Federal Courts Reports

Recueil des décisions des Cours fédérales

[2022] 1 F.C.R. D-20

PRACTICE

JUDGMENTS AND ORDERS

Summary Judgment

Related subjects: Indigenous Peoples; Federal Court Jurisdiction

Motion by respondent seeking to summarily dismiss application for judicial review of actions taken by respondent to prohibit applicant from Heiltsuk Nation's traditional territory — Applicant former employee of Bella Bella Community School (BBCS), not member of Heiltsuk Nation — School board terminated applicant's employment pursuant to its authority over education delegated by respondent— Employees of BBCS entitled to be on Residency List controlled by Heiltsuk Nation — Applicant remained in Bella Bella after termination — Respondent having residency bylaw limiting residency to those on Nation's Residency List or those who have Limited Stay Permit — Applicant failing to comply with Band Council Resolutions (BCR) stating that applicant had no entitlement to be on Reserve, requesting that he voluntarily leave Bella Bella — Preliminary issue involving request by applicant for leave to file sur-reply, affidavit — Proposed formulation in *Dzawada'enuxw First Nation v. Canada*, 2021 FC 939 adopted herein with respect to test for admitting sur-reply argument — Special circumstances existing warranting departure from general rule prohibiting filing of sur-reply argument, affidavit evidence — Issue 1: whether application should be dismissed summarily because impugned actions not undertaken by federally empowered decision maker — Federal Court has recognized existence of Indigenous legal traditions, has given effect to Indigenous law in certain situations — Court should not dodge these challenging questions, refuse to hear application altogether just because issues raised by parties difficult, hearing may be complex, lengthy — On contrary, complexity precisely why application should be heard on its merits, instead of being dismissed on summary basis — Case law not supporting position that BCRs always reviewable by Federal Court — Question of whether or not Court having jurisdiction over first of two BCRs depending on whether Court finding it was issued pursuant to bylaw under *Indian Act*, R.S.C., 1985, c I-5 (Act) — Since Residency Bylaw upon which first BCR enacted based on Act, there may be grounds to support applicant's position that impugned actions undertaken by respondent pursuant to power granted under federal legislation — Application not "bereft of any possibility of success" — Issue 2: whether application should be dismissed summarily because impugned actions essentially private in nature, not public — *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 enumerating eight (non-exhaustive) factors to determine if process falling within purview of public law so as to satisfy second part of test for jurisdiction — Assertion of Aboriginal title by respondent placing this matter more appropriately within purview of public law than private law — Related issue of whether impugned actions private in nature must also be determined at full hearing of application Court assuming jurisdiction in decisions dealing with banishment, removal of individuals under residency bylaws enacted by band councils pursuant to Act — Application for judicial review to proceed on merits in its entirety — Motion dismissed.

GEORGE V. HEILTSUK FIRST NATION (T-835-22, 2022 FC 1786, Go J., reasons for order dated December 21, 2022, 31 pp.)