Federal Court  Cour fédérale

Date: 20211214

Docket: T-553-21

Vancouver, British Columbia, December 14, 2021

PRESENT: Case Management Judge Kathleen Ring

BETWEEN:

RODERICK WIGWAS, BRIAN KING AND BAND MEMBERS ALLIANCE AND ADVOCACY ASSOCIATION OF CANADA

Applicants

and

GULL BAY FIRST NATION

Respondent

ORDER

UPON MOTION in writing dated October 8, 2021 on behalf of counsel for the Applicants, pursuant to Rules 369 and 402 of the *Federal Courts Rules* ["*Rules*"] for:

(a) an Order pursuant to Rule 402 of the *Rules* granting the Applicants leave to discontinue this application for judicial review on a without costs basis;

(b) an Order for costs of this motion or alternatively no costs for this motion; and

(c) and such further and other relief as this Honourable Court may deem just;

AND UPON reading the motion records filed on behalf of the parties, and the Respondent's written representations in reply;

Some background is necessary to place the Applicants' Rule 402 motion in proper context. On March 30, 2021, the Applicants filed the underlying application for judicial review of the decision of the Council of the Gull Bay First Nation ("GBFN") dated March 1, 2021 whereby the Council extended their term of office to November 27, 2021 and postponed the GBFN election, pursuant to section 3 of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR 2020-84 ["*GIC Regulations*"]. Section 3 governs postponement of an election under the *First Nations Elections Act*, S.C. 2014, c. 5. The Applicants sought an order setting aside the decision, *quo warranto*, and an order of *mandamus* compelling the GBFN to declare an election. The Applicants also sought a declaration that the *GIC Regulations* are *ultra vires* and of no force and effect, or alternatively that section 3 is *ultra vires* and of no force and effect.

On April 1, 2021, two days after the Applicants filed their application, the Federal Court released its decision in *Bertrand v. Acho Dene Koe First Nation*, 2021 FC 287 ["*Bertrand*"] which involved a custom band that postponed its election under section 4 of the *GIC Regulations*. The judgment of the Court included a declaration that "Section 4 of the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, SOR/2020-84, is *ultra vires* and invalid".

In light of the *Bertrand* decision, on April 5, 2021 the Applicants invited the Respondent to resolve the litigation by holding an election in June 2021. Alternatively, the Applicants took the position that the judicial review should proceed on an expedited timeline so that the remedies

sought did not become moot. The first step under the proposed timetable was the transmission of the certified tribunal record [“CTR”] by April 16, 2021.

By letter dated April 12, 2021, the Respondent requested service of the Applicants’ Rule 306 affidavits. The Applicants responded the same day by requesting a response to their proposed expedited timetable and requesting transmission of the CTR.

On April 20, 2021, the federal government released its 2021 budget announcement that stated “… the Government also proposes to introduce legislation that would ensure that the *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)* are deemed to have been validly made since April 7, 2020”.

That same day, the Respondent wrote to the Applicants advising that the passage of such legislation would render the application moot. The Respondent proposed that the parties jointly write to the Court and “ask that this proceeding be stayed until the Federal legislation is addressed by Parliament”.

In correspondence dated April 21, 2021, the Applicants disagreed that the proceeding was rendered moot by the budget announcement. The Applicants conceded that the proposed legislation would likely be an answer to the *vires* argument raised by the Applicants. However, they took the position that it would not address the other issues in the application such as procedural fairness and a substantive review of the decision. The Applicants again proposed that the Respondent proceed with the election in June 2021.

The Applicants expressed the view that “any abeyance would, in fact, almost guarantee that the matter will become moot”. The Applicants based this view on the determination in

Bertrand (at paras 24 to 26) that an application to compel a First Nation to hold an election will lose its substance and become moot if the application is not heard until after the postponed election is underway. The Applicants proposed another expedited timetable commencing with the Tribunal transmitting the certified tribunal record by April 26, 2021.

By letter dated April 26, 2021, the Respondent opposed the Applicants' proposal for an expedited process. They also raised a number of procedural concerns regarding the improper naming of the GBFN as a respondent and the failure to name the individual members of the Chief and Council and the Attorney General of Canada as respondents. The Respondent took the position that the application was pointless given the timing of the upcoming election on November 20, 2021. The next day, the Respondent proposed adhering to the timelines under the *Federal Courts Rules*, with the first step (transmitting the CTR) being completed by May 7, 2021.

The Applicants agreed to the Respondent's proposed timetable, and it was approved by the Court by Order dated April 29, 2021.

The CTR was transmitted to the Court Registry and to the Applicants on May 7, 2021. An Amended CTR was transmitted to the Court Registry on May 11, 2021.

The Applicants served their Rule 306 affidavits on May 14, 2021.

On May 26, 2021, the Applicants' counsel was notified by Respondent's counsel that a federal bill had been introduced amending the federal legislation at issue in these proceedings.

On May 31, 2021, the Respondent served their Rule 307 affidavits.

On June 1, 2021, a case management teleconference was convened to discuss the correct parties to name in this proceeding, the *Bertrand* appeal (which was subsequently discontinued), and the recent federal bill. Following the teleconference, the Court issued a Direction scheduling a further teleconference on June 8, 2021 to address the status of the Respondent's proposed motion for an order regarding proper parties and for other relief, and any amendments proposed by the parties to the timetable fixed by the Order dated April 29, 2021. The Court Registry was directed to return the Respondent's unfiled Notice of Motion without prejudice to the Respondent to re-file a revised Notice of Motion following the June 8th teleconference.

On June 7, 2021, the parties sent a letter to the Court jointly proposing that the proceeding be held in abeyance for 30 days, with a possible further extension. By Order of the same date, the parties were dispensed from taking further steps in the application pending further order or directions of the Court. The proceeding has been held in abeyance since that time.

The *Budget Implementation Act, 2021* received royal assent on June 29, 2021.

On July 7, 2021, the Applicants wrote to the Respondent to propose a discontinuance of the application, in light of the passage of Bill C-30, on a without costs basis. The Respondent rejected the Applicants' proposal. The Respondent took the position that the Applicants should pay costs fixed at $10,000.

On July 23, 2021, the Applicants advised the Court that they had decided to discontinue this application for judicial review in light of the passage of the *Budget Implementation Act, 2021* and its impact on the issues raised in this proceeding. They advised that the issue of costs remained between the parties.

The parties were unable to resolve the costs issue and on October 8, 2021 the Applicants filed this motion seeking leave to discontinue the proceeding on a without costs basis. The Respondent now takes the position that the Applicants should be required to pay costs in the amount of $25,000. According to the Respondent, this represents about one third of the total costs incurred by the Respondent.

The issues on this motion are: (1) Should the Applicants be granted leave to discontinue the proceeding on a without costs basis? (2) If not, should the Court exercise its discretion to grant lump sum costs in an amount in excess of the Tariff B amount? (3) Should the Court order costs of this motion be paid by either party?

As regards the first issue, the Applicants submit that they should be relieved from having to pay the Respondent's costs. They argue that at the time it was filed, the application had significant merit as the *GIC Regulations* were *ultra vires*. However, after the application was filed, Parliament adopted declaratory legislation under the *Budget Implementation Act, 2021* that largely defeated the application by validating the *GIC Regulations* and all steps taken pursuant to them. The Applicants say that they acted reasonably in offering to discontinue this matter without costs once it became apparent that the change in law foreclosed the arguments on the application.

The Respondent submits that the Applicants should not be allowed to discontinue the proceeding on a without costs basis because the Applicants failed to take steps to discontinue the application in a timely manner. They say that a costs award is justified in the circumstances as the Applicants were aware that the real issue in this proceeding was practically moot as of April 20, 2021 before significant costs had been incurred. Instead of discontinuing the application

at that point, the Applicants proceeded forward with the application until June 7, 2021 when the litigation was placed in abeyance.

The general rule is that a party against whom an action has been discontinued is entitled to costs forthwith: Rule 402 of the *Rules*. However, the Court has the discretion to decline costs to a party where it is in the interests of justice to do so: *Darkzone Technologies Inc. v. 1133150 Ontario Ltd.*, 2002 FCT 1 at para 5 ["*Darkzone*"].

The policy objective underlying the Court's discretion in Rule 402 is rooted in "the desirability of plaintiffs discontinuing or settling actions having little chance of success, after the normal procedures in ascertaining whether its case can be proved": *McCain Foods Limited v. CM McLean Limited*, [1981] 1 FC 534 at para 8. Simply put, the Court should not discourage the discontinuance of unmeritorious proceedings by penalizing parties with costs by imposing a substantial award of costs when they have acted responsibly: *Scott v. Piikani First Nation*, 2009 FC 313 at para 4.

The Court has permitted a discontinuance without costs where the party discontinuing the proceeding acted reasonably in bringing the action and discontinued it promptly when provided with the other party's exculpatory information: *Darkzone* at para 11.

I have carefully reviewed the evidence presented by the parties, including the supporting affidavit filed on behalf of the Applicants and the five affidavits filed on behalf of the Respondent. Applying the principles set out in *Darkzone*, I find that the Applicants acted reasonably in bringing the application. The application challenges, amongst other things, the constitutional validity of

section 3 of the *GIC Regulations*. Section 3 authorized the council of a First Nation to extend the term of office of the chief and councillors elected under the *First Nations Elections Act*.

The Respondent cannot seriously contend that the application was frivolous or lacked any merit at the time it was brought. To the contrary, within a few days of the application being brought, this Court declared in *Bertrand* that section 4 of the *GIC Regulations* is *ultra vires* and invalid. Section 4, like section 3, authorized the council of a First Nation to extend the terms of office of a chief and councillors, but it applied in cases where the chief and councillors are chosen according to the custom of the First Nation. In these circumstances, I find that when the application was brought, the Applicants had an arguable case to advance before the Court.

The central issue on this motion is whether the Applicants took steps to discontinue the application in a timely way. The Respondent says that the Applicants should have discontinued the proceeding as of April 20, 2021 when the federal government released the budget announcement, as the application was "practically moot" at that time.

I reject the Respondent's argument. The 2021 budget announcement indicated that the Government proposed to introduce legislation that would ensure that the *GIC Regulations* "are deemed to have been validly made since April 7, 2020". While the proposed legislation would presumably address the Applicants' *ultra vires* argument, I agree with the Applicants that it did not, as described in the budget announcement, preclude judicial review on procedural fairness issues and on substantive review. As such, the judicial review application was not "practically moot" as of April 20, 2021, as argued by the Respondent. In my view, it was reasonable in the circumstances for the Applicants to move forward with the application following the 2021 budget

announcement and to seek an expedited timetable in light of this Court's mootness determination in *Bertrand*.

Based on the material before the Court, it was not until May 26, 2021 that counsel for the Applicants became aware that the *Budget Implementation Act*, 2021 No. 1, S.C. 2021, c. 23 had been introduced in Parliament. The following provision of the proposed legislation, on its face, went further than the initial budget announcement and sought to validate all decisions made under the *GIC Regulations*:

> 267 The *First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, made on April 7, 2020 and registered as SOR/2020-84, and the *Regulations Amending the First Nations Election Cancellation and Postponement Regulations (Prevention of Diseases)*, made on April 8, 2021 and registered as SOR/2021-78, are deemed to have been validly made and everything done under, and all consequences flowing from, those Regulations since April 8, 2020 are deemed effective as if those Regulations were so made.
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> [Emphasis added]

By May 26, 2021, when the Applicants became aware of the proposed legislation, the Respondent would have already been well on their way to preparing their Rule 307 affidavits, as they were required by Order dated April 29, 2021 to serve their affidavits and file proof of service by May 31, 2021.

In my view, it would reasonably take some time after May 26, 2021 for the Applicants' counsel to consider the proposed legislation and its potential implications on this proceeding and to seek and obtain instructions accordingly. The Applicants ultimately concluded that the effect of the proposed legislation – by also validating all decisions made under the *GIC Regulations* – was

that it "appeared to address the additional procedural fairness and substantive review arguments that the applicants had raised" (paragraph 24 of the written representations).

By June 7, 2021 (12 days after the Applicants became aware of the proposed legislation), the parties jointly requested the Court to place the proceeding in abeyance. In my view, the Applicants acted reasonably and in a timely manner by taking steps to place the proceeding in abeyance by early June, and thereafter moving to discontinue the proceeding.

In addition to considering whether the Applicants had an arguable case on the merits when the application was initially filed, and the timeliness of the Applicants' actions to place the application in abeyance and seek a discontinuance, I have also considered the following factors in determining that it is in the interests of justice to exercise my discretion to decline costs to the Respondent in the particular circumstances of this case:

(a) at the time the application was filed, the application raised an issue of general public interest, namely whether the *GIC Regulations*, or alternatively section 3, were *ultra vires* and of no force and effect;

(b) the Applicants should not be penalized for seeking to discontinue the application as a result of Parliament changing the law to address the very issue of public interest raised by the Applicants in their application;

(c) the imbalance between the financial resources of the Applicants and those of the Respondent; and

(d) the Applicants' counsel acted *pro bono* on this proceeding and did not charge any fees to the Applicants.

Finally, I am not persuaded by the Respondent's argument that the application was motivated, at least in part, by the collateral purpose of advancing the Applicants' political campaigns for Chief. This same argument was raised and rejected by this Court in *Bertrand*.

For these reasons, in the exercise of my discretion I conclude that it is in the interests of justice to grant leave to the Applicants to discontinue the application without costs.

In light of my decision, it is not necessary to determine the second issue relating to the amount of costs to be paid to the Respondent upon filing a notice of discontinuance.

The Applicants seek fixed costs of $250.00. I see no reason to deviate from the general rule that a successful party is entitled to his or her costs on a motion. Accordingly, the Respondent shall pay to the Applicants their costs of the motion, hereby fixed in the amount of $250.00 inclusive of disbursements and costs.

THIS COURT ORDERS that:

1. The Applicants are hereby granted leave to serve and file forthwith a Notice of Discontinuance, without costs.

2. Costs of this motion, hereby fixed in the amount of $250.00, inclusive of disbursements and taxes, shall be paid by the Respondent to the Applicants.

"Kathleen Ring"
Case Management Judge