Federal Court  Cour fédérale

Date: 20210608

Docket: T-742-20

Citation: 2021 FC 562

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THOMAS PELLETIER

Applicant

and

FORT WILLIAM FIRST NATION,
AS REPRESENTED BY CHIEF AND COUNCIL

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a bylaw made by the Council of the Fort William First Nation [FWFN] in response to the COVID-19 pandemic. It is brought by Mr. Pelletier, one of its members.

[2] The FWFN Council passed and published three bylaws intended to address the pandemic and protect its members.

[3] Bylaw #1 was enacted on April 3, 2020. It sought to restrict access to the Reserve by defining the term "Trespasser" and imposing a curfew by restricting the entry of non-authorized people between the hours of 6:00 p.m. and 6:00 a.m.

[4] Bylaw #2 was enacted on April 9, 2020. It also defined the term "Trespasser" and restricted entry and access to the Reserve by non-authorized people.

[5] Bylaw #3 was enacted on May 1, 2020. It too defines the term "Trespasser" and provided for the gradual re-opening of the Reserve.

[6] Bylaws #1 and #3 remain in force, but Bylaw #2 was repealed effective 8:00 a.m. May 5, 2020, after Bylaw #3 came into effect.

[7] This application was filed on July 13, 2020, and is directed only to Bylaw #2, notwithstanding that at that time, it had been repealed, and the other two bylaws were in force.

[8] In his application, Mr. Pelletier seeks a Declaration that Bylaw #2 "is invalid and unenforceable." Specifically, he submits that the FWFN has no jurisdiction to determine what constitutes trespassing and therefore "Bylaw #2 is *ultra vires* the authority of Chief and Council and was unlawfully and improperly enacted." Additionally, he submits that the penal provisions

of Bylaw #2 “relating to the office of trespass, is in direct conflict with the maximum penalty for an act of trespass as provided for in section 30 of the Indian Act, and is thus ultra vires.”

[9] The FWFN submits that this Application is moot because the impugned bylaw was repealed prior to the commencement of the application, and further submits that this Court, notwithstanding that fact, ought to not exercise its discretion to hear the matter.

[10] The parties were directed to first address the mootness issue when this matter was heard.

[11] The law applicable to this issue is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*]. In it, the Supreme Court of Canada articulates that a two-step process is to be followed. First, the court is to ask “whether the required tangible and concrete dispute has disappeared and the issues have become academic.” If it has, then the court must decide, notwithstanding the mootness of the matter, whether it should exercise its discretion to hear the case.

[12] When assessing whether or not to exercise its discretion to hear the moot matter, the Supreme Court suggests considering three factors: judicial economy, the court’s proper role, and the existence of an adversarial context.

[13] Mr. Pelletier submits that notwithstanding the repeal of Bylaw #2, there is a live controversy between him and the FWFN. He relies on the observation in *Borowski* at paragraph 31 that “although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary

adversarial context." He says that if this application is decided on its merits, the Court will be offering an opinion on whether the FWFN can define "Trespasser" as it has and also whether it can impose penalties in excess of the *Indian Act*. As Bylaws #1 and #3 are still in existence, and because these issues arise within them as well as under Bylaw #2, he says there remains a live issue. I disagree.

[14] The passage cited in *Borowski* makes it clear that a collateral consequence is one that arises directly from the repealed law. Citing *Vic Restaurant Inc v City of Montreal*, [1959] SCR 58, *Borowski* provides an example of a relevant collateral consequence:

> The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking.

[15] The evidence before me on this application is that there is no outstanding charge or penalty of any kind involving Mr. Pelletier or anyone else resulting from the application of Bylaw #2. Nor was there at the time this application was filed.

[16] I do not accept the submission that adjudicating the challenges raised to Bylaw #2, will impact the controversy between these parties as regards to the other two bylaws. It is not evident that there is any such controversy. It is notable that Mr. Pelletier could have challenged all three when this application was commenced but chose not to do so. I agree with the characterization given by counsel for the FWFN, that what Mr. Pelletier is now attempting to do is a collateral

attack on those bylaws, when a frontal attack is the appropriate avenue of redress. There is no live issue between these parties regarding the other bylaws, as they are not challenged as part of this or any other proceeding.

[17] Judicial economy is a very relevant consideration here. Hearing matters that are moot necessarily means that others will be delayed. This is a matter of access to justice. This application was scheduled for a two-day hearing. Mr. Pelletier suggests that using such Court time on this application is merited because the issues raised "are of utmost importance to Indigenous bands across Canada and members of these bands alike." No evidence is provided to support that bald assertion. In any event, the issues he raises and the determinations that he asks be made will depend very much on the actual language of any bylaw passed. Accordingly, the issue he raises remains only one of academic interest.

[18] Lastly, I agree with the FWFN that addressing the issues raised in this application given the mootness of the matter will skew the proper role of the Court. I concur with the observation of Justice McVeigh in *Cheecham v Fort McMurray #468 First Nation*, 2020 FC 471 at paragraph 41 that doing what Mr. Pelletier asks would result in this Court rendering a judgment that would intrude into the legislative sphere of a band council when the "Court's role on judicial review is not to create general precedents to govern future interactions, but rather to scrutinize the actual decisions under review."

[19] For these reasons, this application must be dismissed as it is moot and the Court will not exercise its discretion to hear the matter.

[20] The FWFN is entitled to its costs. The parties agreed that costs fixed at $4,000.00, would be reasonable. I agree.

JUDGMENT IN T-742-20

THIS COURT'S JUDGMENT is that this application is dismissed, and the Respondent is entitled to its costs which are fixed at $4,000.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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