Date: 20080415

Docket: T-440-08

Citation: 2008 FC 479

Ottawa, Ontario, April 15, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

GEORGE PRINCE and PAULETTE CAMPIOU

Applicants

and

SUCKER CREEK FIRST NATION #150A, JARET CARDINAL, RONALD WILLIER and RUSSELL WILLIER

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicants, George Prince and Paulette Campiou, bring this motion for an interlocutory injunction against decisions dated February 26, 2008, wherein the respondents purported to suspend the applicants from their position as Councillors of the Sucker Creek First Nation. The applicants seek to be reinstated as Councillors pending the outcome of the underlying application for judicial review. The applicants have been suspended by the Chief and two Councillors in the middle of their elected three year term of office.

FACTS

[2] The applicants are members of the Sucker Creek First Nation (the respondent Band). They were elected as Councillors of the respondent Band Council on November 28, 2006 for terms of three years. Their elections were never challenged.

[3] The Sucker Creek First Nation is three and a half hours north of Edmonton.

[4] The respondent Band is a First Nations Band duly constituted under the *Indian Act*, R.S.C. 1985, c. I-5 (the Act). The government structure, procedures, and custom elections of the respondent Band are governed by the *Customary Election Regulations of the Sucker Creek First Nation #150A* (the Election Regulations). The Election Regulations provide for the election of one Chief and six Councillors to act as representatives of the respondent Band for a term of three years.

[5] The respondent, Jaret Cardinal, is the Chief of the respondent Band, having been elected along with the applicants on November 26, 2006. The respondents, Ronald Willier and Russell Willier, are Councillors of the respondent Band and occupy positions on Council along with the applicants.

Allegations of misconduct

[6] On or about February 6, 2008, the Chief and Council of the respondent Band received a complaint that the applicants were involved in a conflict of interest with regard to one of the Band's contractual arrangements. The allegations were contained in a letter of complaint dated February 6,

2008, written by Orlando Alexis, who is employed as the Consultation Officer of the respondent Band.

[7] The complaint alleged, in part:

1. the verbal abuse of Band employees;
2. "political interference" by the applicants;
3. the diverting of work from one third party contractor to Joy Ann Prince, the daughter of the applicant George Prince and first cousin of the applicant Paulette Campiou; and
4. the unauthorized renegotiation of rates paid to third party contractors for brush and tree clearing under the contractual arrangement between the respondent Band and ATCO Electric Ltd.

Process leading to the suspensions

[8] In response to the letter of complaint, on February 7 or 8, 2008, the respondent Band Council convened a meeting to address the allegations raised therein. Both applicants were present at that meeting and had a copy of the letter of complaint.

[9] On February 14, 2008, the respondent Band Council convened to review the issues raised in the letter and to determine how best to proceed. The applicants were present at that meeting and presented a letter from Vic McArthur responding to, and rebutting, the allegations against them.

[10] On February 15, 2008 the Chief and Council convened another meeting to decide how to proceed in relation to the applicants. The applicants were excluded from this meeting.

[11] On February 20, 2008 the Sucker Creek First Nation received a letter (which the respondents concede was important) from Morgan Construction and Environmental Ltd. This letter alleged “issues” regarding rates of pay for contractors, which was the main conflict of interest allegation against the applicants. This letter was never shown to the applicants.

[12] On February 21, 2008 the respondent Band received a memorandum from ATCO Electric Ltd. alleging problems with rates of pay for contractors involving the applicants. This memorandum was also never shown to the applicants.

[13] On February 22, 2008, the respondent Band Council convened a “secret” meeting in Edmonton, Alberta, at which all of the allegations against the applicants were further deliberated. Present at that meeting were the three individual respondents, as well as Councillor David Prince. Neither of the applicants were present at the meeting, nor were they notified of its occurrence. Also not present at the meeting was Councillor Ken Cardinal, who was under suspension pending an investigation into unrelated allegations of misconduct.

[14] At the meeting, it was decided that the applicants should be suspended with pay until such time as an independent investigation had been conducted into the allegations contained in the letter of complaint. On or about February 29, 2008, the applicants each received a letter signed by Chief

Cardinal and the two respondent Councillors advising them of the suspensions. The letters, dated February 26, 2008, are the decisions under review and stated, in part:

> Given the seriousness of this situation, the Chief and Council are compelled to act and look into this issue. Therefore, I regret to inform you that you have been suspended from your position on Council pending a full investigation into this matter. The suspension will be with pay. During the investigation, you will be prohibited from going to the Finance Office or from having any dealings with the Consultation Department…. Please turn in your keys, your cell phone as well as any other Band Property.

The applicants ignored the respondents' letters and continued to perform their duties as Councillors.

[15] On March 3, 2008 the applicant Paulette Campiou responded to the letter of complaint dated February 6, 2008.

[16] On March 10, 2008, the applicants each received another letter from the respondents advising them that if they did not abide by the suspension decision, their pay would be suspended and a special meeting called to consider removing them from office. The letters provided for a "framework of investigation" and review, which outlined the process that the respondent Band would follow in assessing the plausibility of the allegations. As well, the letters outlined how the ultimate suspension decision was reached, stating at page 3:

> On Friday, February 22, 2008, the Chief and Council met in Edmonton, at the Hilton Garden Suites Hotel to follow up the initial review of the letter of complaint.
>
> Based on the information tabled, it was felt that it was in the interests of the Council's, our membership, and our community that both George Prince and Paulette Campiou be suspended pending an investigation of this letter of complaint.

> The formal vote occurred and the motion passed as the votes all registered in the affirmative. As a result, both you, Paulette Campiou and George Prince are suspended from active duty as Councillors effective immediately with pay.

[17] On March 12, 2008, the applicants arrived at the offices of the respondent band and discovered that the locks on their office doors had been changed and that they were forbidden to access the premises. On March 17, 2008, the applicants filed the within application for judicial review, as well as this motion, in which they seek an interlocutory injunction allowing them to continue to carry out their duties uninterrupted until the within application is finally determined.

[18] On March 20, 2008, the pay of each applicant, while under suspension, was reduced from $1,750 a week each to $700 a week.

ISSUE

[19] The sole issue raised in this motion is whether the applicants are entitled to an interlocutory injunction in this fact situation preventing the respondents from suspending the applicants as Councillors of the sucker Creek First Nation.

ANALYSIS

Issue: <u>Should the applicants be allowed to carry out their duties as Councillors without further interference from the respondents until the underlying application for judicial review is finally determined?</u>

[20] It is well settled that the test to be applied in considering whether an interlocutory injunction is appropriate is the tri-partite test articulated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. In that case, the Court stated that an applicant must establish three principles in order to be granted an interlocutory injunction. Those principles are:

i. the existence of a serious issue to be tried;

ii. the existence of irreparable harm if the injunction is not granted; and

iii. the balance of convenience must favour granting the injunction.

All three elements must be considered in turn.

<u>Serious issue to be tried</u>

[21] This Court is seized with this motion and underlying application for judicial review on account of the fact that the respondent Band Council falls within the meaning of a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. As I held in *Roseau River Anishinabe First Nation v. Atkinson*, 2003 FCT 168, 228 F.T.R. 167 at paragraph 19:

> ¶ 19 In past cases the Federal Court has assumed jurisdiction over Indian band councils, regardless of whether the election of the band council was pursuant to band custom or the *Indian Act*, see *Canatonquin v. Gabriel*, [1980] 2 F.C. 792 (F.C.A.) and *Lameman et al. v. Gladue et al.* (1995), 90 F.T.R. 319 (T.D.). As Mr. Justice

> Rothstein stated in *Sparvier v. Cowessess Indian Band No. 73*, [1994] 1 C.N.L.R. 182; 63 F.T.R. 242 (T.D.), at p. 4:
>
> > It is well settled that for purposes of judicial review, an Indian band council and persons purporting to exercise authority over members of Indian bands who act pursuant to the provisions of the Indian Act constitute a "federal board, commission or other tribunal" as defined in section 2 of the *Federal Court Act* [...] an Indian band council came within the jurisdiction of the Federal Court where the election of the band council was pursuant to band custom and not the *Indian Act*.

[22] In the case at bar, the elections and procedures of the Band Council are governed by the provisions contained within the Election Regulations. Accordingly, whether there exists a serious issue depends largely on whether those Regulations were followed in reaching the decision to suspend the applicants from the Band Council, or whether the Band Council has the inherent right to suspend the applicants.

[23] The applicants argue that the decision of the respondent Band Council cannot stand since the Election Regulations do not authorize the suspension of members of the Band Council. The respondents, however, argue that the decision was properly authorized by the Election Regulations, which give the Chief and Council the authority to make decisions "for the proper governance of the Sucker Creek First Nation." Further, the respondents rely on the view that legislative bodies such as the respondent Band Council have the power to suspend or expel one of its members, and that this power has long been the prerogative of the legislature and is independent of any explicit statutory provisions enabling such action. Accordingly, the respondents submit that the Band Council has the

"inherent authority to make rules and procedures to govern their own process including policies and procedures to investigate allegations of misconduct."

[24] Further, the applicants also argue that the suspension decision breached the duty of procedural fairness in that it was made without the applicants having been given any notice of the meeting or an opportunity to address the allegations against them.

[25] As the above matters concern issues of jurisdiction, procedural fairness, and natural justice, the respondents, while maintaining that the respondent Band Council acted with jurisdiction and in accordance with the principles of procedural fairness and natural justice, concede that such issues are "serious questions to be determined by this Honourable Court."

First Serious Issue

[26] The Election Regulations deal specifically with the removal from office of a duly-elected Councillor. These Regulations have not been followed. The applicants raise a serious issue with a real possibility of success that the respondents cannot suspend a Councillor, either indefinitely, as was done in the case at bar, or even for a limited timeframe, without following the procedures contained within the Election Regulations.

Second Serious Issue

[27] In the alternative that the respondent Band has the inherent power to suspend, the applicants raise a serious issue likely to succeed that they cannot be suspended without first being given a full

opportunity to know the case against them, including the allegations from Morgan and ATCO, as well as a full opportunity to respond to the allegations before Council. There is a right to a fair hearing before being fired or suspended.

Third Issue

[28] Finally, the applicants raise a serious issue to be decided at the hearing of this application for judicial review whether the respondents can suspend or "fire" the applicants without a petition from 50 percent plus 1 of the electors as required in section 15.3 of the Election Regulations. The interpretation of section 15 of the Election Regulations is a serious issue between the parties. Moreover, a question arises about whether section 15 is still a practical procedure for removing an elected Chief or Councillor who warrants removal in view of the jurisprudence that off-reserve band members are now considered part of the band electorate.

[29] Accordingly, the Court concludes that the applicants have demonstrated the existence of a serious issue to be tried at the higher threshold of likely to succeed.

Irreparable Harm

[30] An applicant seeking an interlocutory injunction must show that they would suffer irreparable harm if the injunction is not granted. Establishing irreparable harm is a difficult task, as it involves establishing that the harm caused could not later be compensated through damages. As I stated in *White v. E.B.F. Manufacturing Ltd.*, 2001 FCT 1133, 15 C.P.R. (4th) 505 at paragraph 13:

> ¶ 13 ... The second question is whether damages will provide the plaintiff with an adequate remedy. An interlocutory injunction is a

> discretionary and equitable remedy which will not be granted in the absence of the applicant showing irreparable harm. “Irreparable” refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured with damages....

[31] In *Gabriel v. Mohawk Council of Kanesatake*, 2002 FCT 483, [2002] F.C.J. No. 635 (QL), Madam Justice Tremblay-Lamer considered irreparable harm within the context of Band Councils, stating at paragraphs 26-27 that the political nature of the offices held by councillors creates a very different situation than occurs within a general employment context:

> ¶ 26 The applicant argues that he will suffer irreparable harm, which cannot be quantified in monetary terms, should I refuse to grant an interlocutory injunction reinstating him as Grand Chief of the Mohawk Council of Kanesatake pending a final order in the matter. The jurisprudence makes it clear that the office of Chief is political and that the law concerning wrongful dismissal does not provide for remedies for loss of elective office. This was recognized by my colleague MacKay J. in *Frank v. Bottle et al* (1993), 65 F.T.R. 89 at paras. 27-28 where he said:
>
> > In my view the law concerning wrongful dismissal, and damage awards for that, deals with situations of employer-employee relations and it does not provide for remedies for loss of elective office. The Chief is not an employee of Council nor in my view can he be considered an employee of the Tribe. The office of Chief is political, filled by valid election, with attendant responsibilities that transcend any concept that he is an employee of the Tribe, just as is the office of council member.
> >
> > ... Without determining the issues which are not before the Court, in my view, he would have no claim in damages for wrongful dismissal and probably no realistic monetary claim for loss of reputation.
> >
> > […]

> ¶ 27 Therefore, if I did not grant an injunction and the applicant subsequently succeeded with his application for judicial review, he would not be entitled to the relief normally available to employees who have been dismissed. This, in my view, constitutes irreparable harm.

[32] While Madam Justice Tremblay-Lamer was addressing irreparable harm within the context of the removal of the Grand Chief of the Mohawk Council of Kanesatake, I believe that the same considerations apply when considering the suspension and possible dismissal of two Councillors of the respondent Band Council. Like the situation in *Gabriel*, the position of a Councillor of the respondent Band is a political office to which the applicants have been elected by other members of the Sucker Creek First Nation. Removal from this office means that the applicants cannot speak out on behalf of those policies for which they were elected, either at Council meetings or within the community at large. Such a situation irreparably harms not only the applicants themselves, but also those individuals who elected them as their representatives in November 2006.

Balance of Convenience

[33] The applicants submit that the balance of convenience is with the restoration of the applicants to their positions as Councillors of the respondent Band, at least until this application is finally determined. Their argument is premised on the view that if the injunction is not granted, they will be prevented from governing the people who elected them to office, and those people will be deprived of their elected representatives.

[34] When determining where the balance of convenience lies, it is paramount to ask who is likely to be more injured by the Court's decision.

[35] The applicants have shown that the democratic process and their constituents will be irreparably harmed should the injunction not be granted. To begin with, their suspensions are indefinite, meaning that no definitive timeline has been established concerning the investigation into the allegations against them. Only one year and eight months remain in the applicants' term of office. Each month is important.

[36] Accordingly, the balance of convenience favours the applicants, their constituents, and the democratic process. The concern over the alleged conflict of interest can be addressed by suspending the applicants' duties with respect to the ATCO contracts until the investigation has been completed.

CONCLUSION

[37] For these reasons, this motion for an interlocutory injunction will be granted.

UNDERTAKING AS TO DAMAGES

[38] The applicants, George Prince and Paulette Campiou, have undertaken to abide by any Order concerning damages caused by the granting of the injunction as required by Rule 373(2) of the *Federal Courts Rules*, S.O.R./98-106.

ORDER

THIS COURT ORDERS that:

1. This motion for an interlocutory injunction is allowed with costs in the cause;
2. The respondents are enjoined from suspending the applicants as Councillors in accordance with these Reasons for Order; and
3. The respondents are ordered to reinstate the applicants as Councillors with access to their offices and with their pay, including back pay.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-440-08
STYLE OF CAUSE:	GEORGE PRINCE ET AL. v. SUCKER CREEK FIRST NATION #150 ET AL.
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REASONS FOR ORDER AND ORDER:	**KELEN J.**
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