Date: 20090312

Docket: T-345-09

Citation: 2009 FC 257

BETWEEN:

STANLEY LAURENT ON HIS OWN BEHALF AND MEMBERS OF THE FORT MCKAY FIRST NATION

Applicant

and

THE FORT MCKAY FIRST NATION, CHARLES STRAHL, THE MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA, RAYMOND POWDER, MIKE ORR, CECILIA FITZPATRICK AND DAVID BOUCHIER

Respondents

REASONS FOR ORDER
(Dictated from the Bench, reserving the right to correct grammatical or clerical errors)

HARRINGTON J.

[1] Tomorrow, March 13, 2009, a referendum is scheduled to take place on the following question:

> Do you agree that the Fort McKay First Nation Election Code (dated December 22, 2004) has been a recognized customary election law since February 8, 2005?

This initiative was taken by the Council of Elders.

[2] Mr. Stanley Laurent on his own behalf, and on behalf of other members of the Fort McKay First Nation, has brought on a motion, to be decided today on an urgent basis, for an injunction enjoining the "Fort McKay First Nation's Administration" from holding said referendum. These are the reasons why I am dismissing his motion.

BACKGROUND

[3] The event which precipitated this motion was the refusal of the Returning Officer of the Fort McKay First Nation to accept Mr. Laurent's nomination papers in his bid to be elected chief in an election scheduled for 25 February 2008. She rejected his papers because he was ineligible to run for election in accordance with the Fort McKay First Nation Election Code dated 22 December 2004, which among other things, required that a candidate for office be a "life long member" of the First Nation, which meant that the candidate must have been born to a member. Mr. Laurent did not meet that qualification.

[4] Mr. Laurent sought a judicial review of that decision in *Stanley Laurent v. Pauline Gauthier and the Fort McKay First Nation*, docket number T-396-08. Since he was clearly ineligible to run for office in accordance with the Code itself, he also had to attack its legitimacy. On 24 February 2009, Mr. Justice Campbell ordered (2009 FC 196):

> For the reasons provided, pursuant to s. 18.1 (3) (b) of the *Federal Courts Act*, I declare that the *Fort McKay First Nation Election Code* dated December 22, 2004 is invalid. As a result, I further declare that, for want of jurisdiction, Ms. Gauthier's decision of February 11, 2008 rejecting the nomination of Mr. Laurent and acclaiming Mr. Boucher as Chief of the Fort McKay First Nation is invalid.

[5] An appeal from that decision has been launched by the Fort McKay First Nation, docket A-102-09. An appeal to the Federal Court of Appeal does not stay the full force and effect of an order of this Court. The First Nation is entitled to seek a stay from the Federal Court of Appeal in accordance with Rule 398 of the *Federal Courts Rules*. They have filed such a motion which has yet to be heard, much less adjudicated upon.

[6] Quite apart from Mr. Laurent's situation, great concern has been expressed by various members of the Band as to the effect of Mr. Justice Campbell's decision on business carried out by the Band since the Code had been promulgated in February 2005. There are various contracts in place with third parties, people hired, moneys disbursed, moneys owing and moneys to be received.

[7] No motion has been made under Rule 397 requesting the Court, as constituted at the time of the order, to reconsider on the grounds that matters which should have been dealt with were overlooked or accidentally omitted.

[8] I do not take the proposed referendum as being a collateral attack on the order of Mr. Justice Campbell. It certainly cannot be taken as retroactively ratifying the decision of the Returning Officer to reject Mr. Laurent's nomination papers.

[9] Depending on the result, the referendum may have the effect of allowing the Band to move forward, and to soothe concerns with respect to the validity of matters carried out by the Band

through its Chief and Councillors since the Code had purportedly come into force on 8 February 2005.

[10] In the underlying judicial review in this case, Mr. Laurent not only seeks relief in the nature of an injunction to prevent a referendum, but also a declaration that the Chief and Council, or the Administration, and Council of Elders are without authority and jurisdiction, are in office unlawfully and are making decisions without authority. However he only seeks to have decisions made from 24 February 24 2009, the date of Mr. Justice Campbell's decision, quashed. He also seeks the appointment of a Receiver Manager to assume control over all operations of the First Nation and its affiliated groups of companies, and an order requiring the First Nation to hold a new election.

MR. JUSTICE CAMPBELL'S DECISION

[11] The basis of Mr. Justice Campbell's decision is that the Code under which the Returning Officer rejected Mr. Laurent's nomination papers had not been properly approved by the members of the Fort McKay First Nation. It seems that before the Code came into place in February 2005, Mr. Laurent was eligible to run for office. In fact he did run successfully as a Councillor and unsuccessfully for Chief.

[12] Although Mr. Laurent had argued that his equality rights under s. 15 of the Charter had been offended by his rejection as a candidate, Mr. Justice Campbell did not address that argument as a result of his finding on the jurisdiction issue.

[13] The problem facing Mr. Justice Campbell was the number of electors required to put the Code in place. He did not deal with the legality of the provisions thereof. The Notice of Referendum provided that the Code would be of full force and effect as of the date it was approved by the electors at a special meeting at which at least 50 per cent of the electors were in attendance. This would mean a double majority, with at least 25 per cent of eligible electors voting in favour. As it was, only 44 per cent of the eligible electors voted. Of those, 56.6 per cent voted in favour, but as a total of all electors only 24.86 per cent approved the code. The Code under discussion did not include this double majority provision. Mr. Justice Campbell noticed the discrepancy between the Notice and the Code and held the whole process was flawed. The misleading information could well have affected the attendance at the referendum meeting. Indeed, Mr. Laurent, who opposes the Code, did not vote in an effort to keep a majority of the First Nation from attending the ratification vote meeting. His failure to attend constituted a negative vote.

[14] I am in no way persuaded that the effect of Mr. Justice Campbell's order is that the Elders cannot put in process a referendum which might have the effect of resolving issues other than the decision of the returning officer to reject Mr. Laurent's nomination papers. The Code under attack does not deal with the authority of Elders.

[15] I am not prepared to speculate as to what the outcome of the referendum will be, or its effect. The "NOs" may have the majority, or the "YAYs" may have a single majority, or a double majority.

INTERLOCUTORY INJUNCTIONS

[16] The leading case is *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. It is well accepted that there is a tri-partite test: serious issue, irreparable harm and balance of inconvenience.

[17] I am prepared to assume that the motion is serious in that it is neither vexatious nor frivolous. It is not necessary to determine whether Mr. Laurent has suffered irreparable harm, although I do note that all he lost was an opportunity to run for office. In my view this motion turns on balance of inconvenience. In *R.J.R.-MacDonald*, above, the Court referred to its earlier decision in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 as follows:

> *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

[18] It is my view that the Band will suffer far greater harm from the granting of the requested injunction than would Mr. Laurent, and whoever is with him, should the injunction not be granted. If they think that the Code is a bad idea, they have the right to go out and vote “no”.

[19] As to another aspect of this motion, which is for an order to have Ackroyd LLP removed as solicitors of record for the respondent Fort McKay First Nation, I am adjourning same. It would be completely inappropriate to deprive some members of the Band a legal voice on this motion. It would be impossible for those members to appoint and instruct new counsel so as to be in position to make meaningful representations. Furthermore it may behove the applicant to develop a much better record on this point.

[20] Although Mr. Laurent seeks an order for the appointment of a Receiver Manager, he does not seek that order today.

[21] It is obvious to me that this proceeding begs for special management pursuant to Rule 384. The case manager(s) to be appointed by the Chief Justice pursuant to Rule 383 may deal with such matters as an expedited hearing on the merits, the possible appointment of Receiver Managers, the motion to remove Ackroyd LLP as solicitors of record for the Fort McKay First Nation, as well as the aftermath of the referendum.

"Sean Harrington"

Judge

Ottawa, Ontario
March 12, 2009

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	T-345-09
STYLE OF CAUSE:	Stanley Laurent on his own behalf and Members of the Fort McKay First Nation v. The Fort McKay First Nation et al.

SPECIAL SITTING HELD BY WAY OF TELECONFERENCE BETWEEN OTTAWA, CALGARY, EDMONTON AND VICTORIA

DATE OF HEARING:	March 12, 2009
REASONS FOR ORDER:	HARRINGTON J.
DATED:	March 12, 2009

APPEARANCES:

Jeffrey R.W. Rath Natalie White	FOR THE APPLICANT
Trina Kondro Jerome Slavik	FOR THE RESPONDENT Fort McKay First Nation
Tanya Knobloch	FOR THE RESPONDENT Charles Strahl and Minister of Indian and Northern Affairs
Dominique Nouvet	FOR THE RESPONDENTS Raymond Powder, Mike Orr, Cecilia Fitzpatrick and David Bouchier
Brian Crane, Q.C.	FOR Ackroyd LLP On the motion that they be struck as solicitors of record for Fort McKay First Nation

SOLICITORS OF RECORD:

Rath & Company Priddis, Alberta	FOR THE APPLICANT
Ackroyd LLP Edmonton, Alberta	FOR THE RESPONDENT Fort McKay First Nation

John H. Sims Deputy Attorney General of Canada	FOR THE RESPONDENTS Charles Strahl, Minister of Indian and Northern Affairs
Woodward & Company Victoria, British Columbia	FOR THE RESPONDENTS Raymond Powder, Mike Orr, Cecilia Fitzpatrick and David Bouchier
Gowling Lafleur Henderson Ottawa, Ontario	FOR Ackroyd LLP On the motion that they be struck as solicitors of record for Fort McKay First Nation