Federal Court  Cour fédérale

Date: 20151116

Docket: T-193-15

Citation: 2015 FC 1271

Ottawa, Ontario, November 16, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SHANE CRAWLER

Applicant

and

WESLEY FIRST NATION

Respondent

JUDGMENT AND REASONS

[1] The relationship between councillor, or ex-councillor as the case may be, Shane Crawler, on the one hand, and the Chief and the other band councillors of the Wesley First Nation on the other has been strained for years.

[2] In February 2013, he was suspended, with pay, in circumstances which are not before this Court.

[3] In August 2013, an information was laid by an officer of the Royal Canadian Mounted Police that between March 2011 and October 2012 Mr. Crawler had, by fraudulent means, defrauded the Wesley First Nation of $25,600 contrary to s 380(1) of the *Criminal Code*.

[4] On 8 December 2014, in full knowledge of the criminal charges, the Wesley First Nation re-elected Mr. Crawler as a councillor.

[5] By Band Council Resolution dated 19 January 2015, Mr. Crawler was either constructively disqualified (as he would have it) or had his rights as councillor restricted (as the respondent would have it). After referring to the indictable offence charge against Mr. Crawler and stating that the Chief and Council had a fiduciary obligation to the Wesley First Nation to manage its affairs and assets, it was resolved that although Mr. Crawler was entitled to receive councillor severance pay for the years 2010 to 2014, $25,600 was deducted therefrom to offset the losses incurred by the Band as a result of his handling of its finances and assets. He was not to, in any way, administer the Band's finances or assets, except for the receipt of his ongoing councillor pay, and authorized expenses, pending the resolution of all criminal charges relating to the alleged fraud. He was not entitled to act or vote in any matter concerning the Wesley First Nation's assets or budgetary matters "pending the resolution of all criminal actions related to the alleged defrauding" and the administration of the area of the Wesley First Nation where Mr. Crawler resided was to report directly to the Chief.

[6] It is this Band Council Resolution, and only this one, which is the subject of this judicial review.

[7] In June 2015, Mr. Crawler was disqualified as a councillor on the grounds that he missed three consecutive council meetings without lawful excuse. That resolution is the subject of a separate judicial review under our court docket T-1095-15.

[8] On 6 July 2015, the indictment against Mr. Crawler was withdrawn by the Crown. However, he has not been paid the $25,600 withheld from his severance pay for the years 2010-2014.

[9] On 7 September 2015, Mr. Crawler sued the Wesley First Nation in the Provincial Court of Alberta for the said $25,600, with interest.

[10] This recital of events which occurred after the enactment of the 19 January 2015 resolution, the one which is before this Court, is necessary, as the Wesley First Nation takes the position that the entire matter is now moot. Mr. Crawler was never constructively disqualified as a councillor, but was actually disqualified under a separate resolution which is the subject of a separate judicial review yet to be heard. The $25,600 should not be returned because it is the subject of an action in the Provincial Court of Alberta which will be resolved by a trier of fact after hearing witnesses.

[11] For his part, Mr. Crawler's position is that he was not given proper notice of the Chief and Council meeting of 19 January 2015, so he was unable to prepare for it and defend himself. Consequently, the resolution has to be quashed. However, he is prepared to have the Provincial Court of Alberta decide the fate of the $25,600 in dispute. He also invited me to make some

obiter comments which he thinks might help him in the judicial review that is coming down the road.

I. Background

[12] The Wesley First Nation is one of three First Nations that comprise the Stoney Nakoda First Nations. The Stoney Nakoda First Nations is an Indian Band under the *Indian Act*. It governs itself by band custom, which has been reduced to writing, at least in part, rather than by the provisions of the *Act*. The Wesley First Nation comprises three areas which are not contiguous: Morley, Eden Valley and Big Horn. Although every qualified elector may vote for the Chief and all Councillors, one councillor must reside in Big Horn. That was Mr. Crawler.

II. Decision

[13] I have come to the conclusion that Mr. Crawler was not given proper notice that his rights and duties as a councillor and his financial affairs were on the agenda for the 19 January 2015 Chief and Council meeting. Therefore, I declare that the Band Council Resolution is invalid. However, I will not order that the $25,600 in question be returned to Mr. Crawler. It is more appropriate that that matter be dealt with in the Provincial Court of Alberta.

III. The Facts

[14] On 11 January 2015, Mr. Crawler received an email and text message from Norma Jean Roberts that there would be a council meeting on 19 January 2015 at the offices of Doug Rae.

Mr. Rae is the senior partner of the law firm acting for the Wesley First Nation in this matter. No one has suggested that having a meeting at Mr. Rae's office was unusual.

[15] Ms. Roberts was, at the time, Chief Executive Officer and Chief Financial Officer of the Wesley First Nation. Mr. Crawler asked Ms. Roberts if he needed to have a lawyer present. He recalls that she said no. Ms. Roberts has no recollection of any such conversation. According to Mr. Crawler, he asked because he knew at some point his severance pay had to be dealt with. In my opinion, nothing turns on whether or not this conversation took place.

[16] As was usual, the agenda was only handed out at the opening of the meeting. There were three items: a) opening prayers; b) Big Horn Councillor matter; and c) updates from the administration.

[17] According to Mr. Crawler, the agenda did not put him on notice that he was going to be constructively disqualified to sit as a councillor and that the $25,600 in question would be set off against his severance pay. There was still the matter of his earlier suspension.

[18] According to a draft of the minutes of the meeting, Mr. Crawler agreed to the resolution. However, he never signed it, while the Chief and the other councillors did.

[19] One particularity of the meeting is that Mr. W. Tibor Osvath was present. Mr. Osvath is a lawyer at Rae and Company and actually drafted the resolution following the meeting.

[20] The draft minutes are somewhat unusual in that portions thereof have been redacted allegedly on the grounds of solicitor-client privilege. Mr. Osvath, who represented the Wesley First Nation at the hearing of this judicial review, can hardly say his client was Mr. Crawler. The whole matter smells of a set up.

IV. Analysis

[21] As counsel for Mr. Crawler points out, had Mr. Crawler been given proper notice and consulted him (as he had with respect to the earlier suspension), he would have suggested that Mr. Crawler take the position at the meeting that any claim of the Wesley First Nation was time barred. It is not for me to comment one way or the other, except to say that Mr. Crawler should have had the opportunity to raise the point.

[22] Natural justice requires that Mr. Crawler have had an opportunity to fully present his defence. It has been said that even God did not remove Adam and Eve from the Garden of Eden without a full hearing (*The King v. the Chancellor, & c., of Cambridge*, (1723) 1 Stra. 557; *Cooper v. The Wandsworth Board of Works* (1863), 143 E.R. 414 at p. 420; and *Matondo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 416, 44 Imm LR (3d) 225).

[23] The respondent argues that this is not a case of no notice being given, or of secret meetings held behind Mr. Crawler's back. That may well be true, but once you are over the line, you are over the line.

[24] One need go no further than to consider the decision of the Supreme Court in *Cardinal v Kent Institution*, [1985] 2 SCR 643, [1985] SCJ No 78 (QL). The issue there was that of procedural fairness with respect to disciplinary proceedings within a penitentiary. It was held that Mr. Cardinal did not get a fair hearing.

[25] As to lack of notice, Mr. Justice LeDain said at paragraph 21:

> … With great respect, I do not think it is an answer to the requirement of notice and hearing by the Director, as suggested by Macdonald J.A., that the appellants knew as a result of their appearance before the Segregation Review Board why they had been placed in segregation. They were entitled to know why the Director did not intend to act in accordance with the recommendation of the Board…

[26] In this particular case, Mr. Crawler was attending the meeting as a councillor, not as someone who knew an intended decision was pending.

[27] Mr. Justice LeDain added at paragraph 23:

> …I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

[28] The failure to provide adequate notice disposes of the matter. It is not necessary, and would be inappropriate, to decide that he was constructively disqualified to act as a councillor, as the election by-law calls for disqualification in the event of a criminal conviction, not a charge.

[29] There was no evidence before me as to Mr. Crawler actually having been barred from any council meeting, or which allows me to take into consideration his argument that there is a financial aspect to any band resolution, which is why he missed the three meetings which are the subject of an ongoing application for judicial review under Court docket number T-1095-15.

[30] The Chief and Band Councillors all have a fiduciary duty to the Wesley First Nation at large. Nothing stated herein should be taken as defining or restricting the extent of that fiduciary duty. Even Mr. Crawler concedes that it would have been open to the Chief and the other councillors to ensure that he could not sign cheques or handle Wesley First Nation money while these particular charges were outstanding.

[31] Finally, judicial review remedies are discretionary in nature. In the circumstances, I consider it appropriate to simply declare that the application for judicial review is well founded, without ordering any remedy (*MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6).

[32] The legality of the 19 January 2015 resolution will be dealt with in the upcoming judicial review in this Court and the status of the $25,600 is better dealt with in the Provincial Court of Alberta.

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S DECLARES that the application for judicial review is well founded. Mr. Crawler is entitled to his costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-193-15
STYLE OF CAUSE:	SHANE CRAWLER v WESLEY FIRST NATION
PLACE OF HEARING:	CALGARY, ALBERTA
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