

Federal Court



Cour fédérale

Date: 20100924

Docket: T-1305-07

Citation: 2010 FC 959

Toronto, Ontario, September 24, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MUSHKEGOWUK COUNCIL and STAN LOUITTIT

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

Introduction

[1] Mushkegowuk Council and Stan Louttit (collectively the “Applicants”) appeal from the Order of Prothonotary Milczynski dated April 15, 2010. In that Order, the Prothonotary dismissed the Applicants’ motion for an Order seeking leave, pursuant to the *Federal Court Rules*, SOR/98-106 (the “Rules”), to file a supplementary affidavit and to require the re-attendance at her own cost of Elizabeth Dowdeswell to answer questions identified in the Refusals Chart set out in the

Applicants' Motion Record dated March 23, 2010 as well as proper questions arising from her answers to those questions.

Background

[2] The Applicant Mushkegowuk Council is an assembly of seven First Nations communities located in the Western James Bay Region of Ontario. The Applicant Stan Louttit is the Grand Chief of Mushkegowuk Council. The Minister of Natural Resources, Gary Lunn (the "Minister") is responsible for the administration of the *Nuclear Fuel Waste Act*, S.C. 2002, c. 23 (the "Act"). The Nuclear Waste Management Organization ("NWMO") was created under the Act.

[3] The Applicants seek judicial review of the decision of the Minister recommending an approach to the long-term management of nuclear fuel waste. This decision is the subject of cause T-1305-07.

[4] The Applicants also seek judicial review of a related decision, that is the decision of the Governor-in-Council to accept the Minister's recommendation. The decision of the Governor-in-Council is the subject of cause T-1306-07. By Order dated July 8, 2008, the two judicial review proceedings have been consolidated in cause T-1305-07.

[5] In her Order of April 15, 2010, Prothonotary Milczynski dismissed the Applicants' motion to file a supplementary affidavit on the grounds that the further documentary evidence sought to be adduced was not relevant to the issue raised in the judicial review proceedings and further, that two

of the documents in question could have been filed by the Applicants as part of their initial affidavits in support of their judicial review application. She refused to order the re-attendance of Elizabeth Dowdeswell for a continuation of cross-examination on the grounds that any further questions for this deponent “could be resolved between counsel”.

[6] The Applicants seek leave to file a further affidavit in order to introduce eight documents as part of the evidence before the Court which will eventually adjudicate this application for judicial review. The eight documents relate to the possibility that new nuclear reactors will be built in Canada. This prospect carries with it the prospect that the volume of nuclear waste in Canada, that will require transportation and disposal, will increase. The documents in issue, together with their dates of publication or production, are as follows:

Table 1: Table of Contested Documents			
#	Author	Title	Date
1	S. Russell (NWMO)	<i>Preliminary Assessment of Potential Technical Implications of Reactor Refurbishment and New Nuclear Build on Adaptive Phased Management</i>	December 2008
2	Ontario Power Generation	<i>Nuclear Waste Management Technical Support Document, New Nuclear, Darlington Environmental Assessment</i>	August 2009
3	Atomic Energy of Canada	<i>Power Through Partnership, Annual Report 2003-2004</i>	2003-2004
4	Bruce Power	<i>Bruce Power to explore restart of Bruce A Units 1 and 2, Feasibility study to also examine new build and Bruce B refurbishment, (Press Release)</i>	January 29, 2004

5	M. Hung (NWMO)	<i>Financial Implications of Used Fuel Volume Variation in Long Term Management -2008 Update</i>	December 2008
6	M. Garamszeghy (NWMO)	<i>Nuclear Fuel Waste Projections in Canada – 2008 Update</i>	December 2008

[7] In her reasons, the Prothonotary addressed the requirements of Rule 312, concerning the filing of supplementary affidavits upon an application for judicial review. She noted that documents 3 and 4 were produced in 2004 and “could have been included in the Applicants’ affidavit material. No reasonable explanation is provided why they could not.” The Prothonotary said that this was a sufficient reason to refuse leave for the introduction of these two documents as part of a supplementary affidavit, but she gave a second reason for denying leave, that is the “marginal value” of these two documents that they “would not provide any meaningful assistance to the Court”.

[8] The Prothonotary found that the six remaining documents for which leave to produce was sought were all published after completion of the NWMO study and publication of its report “Choosing a Way Forward” and, further, that these documents were not relevant “to the issue of the quality or propriety of the consultation that had already concluded”. She went on to say that these six documents would “not only be of little or no assistance to the Court, but actually would serve only to confuse or muddy the record and the issues to be decided.”

Submissions

[9] The Applicants argue that the Prothonotary erred in law in finding that the eight documents in question are not relevant. They submit that is an error of law that justifies reversal of the Order.

[10] As well, the Applicants submit that the Prothonotary implicitly dismissed their motion regarding the re-attendance of Ms. Dowdeswell to answer questions about documents 1 to 4 on the basis of her findings as to the lack of relevance of those documents. They argue that the finding of relevance was an error of law and implicitly, submit that the re-examination should follow upon reversal of the Prothonotary's Order.

[11] The three Respondents take the position that the Prothonotary properly exercised her discretion pursuant to Rule 312 and the applicable jurisprudence and that the appeal should be dismissed, submitting that the Prothonotary reasonably determined that the outstanding documents are not relevant to the issues raised by the application for judicial review.

Discussion and Disposition

[12] The legal test to be applied in an appeal from an Order of a prothonotary was set out by the Federal Court of Appeal in its decision in *Merck & Co. v. Apotex Inc.*, [2004] 2 F.C.R. 459; leave to appeal denied (2004) 30 C.P.R. (4th) vii (S.C.C.). A discretionary order of a prothonotary should only be reviewed *de novo* if the questions raised in the motion are vital to the final disposition of the case, or if the order is clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or upon a misrepresentation of the facts. Applying this test, the first question to be

addressed is whether the Applicants' motion raises an issue that is "vital" to the final disposition of this proceeding.

[13] In my opinion, having regard to the materials before me, the issue raised by the Notice of Motion is not vital to the ultimate disposition of the Applicants' applications for judicial review. The applications for judicial review relate to the substantive decision made by the Minister and the Governor-in-Council. The motion relates to the exercise of discretion to allow the introduction of a supplementary affidavit pursuant to Rule 312 of the Rules.

[14] Rule 312 governs the introduction of supplementary affidavits and provides as follows:

312. With leave of the Court, a party may	312. Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307;	a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(c) file a supplementary record.	c) déposer un dossier complémentaire.

[15] According to the decision in *Abbott Laboratories Ltd. v. Apotex Inc.*, 2007 FC 817 (F.C.) at para. 16, a party seeking to file additional evidence must meet a four-part conjunctive test as follows:

[16] Turning now to Rule 312, this Court has held that in exercising discretion to allow the filing of additional evidence, a four-part conjunctive test must be considered: a) whether the further evidence serves the interests of justice; b) whether the further evidence will assist the Court; c) whether granting the motion will cause substantial or serious prejudice to the other side and d) whether the evidence was not available or could not have been anticipated as being relevant at an earlier date (*Pfizer Canada Inc. v. Canada (Minister of Health)*, 2006 FC 984, [2006] F.C.J. No. 1243, Teitelbaum J. and *Pfizer Canada Inc. v. Canada (Minister of Health)*, 2007 FC 506, [2007] F.C.J. No. 681, Mosley J.).

[16] I am not persuaded the Prothonotary proceeded upon a wrong principle of law or a misrepresentation of the facts in dismissing the Applicants' motion.

[17] The Prothonotary first considered the new documents sought to be introduced by the Applicants on the basis of their dates. She found that documents number 3 and 4 were created in 2004 and could have been produced earlier by the Applicants when they first filed their affidavit material. She said that no reasonable explanation had been given for their failure to produce these documents earlier.

[18] In my opinion, this conclusion is reasonable. The Prothonotary did not err in her understanding of the facts nor in the exercise of her discretion pursuant to Rule 312.

[19] The Prothonotary looked at the remaining six documents and concluded that they were all published after completion of the NWMO study and after publication of the report entitled

“Choosing a Way Forward”. As such, she found that these remaining six documents were not relevant to “the issue of the quality or propriety of the consultation that had already concluded”.

[20] She clearly appreciated the guiding principle in the application of Rule 312 when she noted that these six documents, which came into existence after the two “decisions” which are the subject of the application for judicial review, would “be of little or no assistance to the Court”. The factors of relevance and assistance to this Court are elements to be considered in the exercise of discretion pursuant to Rule 312.

[21] From my review of her reasons, the Prothonotary was aware of this test, considered it and reasonably applied it. She committed no reviewable error.

[22] Contrary to the submissions of the Applicants the motion to adduce additional affidavit evidence does not raise a question of law, at least in this case. Generally, questions of law are reviewable on the standard of correctness; see *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195 (F.C.A.). Review on the standard of correctness is in the nature of review *de novo*, allowing me to determine the motion anew. However, the standard of correctness is not engaged by the Applicants’ motion and the matter will be considered in terms of whether the Prothonotary properly exercised her discretion having regard to the relevant legal principles and jurisprudence.

[23] For the reasons above, I am satisfied that she did.

[24] Since the Applicants have failed to show a reviewable error by the Prothonotary in dismissing the motion to adduce further affidavit evidence, it follows that the request for an Order requiring the re-attendance of Dr. Elizabeth Dowdeswell must also fail. There is no basis to make such an Order.

[25] In conclusion, the Applicants' appeal is dismissed with costs to the Respondents. If the parties cannot agree on costs, brief submissions not exceeding five (5) pages may be made in accordance with the following schedule:

- i) Respondents' submissions to be served and filed by October 14, 2010;
- ii) Applicants' submissions to be served and filed by October 21, 2010;
- iii) Respondents' reply, not exceeding three (3) pages to be served and filed by October 27, 2010.

ORDER

THIS COURT ORDERS that the appeal is dismissed with costs to the Respondents. If the parties cannot agree on costs, brief submissions may be made, not exceeding five (5) pages in accordance with the following schedule:

- i) Respondents' submissions to be served and filed by October 14, 2010;
- ii) Applicants' submissions to be served and filed by October 21, 2010;
- iii) Respondents' reply, not exceeding three (3) pages to be served and filed by October 27, 2010.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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, ON

DATE OF HEARING: June 21, 2010

**REASONS FOR ORDER
AND ORDER:** HENEGHAN J.

DATED: September 24, 2010

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