require separate applications for each BCR; addressing all of the BCRs in one judicial review strikes me as the most expeditious and judicially economical way of dealing with the matter at hand, in keeping with Rule 3 of the *Rules*. Still, I can appreciate that its inclusion would in fact widen the scope of the matter, as the eligibility criteria discussed in the Third BCR involves a forward-looking aspect of the governance issue. As such, I find it appropriate to allow the Respondent the requested opportunity to file additional evidence in the judicial review as a result of the addition of the Second and Third BCR. I therefore grant the Respondent 30 days from the date of this order to file any additional affidavit evidence.

III. **Costs**

[26] I see no reason to deviate from the general rule that costs should follow the event. I therefore order that costs be awarded to the Applicants on this motion in the amount of $1,000 inclusive of disbursements and taxes.

ORDER in T-137-22

THIS COURT ORDERS that:

1. Leave to amend the Applicants' Notice of Application is granted.

2. Costs payable to the Applicants by the Respondent in the amount of $1,000 inclusive of disbursements and taxes.

3. The Respondent is granted 30 days from the date of this order to file any additional affidavit evidence with the Court.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-137-22
STYLE OF CAUSE:	DAKOTA PLAINS WAHPETON OYATE as represented by EVANGELINE TOWLE in her capacity as Hereditary Chief of Dakota Plains Wahpeton Oyate, CRAIG BLACKSMITH and ALVIN SMOKE in their capacity as representative Dakota Plains Wahpeton Oyate Council Members v DONALD RAYMOND SMOKE

MOTION IN WRITING UNDER RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	AHMED J.
DATED:	JUNE 16, 2022

WRITTEN SUBMISSIONS BY:

Jessica Barlow Markus Buchart	FOR THE APPLICANTS
Devon C. Mazur Amanda Cheys	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jerch Law Barristers and Solicitors Winnipeg, Manitoba	FOR THE APPLICANTS
Myers LLP Barristers and Solicitors Winnipeg, Manitoba	FOR THE RESPONDENT