Federal Court Cour fédérale

Date: 20110113

Docket: T-2089-10

Citation: 2011 FC 37

Vancouver, British Columbia, January 13, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

COUNCILLOR MIKE ORR and
COUNCILLOR CECILIA FITZPATRICK

Applicants

and

FORT McKAY FIRST NATION
CHIEF JIM BOUCHER,
COUNCILLOR RAYMOND POWDER,
and COUNCILLOR DAVID BOUCHER

Respondents

REASONS FOR ORDER AND ORDER

UPON the applicants' motion for an interim injunction pursuant to Rule 373 of the *Federal Courts Rules*, SOR/98-106 to compel the Fort McKay First Nation to adjourn the special meeting set for January 18, 2011 for a vote to remove Councillors Mike Orr and Cecilia Fitzpatrick, to restore them in their position as Councillors, to provide notice of all meetings of Fort McKay First Nation Council and to pay them their salary as duly elected Councillors;

UPON reviewing all the material filed by the parties including the additional affidavit of Crystal Topilko, filed with leave of the Court and upon consent of the respondents, and having considered the representations of their counsel, which in this case are particularly important given that the applicants' counsel had to deal with new issues raised by the respondents' evidence;

UPON noting that the meeting scheduled for January 18, 2011 only concerns the removal of Mr. Orr given that Ms. Fitzpatrick has apparently resigned from her position by way of a letter dated December 14, 2010. The applicants' counsel advised the Court that Ms. Fitzpatrick may shortly file evidence in response to the affidavit of Philip Peddie, the Band administrator, who states that she had confirmed to him that she would give instruction to her counsel to discontinue the proceedings on her behalf. Be that as it may, at this stage, it is clear that the vote scheduled to take place on January 18, 2011 does not concern Ms. Fitzpatrick. Also, in the absence of evidence to the contrary on the record before me, the Court cannot make any order respecting Ms. Fitzpatrick's status;

UPON considering that to succeed, Mr. Orr has to establish that he meets the tripartite test set out in *RJR-MacDonald Inc v. Canada (AG)*, [1994] 1 SCR 311: (i) that there is a serious issue to be tried; (ii) that he would suffer irreparable harm if the relief sought is not granted; and (iii) that the balance of convenience is in his favour;

UPON considering that Mr. Orr was duly elected Band Councillor on February 25, 2008 for a four-year term. Pursuant to the applicable Election Code, particularly section 101, a Chief or Councillor can only be <u>removed or suspended</u> from his or her functions (presumably this would also normally apply to the suspension of the Chief or Councillor's pay) by a vote of the electors

conducted at a special meeting at which a majority of electors have attended (see section 103 of the Election Code). Such process can only be set in motion by a valid resolution of the Council which includes the particulars of the cause for removal or suspension including cause on the basis set out in sections 101.3.1 or 101.3.7, or a petition setting out the grounds on which the removal or suspension is sought and meeting the requirements in section 102 of the Election Code. In this particular case, no petition was filed and the process has been put in motion by a resolution of the Council dated December 13, 2010 (as amended on December 14, 2010 to include Ms. Fitzpatrick);

[1] It also appears that two other Band Council Resolutions (BCRs) were signed on October 26, 2010 and November 25, 2010 respectively by the Chief and two Band Councillors. The first one purports to cancel the Shareholder Trust Agreement between Mike Orr and Cecilia Fitzpatrick and the First Nation for the corporations listed in the said BCR while the second states that "the salaries, benefits and emoluments of councillors Orr and Fitzpatrick are discontinued effective immediately" (i.e. as of November 25, 2010). Also, the said Resolution states that "where necessary and appropriate and in the best interests of the First Nation, the Chief and Council will hereby continue to conduct business of the Council without the participation of councillors Orr and Fitzpatrick".

[2] Although the BCR of November 25, 2010 expressly states that there was a quorum of the Chief and Council of the Fort McKay First Nation at "a duly convened meeting", Mr. Peddie in his affidavit affirms that there was no meeting of the Chief and Band Council on that date or on October 26, 2010. Accordingly, it is not disputed that Councillors Orr and Fitzpatrick were not notified of the meetings referred to in the said BCRs. That said, the respondents' counsel offered no cogent explanation as to how these BCRs could be validly adopted without being placed before

the Chief and Band Council at a properly convened meeting. At this stage, there is no evidence that a general system of rules dealing with such matters has been adopted, and there is nothing in that respect in the Election Code. Thus, in accordance with section 105.1 of the Election Code, the Council was to govern its conduct in accordance with the *Indian Band Council Procedure Regulations*, CRC, c. 950 (see particularly ss. 12 and 13 of these *Regulations* which appear to require that a BCR be presented and placed before the Council at a meeting). See also s. 19 dealing with votes involving a conflict of interest.

[3] Moreover, no explanation – let alone a cogent one – was provided as to why, if the November 25, 2010 BCR is considered proper by the Band administrator, it was not applied as per its terms. In effect, Mr. Peddie states in his affidavit that Councillors Orr and Fitzpatrick's pay was only suspended as of December 13, 2010, the date of the BCR commencing the process for their removal.

[4] In accordance with the *Indian Band Council Procedure Regulations*, notice of <u>all</u> meetings is to be given to all Councillors.

[5] The Court is satisfied that there are serious issues to be determined in respect of the validity of these two BCRs. At this stage, the Court can only conclude that these BCRs could not be validly adopted without being placed before the Chief and Band Council at a duly convened meeting.

[6] With respect to the December 13, 2010 meeting, although in his affidavit Mr. Orr states that he did not receive notice of the said meeting, it appears from the affidavit of Mr. Peddie that Mr. Orr

was actually notified by way of an email, and that, in fact, he and Councillor Fitzpatrick did attend the meeting or at least part thereof.

[7] It appears from the draft minutes of the December 13, 2010 meeting that shortly after the beginning of that meeting Mr. Orr and Ms. Fitzpatrick were asked to excuse themselves to allow the other Councillors and the Chief to discuss a resolution seeking their removal. There is no indication that they were given any opportunity to be heard before the decision was actually taken by the Chief and the two other Councillors to seek a vote by the electors. In fact, the draft minutes reflect that the two Councillors were simply informed that a decision had been taken in that respect.

[8] The vote is scheduled to take place simultaneously in three locations and there is no mechanism in place to provide Councillor Orr an opportunity to be heard by the electorate before the vote proceeds.

[9] For Mr. Orr, this means that the matter of his removal from his electoral office will be decided without him having had an opportunity to be heard orally or in writing. This, the applicant argues, is a clear breach of the principles of procedural fairness that should apply given the importance of this decision and its impact on him.

[10] According to the respondents, the Election Code does not provide for anything in that respect. Thus, there is simply no duty to give such an opportunity to Mr. Orr. In any event, they say that as a politician, Mr. Orr has had ample opportunity and means to convey his message to the electorate prior to the vote.

[11] The Court cannot agree that the issue is that simple. The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 set out the various criteria to be used to determine the extent of the duty to act fairly in any given circumstance. The process chosen by the decision-maker is only one of the elements to be examined by the Court, as is the nature of the decision – a purely discretionary one versus a quasi-judicial decision – to use the terminology adopted by the respondents' counsel.

[12] Although the content of the duty to proceed fairly is flexible and depends on the context, the most basic requirements are that of notice and an opportunity to make representations.

[13] In *Sparvier v. Cowessess Indian Band No. 73 et al*, [1993] 3 FC 142, [1993] FCJ No 446 (TD), Justice Rothstein (now a member of the Supreme Court of Canada) stated:

> 47 While I accept the importance of an autonomous process for electing band governments, in my opinion, minimum standards of natural justice or procedural fairness must be met. I fully recognize that the political movement of Aboriginal People taking more control over their lives should not be quickly interfered with by the courts. However, members of bands are individuals who, in my opinion, are entitled to due process and procedural fairness in procedures of tribunals that affect them. To the extent that this Court has jurisdiction, the principles of natural justice and procedural fairness are to be applied.

[14] These principles have been applied consistently to merely administrative decisions in the context of removal or suspension of a Chief or Band Councillors (e.g. *Duncan v. Behdzi Ahda First Nation*, 2003 FC 1385 at paras. 18-23; *Catholique v. Lutsel K'e First Nation*, 2005 FC 1430 at paras. 53-57; *Prince v. Sucker Creek First Nation #150A*, 2008 FC 1268 at paras. 39 – 42; *Metansinine v. Animbiigoo Zaagi'igan Anishinaabek First* Nation, 2011 FC 17 at para. 22) although none of the

cases cited directly involved a final decision to be taken by the electorate, there is clearly a serious issue in that respect which will need to be determined by the judge hearing the merits of the application. In view of the foregoing, the Court is satisfied that Mr. Orr meets the first part of the test. In fact, he has established a strong *prima facie* case. I should note here that this Court has not looked at the merits of the grounds set out in the December 13, 2010 BCR for it is not its role in these proceedings.

[15] Turning now to the second element, irreparable harm, Mr. Orr argues that his position is a political position and that the law does not provide for remedies for loss of an elective office. Thus, his effective suspension as a result of the November 25, 2010 vote and his eventual wrongful removal on January 18, 2011, will constitute irreparable harm, as found by Justice Tremblay-Lamer in *Gabriel v. Mohawk Council of Kanesatake*, 2002 FCT 483 at paras. 26 to 30.

[16] There are also other concerns regarding the irreparable harm to be suffered by the applicant were he to be removed from office (*Sound v. Swan River First Nation*, 2002 FCT 602 at para. 21; *Prince v. Sucker Creek First Nation* #150A, 2008 FC 479 at paras. 31-32).

[17] The respondents submit that this motion is premature given that the majority attendance of electors for the vote, as required by the Election Code, may not be met or that the electors may choose not to remove Councillor Orr. In that sense, the prejudice alleged is speculative.

[18] The Court cannot agree. The position of Councillor is one of prestige (although not as much as that of a Grand Chief as discussed in *Gabriel*, above, at paras. 28-29). The holding of a vote on a resolution whose legality is seriously challenged and where electors are asked to assess the validity

of the grounds set out in the December 13, 2010 BCR without the benefit of an explanation from the person concerned will certainly affect the reputation and prestige of Mr. Orr, even if he is not effectively removed.

[19] As mentioned by the Supreme Court of Canada in *RJR-MacDonald*, above, at para. 59, “irreparable harm” refers to the nature of the harm rather than its magnitude.

[20] The Court is satisfied that a vote on January 18, 2011 in the particular circumstances of this case will cause some irreparable harm to Mr. Orr regardless of its outcome.

[21] Does the balance of convenience favour the granting of the remedy sought, particularly the adjournment of the January 18, 2011 special meeting? Here the Court must also consider the best interests of the Band members (public interest) who should not be asked to vote on a removal when there is a strong *prima facie* case that the process leading to such a vote is flawed. This especially so when one considers that if Councillor Orr is removed by vote and ultimately reinstated by the Court hearing the judicial review on the merits, this will put in jeopardy the validity of all decisions taken by the Council after this vote. As is apparent from the evidence filed by both sides, there are important issues to be addressed by the Council such as a potential forensic audit and the appointment of arbitrators to deal with employee grievances filed more than a year ago.

[22] The Court also considered what the situation would be if Councillor Orr were to continue his functions for a short while. It is apparent that the Band Council has put in much effort to foster harmony within the Council and that it has mentioned important issues must be dealt with by a

Council which is bound by the Election Code to work on the consensus (unanimity) basis.
The Court notes, however, that pursuant to section 92.3 of the Election Code, in circumstances where the Council is unable to arrive at a consensus on a particular issue, it may bring the issue to the membership at its next meeting. Section 93.1.1 provides that quarterly general meetings are to be held and that special meetings can be held as necessary.

[23] The respondents put much emphasis on the need to respect the democratic process already set in motion, but is fairness not an essential part of any democratic process?

[24] Finally, the Court should favour *status quo*.

[25] Having weighed all the factors the Court is satisfied that the balance of convenience favours the applicant Mr. Orr. The Court concludes that the test has been met for the adjournment of the January 18, 2011 meeting.

[26] Mr. Peddie states that there is no need for the Court to deal with notices of meetings given that Mr. Orr has already received notice of the next meeting scheduled for January 19, 2011. Given that Mr. Peddie also confirms the suspension of pay, it is not clear how one would expect Councillor Orr to fulfill his duty.

[27] Finally, it is evident that this application must be resolved as expeditiously as possible in the interests of not only the parties, but the Band as a whole. The Court finds that it is appropriate to continue this proceeding as a specially managed proceeding and on an expedited basis. In this

context, the parties should file a proposed joint schedule for all the steps necessary to prepare this file for hearing so that an early date for a hearing can be fixed. This should include amendments of the notice of application to reflect the true issues involved. Finally, the applicants sought leave pursuant to Rule 302 so that a judicial review properly proceeds in respect of the three BCRs referred to herein.

ORDER

THIS COURT ORDERS that:

1. The Chief and Band Council of the Fort McKay First Nation shall adjourn the special meeting scheduled for January 18, 2011.
2. As an interim measure, Councillor Orr shall continue to perform his duties as Councillor with pay and to receive the notices as provided for in the Election Code and the applicable regulations for all meetings of the Chief and Council.
3. This proceeding shall continue as a specially-managed proceeding and on an expedited basis.
4. On or before January 30, 2011, the parties shall file a proposed joint schedule as well as dates for an early hearing.
5. Leave is granted pursuant to Rule 302.
6. Costs in the cause.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2089-10
STYLE OF CAUSE:	COUNCILLOR MIKE ORR et al. v. FORT McKAY FIRST NATION et al.
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	January 10, 2011 Telephone Conference on January 13, 2011
REASONS FOR ORDER AND ORDER:	GAUTHIER, J.
DATED:	January 13, 2011

APPEARANCES:

Priscilla Kennedy	FOR THE APPLICANTS
Trina Kondro	FOR THE RESPONDENTS

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