Date: 20080930

Docket: T-1370-08

Citation: 2008 FC 1098

Ottawa, Ontario, September 30, 2008

PRESENT: The Honourable Madam Justice Hansen

BETWEEN:

GEORGE PRINCE and PAULETTE CAMPIOU

Applicants

and

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

Respondents

REASONS FOR ORDER AND ORDER

[1] Applicants were elected as Councillors of the Respondent First Nation by custom election pursuant to *The Customary Election Regulations of the Sucker Creek First Nation #150A* (*Regulations*) for three-year terms in November 2006.

[2] The parties are currently involved in another judicial review proceeding in Court file T-440-08 in relation to the Respondent First Nation's decision to suspend the Applicants as Councillors in February 2008. In April 2008, Justice Kelen granted the Applicants an interlocutory injunction enjoining the Respondents from suspending them as Councillors. The Court also ordered the Respondents to reinstate the Applicants as Councillors pending a determination in the underlying judicial review.

[3] On August 21, 2008, the Applicants received a copy of a Band Council Resolution dated August 20, 2008 stating that they had been removed as Councillors. They now seek an interlocutory injunction enjoining the Respondents from holding a by-election to replace them as Councillors and from interfering with the exercise of their duties as Councillors pending a determination of the judicial review in this proceeding. At the hearing of this motion, the Respondents undertook not to hold a by-election until the within judicial review has been resolved.

[4] In response to the motion for injunctive relief, the Respondents relied primarily on their assertion of the existence of an adequate alternative remedy. In particular, relying on Justice Gibson's decision in *Willier v. Sucker Creek Indian Band #150A*, 2001 FCT 1325, the Respondents submit that since the *Regulations* provide an appeal procedure from a decision to remove a Councillor, this is the process that must be followed rather than an application for judicial review to this Court. In the Respondents' view, this motion should fail for the same reason.

[5] Section 15 of the *Regulations* addresses the removal of a Chief or Councillor from office and the procedure to appeal that decision. Section 15.5 states;

> […]
>
> If a person does want to appeal this decision, the same procedure for an Election appeal will be followed.

[6] Whether the Applicants should be required to pursue a remedy through the appeal procedure in the R*egulations* rather than by application for judicial review to this Court is a discretionary determination for the applications judge. It is not a question to be decided on a motion for injunctive relief.

[7] It is well established that to obtain an interlocutory injunction the Applicants must satisfy the Court that there is a serious issue to be tried; the Applicants would suffer irreparable harm if the relief sought is not granted; and the balance of convenience weighs in favour of granting the injunction (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311);

[8] As a finding of an adequate alternative remedy on judicial review will render a consideration of the alleged errors surrounding the removal of the Applicants as Councillors unnecessary, to be successful on this motion the Applicants must first satisfy the Court that there is a serious issue regarding the existence of an adequate alternative remedy as asserted by the Respondents.

[9] As noted above, a determination that there is an adequate alternative remedy is discretionary. In *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, Chief Justice Lamer observed that a number of factors may be considered in determining whether an individual should be required to proceed with a statutory appeal procedure instead of having recourse to the court on judicial review. The non-exhaustive list of factors include the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body including its investigative, decision-making and remedial capacities.

[10] In the present case, the alleged errors are the misapplication of the *Regulations* and breaches of procedural fairness. Section 12.8 of the *Regulations* sets out the orders the Election Appeal Committee may make in the event of a successful appeal. The Committee is limited to calling a new election, by-election or run-off election. The Committee does not have the authority to order the reinstatement of the Applicants as Councillors. Accordingly, even if the Applicants were successful on appeal, under the *Regulations,* they could not be reinstated and would be required to face an election In my opinion, this raises a serious issue regarding the adequacy of the alternative remedy. As to the Respondents' reliance on *Willier*, it is distinguishable on its facts. The dispute between the parties in that case concerned an election and not the removal of a Councillor as in the present case.

[11] Given that the Court on judicial review will have to consider the issues raised by the Applicants in connection with their removal in the event the adequate alternative remedy argument is rejected, for the purpose of injunctive relief, the Applicants must also satisfy the Court that they

have raised a serious issue in the underlying application for judicial review. At paragraphs 34 and 35 of their memorandum of fact and law, the Applicants submit that the decisions to remove them were not taken in accordance with the *Regulations* and allege numerous instances of non-compliance with the *Regulations*. They further allege breaches of procedural fairness. As noted above, the Respondents relied primarily on their adequate alternative remedy argument and did not specifically address each of the allegations of error. Having reviewed the motion records of the parties, I am satisfied that the Applicants have raised serious issues in the underlying judicial review.

[12] As to the questions of irreparable harm and balance of convenience, the Applicants make the same submissions as they did in their motion for the interlocutory injunction before Justice Kelen in April 2008. His reasons for finding that the Applicants would suffer irreparable harm and that the balance of convenience weighed in their favour are equally applicable to the present motion.

[13] It should also be noted that the Applicants have undertaken to abide by any order concerning damages that may be caused by the granting of an injunction in the present matter as required by Rule 373(2) of the *Federal Courts Rules*, SOR/98-106.

[14] Accordingly, the Applicants' motion for injunctive relief will be granted.

ORDER

THIS COURT ORDERS that:

1. The motion for an interlocutory injunction is granted with costs in the cause.

2. The Respondents shall reinstate the Applicants as Councillors with pay including back pay and with access to their offices.

3. The Respondents are enjoined from interfering with the Applicants' exercise of their duties as Councillors pending a determination of the judicial review in this proceeding.

"Dolores M. Hansen"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1370-08
STYLE OF CAUSE:	GEORGE PRINCE et al v. JARET CARDINAL et al
PLACE OF HEARING:	Edmonton
DATE OF HEARING:	September 11, 2008
REASONS FOR ORDER AND ORDER:	September 30, 2008
DATED:	

APPEARANCES:

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Ms. Priscilla Kennedy	FOR THE RESPONDENTS

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Davis LLP Edmonton, AB	FOR THE RESPONDENTS