Federal Court  Cour fédérale

Date: 20160415

Docket: T-515-16

Citation: 2016 FC 419

Ottawa, Ontario, April 15, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

COUNCILLOR ALLAN PAUL

Applicant

and

ALEXANDER FIRST NATION

Respondent

ORDER AND REASONS

I. Introduction

[1] This decision addresses the Respondent's request for an adjournment of the Applicant's motion for an interlocutory injunction. On March 29, 2016, the Applicant, Councillor Allan Paul, filed an application for judicial review of a decision by the Chief and Council of the Alexander First Nation on March 11, 2016 to suspend him from this position as Councillor. On March 31, 2016, the Applicant filed and served this motion returnable on April 12, 2016 in Edmonton,

seeking an interlocutory injunction to restore him to his position pending the outcome of the judicial review application.

[2] Counsel for the Respondent wrote to the Court on April 6, 2016, to advise that he had just been retained and, subsequently, sought an adjournment of the motion to permit him time to cross-examine the Applicant and prepare a response.

[3] At the hearing on April 12, 2016, counsel for both parties advised that the next General Sittings day in Edmonton, May 2, 2016, was a date convenient for both parties for the hearing of the motion for the interlocutory injunction. Counsel for the Respondent advised the Court that this would allow enough time to prepare a response to the motion and that the Respondent would prefer that the matter not be adjourned to any earlier date that might be available in another city, because members of the Alexander First Nation may wish to attend the hearing of the motion, which would be problematic if it was heard anywhere other than Edmonton.

[4] The Applicant does not oppose an adjournment but takes the position that the adjournment should be granted only along with an interim injunction restoring him to his position as Councillor pending the hearing of the interlocutory injunction.

[5] The Respondent opposes the request for an interim injunction on the basis that it is not yet in a position to properly respond to the Applicant’s arguments in support of an injunction, and on the basis that to grant an interim injunction raises risk of inconsistent conclusions between the interim and interlocutory injunction decisions.

[6] At the conclusion of the hearing, I advised the parties that my decision was to grant the adjournment of the interlocutory injunction motion to May 2, 2016 in Edmonton but that my decision whether to grant an interim injunction pending the hearing of that motion would be reserved and provided subsequently with supporting reasons. My decision is to grant the interim injunction for the following reasons.

II. Background

[7] On August 7, 2014, the Applicant was elected to be one of six Councillors of the Alexander First Nation for a term of three years. The *Alexander Tribal Government Customary Election Regulations* [the Regulations], which govern the Alexander First Nation's electoral process, identify the Alexander Tribal Council [the Council] as consisting of the Chief and six Councillors. The Regulations further state that the office of Councillor becomes vacant when the person who holds that office dies or resigns the office or where 51% of the electors of the Alexander Tribe endorse a petition to the effect that the Councillor is unfit to continue in office for certain prescribed reasons. The Regulations may only be amended by the vote of 51% of the electors.

[8] On September 12, 2015, the Council purported to enact a Governance Code for the operation of the offices of the Chief and Council. The Applicant raises an issue whether the Governance Code was properly enacted as, based on the record currently before the Court, it was signed by the Chief and only four of the Councillors, not including the Applicant. The Governance Code states that the Council may suspend a Councillor when such Councillor is found to be in breach of his or her Oath of Office.

[9] On March 11, 2016, three Councillors met with the Chief and signed a letter, addressed to the Applicant, communicating his immediate suspension from the office of Councillor. The stated reasons for the suspension were the alleged breach of certain provisions of the Governance Code including ethical standards, the responsibility to support the Council as the governing body, and the duty to work cooperatively and towards Council solidarity.

III. Issue

[10] The sole issue for my consideration is whether the Applicant has met the test for an interim injunction in the context of the adjournment of the motion for an interlocutory injunction.

IV. Analysis

[11] The parties are in agreement that the test to be applied to a request for injunctive relief, whether interim or interlocutory, is that prescribed in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [the RJR Test]. Applied to the present case, this test requires that the Applicant demonstrate a serious question to be tried, that irreparable harm would result if he were to remain out of office, and that the balance of convenience favours his reinstatement. I note that the jurisprudence also requires, when seeking an interim injunction, that the applicant establish urgency (see *Les Laboratoires Servier v. Apotex Inc.*, 2006 FC 1443).

[12] In conducting my analysis under this test, I am conscious of the concerns raised by the Respondent about the risk of inconsistent conclusions between interim and interlocutory injunction decisions, where the former would be granted based on only the Applicant’s motion

record and without the benefit of fulsome argument by the Respondent. I note a similar concern to have been expressed by Justice Cattanach in *Duomo Inc. v. Giftcraft Ltd.*, 1 CPR (3d) 395, that to grant an interim injunction would be tantamount to the temporary grant of the relief sought by the applicant without the respondent having the benefit of the right of cross-examination and response. However, that decision arose in the context of a commercial copyright dispute, and I am guided to a greater extent by more recent decisions involving suspensions or removals from bodies involved in the governance of First Nations.

[13] The authorities relied on by the Applicant in support of his injunction motion include the decision of Justice Kelen in *Lafond v. Muskeg Lake Cree Nation,* 2008 FC 480 [*Lafond*], which granted an interim injunction pending an approximately one month adjournment of a motion for an interlocutory injunction. In connection with his analysis of whether the applicant had raised a serious issue, Justice Kelen stated at paragraphs 10 and 18 that he was making his decision without a prolonged examination into the merits of the case and that his analysis was not conclusive or binding on the judge hearing the motion for the interlocutory injunction.

[14] Similarly, in *Bonspille v. Mohawk Council of Kanesatake*, 2002 FCT 677 [*Bonspille*], as the applicable test was met, Justice Lemieux granted an interim injunction reinstating members of the Kanesatake Police Commission pending the hearing of a motion for an interlocutory injunction.

[15] My conclusion, therefore, is that I should make my decision whether to grant the interim injunction based on whether the Applicant has satisfied the RJR Test and the additional

requirement of urgency. In recognition of the concern expressed by the Respondent about inconsistent results, I note, as did Justice Kelen in *Lafond,* that my analysis is not intended to be conclusive or binding on the judge hearing the motion for the interlocutory injunction. I will also state my analysis as briefly as possible, so as to intrude as little as possible upon the mandate of the judge hearing the motion on May 2, 2016.

A. *Serious Issue*

[16] The Applicant challenges the decision to suspend him from office on the basis that the Regulations permit the termination of a Councillor, but only with the concurrence of 51% of the electors, and do not permit a Councillor's suspension. He argues that the Governance Code under which the Council was acting when it issued the suspension was not properly enacted as it was endorsed by only five of the seven members of Council. He also relies on both governance arguments and principles of procedural fairness, submitting that he received no notice of the meeting at which the decision to remove him was made and that he did not receive any notice of the allegations made against him or an opportunity to respond to those allegations.

[17] Based on the record currently before the Court, I am satisfied that these arguments raise serious issues to be considered in this application for judicial review. A similar question surrounding the authority to suspend a councillor, when no provisions for suspension were contained in the governing regulations, was one of the serious issues identified in *Lafond*, as was the question whether the applicant in that case had been given the opportunity to know and respond to the allegations leading to his suspension. Similarly, in *Prince v. Sucker Creek First Nation*, 2008 FC 479, the Court considered the applicants in that case to have raised a serious issue

in arguing that they were suspended without first being given a full opportunity to know and respond to the case against them.

[18] I note that the Respondent argues that the Regulations address termination, not suspension, and that a decision to suspend a Councillor without the endorsement of 51% of the electors is, therefore, not in conflict with the Regulations. This is an argument which merits further consideration by the presiding judge in the judicial review application, but in my view it does not prevent the Applicant's position from meeting the threshold of a serious issue.

[19] I also note that, in *Bonspille*, Justice Lemieux commented that, in the context of a request for interim reinstatement, pending the hearing of the interlocutory injunction motion, the motions judge must engage in a more extensive review of the merits than might otherwise be required under the RJR Test. Taking this guidance into account, I still conclude, particularly in relation to the Applicant's procedural fairness arguments, that the Applicant's argument raise a serious issue. The Applicant has deposed that he received no notice of a meeting or any opportunity to address the matter of his suspension, and there is nothing in the record before me to contradict this. Nevertheless, it remains available to the judge hearing the interlocutory injunction motion to reach a different conclusion with the benefit of additional evidence and argument from the Respondent.

B. *Irreparable Harm*

[20] The Applicant argues that the office of Councillor is a political and democratically elected position and that traditional remedies of damages for wrongful dismissal cannot provide

adequate compensation for loss of such office. I am satisfied, based on the arguments currently before the Court, that the authorities support this proposition, particularly given the resulting impacts on reputation and prestige (see *Gabriel v. Mohawk Council of Kanesatake*, 2002 FCT 483 at paragraphs 26-30; *Buffalo v. Rabbit*, 2011 FC 420 at paragraphs 30-36; *Bonspille* at paragraphs 28-44).

C. *Balance of Convenience*

[21] I also consider the balance of convenience to favour the Applicant. As in *Bonspille*, the granting of the injunction serves to preserve the *status quo* as it was prior to the impugned decision. If the Applicant ultimately fails in his application, or even in his motion for the interlocutory injunction, the suspension can resume, without any significant harm to the Respondent that is apparent to me based on the evidence and argument currently before the Court. However, the granting of the injunction will serve to curtail the accrual of harm through the loss of prestige and reputation until the merits of the parties' positions can be further considered by the Court. In that respect, I also consider the Applicant's request for interim relief to satisfy the requirement of urgency, as the reputational harm has arguably been accruing since the Applicant was suspended on March 11, 2016 and would continue to accrue up to the time of hearing of the interlocutory injunction motion.

V. Conclusion

[22] My Order, therefore, adjourns the Applicant's motion and grants an interim injunction enjoining the decision to suspend Councillor Paul from the Council. The result is that he will

continue in that position with pay, pending a decision on the motion for an interlocutory injunction. The parties did not present argument on costs. Consistent with the decision in *Lafond*, I award costs to the Applicant in the cause.

ORDER

THIS COURT ORDERS that:

1. The Applicant's motion for an interlocutory injunction is adjourned and is rescheduled to be heard at the General Sittings of the Federal Court in Edmonton, Alberta, on Monday, May 2, 2016.

2. Pending a decision on the motion for an interlocutory injunction, an interim injunction is granted preventing the Respondent from suspending the Applicant from his position as Councillor.

3. Costs are awarded to the Applicant in the cause.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-515-16
STYLE OF CAUSE:	COUNCILLOR ALLAN PAUL v ALEXANDER FIRST NATION
PLACE OF HEARING:	EDMONTON, ALBERTA
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