Date: 20081117

Docket: T-1587-08

Citation: 2008 FC 1287

Ottawa, Ontario, November 17, 2008

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

Temagami First Nation

and

John Turner, Jamie Saville, Joseph Twain, Patricia Neu,

Roxanne Ayotte, John Mckenzie, Steven Laronde and Arnold Paul

REASONS FOR ORDER AND ORDER

[1] The applicant is seeking an interim injunction that would enforce the results of a general election held on June 12, 2008 until the underlying proceeding dealing with a judicial review of two resolutions purporting to amend the Temagami First Nation Tribal Constitution has been heard and decided on its merits. The applicant is also requesting a stay of these resolutions amongst other remedies.

[2] What is at stake in these proceedings is the leadership of the community. It is a battle for control and the power to govern the Temagami First Nation.

[3] In order to be successful in their motion for an interlocutory injunction against the respondents, the applicant is required to convince this Court that a serious issue (or issues) exists, irreparable damage has been caused by the issue, and that the balance of convenience favours the applicant's position. This tripartite test is set out in the landmark Supreme Court of Canada decision in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:

> At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.
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> At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. `Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.
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> The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

This Court consistently applies this tripartite test to motions for injunctive relief, as evidenced by the recent cases of *Prince v. Sucker Creek First Nation* 2008 FC 479 (para. 20), and *Henderson v. Sioux Valley Dakota Nation*, [2008] F.C.J. No. 1032 (para. 23).

[4] The underlying proceeding raises issues of a complex nature such as: the interpretation to be given to section 18 (1) of the *Federal Courts Act*, R.C.S. 1985 c. F-7, as amended, in relation to both the standing of the applicant in these proceedings and the respondents as a decision-making

body subject, or not, to extraordinary remedies; the jurisdiction of this Court in consideration of the factual basis presented; the customary traditions and their impact, if any, on the Temagami First Nation Tribal Constitution; the conflicting evidence presented by both parties in support of their respective positions on the interlocutory injunction and stays, and questions of a procedural nature that are of vital importance in these proceedings.

[5] These complex issues cannot be dealt with successfully in a judicial way without the Court benefiting from complete records dealing with all of the legal issues arising from such proceedings.

[6] In effect, the interim measures being sought are effectively asking this Court to pronounce itself on some of the substantive issues that directly impact the underlying application for judicial review of resolutions.

[7] This is not in the interest of justice, nor would it be justice well done.

[8] Having read the proceedings as presented, and having heard the parties for a period of more than two (2) hours, I do find that there are serious issues to be dealt with eventually.

[9] The Court, having reviewed the evidence, does consider that at present the uncertain situation regarding the leadership of the community does result in damages to the community, such as a lack in the decision-making process of the Band Council, the diminution of the control and legal authority of the leadership, unnecessary division within the community, uncertainty in the reporting hierarchy for Band personnel, etc... Such consequences are regretful and should not exist, but do not constitute irreparable harm or damages that the second part of the *RJR Macdonald* test

requires. In that case, the Supreme Court of Canada clearly states that “irreparable harm” is harm that cannot be repaired or compensated:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[10] The damages presented here by the applicants are not in a state of non-repair, and they could be compensated.

[11] The Court has noted that the Chief and counsellors elected in the general election of June 12, 2008 are still in control of the situation: the offices of the Band Council are under their supervision, the bank account of the Band is under their authority, and the department of Indian and Northern Affairs continues to recognize them as the duly elected council. Until this Court comes to a final determination regarding the underlying application for judicial review, such a situation should ensure that the basic needs of the community can at least be met.

[12] Furthermore, as requested by both parties, it is in the best interests of the community that the underlying application for judicial review be expedited, allowing this Court to decide all of the remaining issues at play in a definitive way. With the consent of both parties, this Court will issue an order to this effect which will also include a specific schedule and the permission to include in the application for judicial review the evidence of both parties in support of the present motion.

ORDER

THIS COURT ORDERS that the motion for an interim injunction and stays of the resolutions is dismissed;

The hearing of the underlying application for judicial review will be expedited;

The evidence submitted in the interlocutory proceeding shall be evidence applicable to the underlying proceeding;

The following schedule shall be abided by the parties:

- The applicant must perfect their record by November 21st, 2008;
- The respondents will have the opportunity to cross-examine applicant's affiants during the period from November 21st, 2008 through December 9th, 2008;
- The respondents must perfect their record by December 16th, 2008;
- The applicant will have the opportunity to cross-examine the respondents' affiants during the period from December 16th, 2008 through January 16th, 2009.
- Then, one of the parties shall forward to the Court administrator a requisition for hearing in accordance with Rule 314 of the Federal Court Rules.

Costs in the cause.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	Ottawa, Ontario
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APPEARANCES:

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