

Federal Court



Cour fédérale

Date: 20110405

Docket: T-515-11

Citation: 2011 FC 420

Ottawa, Ontario, April 5, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**CHIEF CAROLYN BUFFALO, GARRY LOUIS
AND LEONARD STANDINGONThEROAD,
ON THEIR OWN BEHALF AND ON BEHALF
OF THE MEMBERS OF THE
MONTANA FIRST NATION**

Applicants

and

**REMA RABBIT,
BRADLEY RABBIT AND
GERALDINE HILL**

Respondents

REASONS FOR ORDER AND ORDER

Introduction

[1] On March 28, 2011, the applicants, Carolyn Buffalo, Chief of the Montana First Nation, Garry Louis and Leonard StandingontheRoad, Councillors of the Montana First Nation, filed an application for judicial review in respect of a decision by the Montana First Nation Council

suspending Chief Buffalo and Councillor StandingontheRoad. This decision resulted from a vote by Councillors Bradley Rabbit and Rema Rabbit during a Council meeting held on January 7, 2011. The result of this vote was communicated to the Chief and Councillor in a letter dated January 8, 2011.

[2] Following the suspension, a referendum was held on March 16, 2011 and an election was scheduled to take place Friday, April 1, 2011.

[3] The applicants filed a Notice of Motion pursuant to Rule 359 of the *Federal Courts Rules*, SOR/98-106 (the Rules) on March 28, 2011 seeking an interlocutory injunction and requesting an expedited hearing on March 31, 2011 pursuant to Rules 32, 35(2) and 373. The applicants raised a number of issues including:

- a. that the purported suspension of the applicant Chief Carolyn Buffalo as Chief and the extension of such suspension is illegal and *ultra vires* for lack of procedural fairness and for failure to comply with the *Montana Tribal Council Regulations*;
- b. that the purported general election of Chief and Council is illegal and *ultra vires* for failure to comply with the *Montana Tribal Council Regulations*.

[4] Given the expedited timeline, counsel for the respondents sought an adjournment on March 30, 2011.

[5] A case management conference was ordered by the Court on March 30, 2011. Following which, the Court provided an extension to the respondents. The hearing for the motion for an interlocutory injunction was re-scheduled for Friday, April 1, 2011, upon confirmation that the

election would not take place on that day as originally planned but would be postponed to a later day. By letter dated March 30, 2011, counsel for the respondents confirmed that the elections were indeed postponed and re-scheduled to take place on April 8, 2011.

[6] The motion at issue for an interlocutory injunction was accordingly heard via teleconference on April 1, 2011.

Background

[7] The Montana First Nation in the Province of Alberta is governed by Chief and Council, specifically one Chief and four Councillors, all of whom are required to serve a term of three years.

[8] At the last general election held on October 8, 2008, Carolyn Buffalo was elected Chief of the Montana First Nation and Rema Rabbit, Bradley Rabbit, Garry Louis and Leonard StandingontheRoad were elected Councillors to the Council.

[9] In December 2010, Chief Buffalo authorized Councillor StandingontheRoad to serve as Acting Chief in her absence in order to meet and discuss a potential arrangement between the Nation and an individual by the name of Jason Lucas. Upon Chief Buffalo's return, Councillor StandingontheRoad advised her that an agreement had been reached to use the Nation's facilities to store a large quantity of tobacco. At that time, the cigarettes were already in storage in a Quonset.

[10] On or about January 5, 2011, Chief Buffalo informed the Royal Canadian Mounted Police (RCMP) that there had been a break-in and theft of some of the stored cigarettes. The RCMP

attended to investigate and when they observed the large quantity of cigarettes, reported the matter to the Alberta Gaming and Liquor Commission (AGLC). The AGLC seized the cigarettes and issued a press release announcing the seizure. The cigarettes did not bear the necessary provincial marking to be sold in Alberta.

[11] Following the seizure, a meeting of the membership of the Montana First Nation was held on January 6, 2011.

[12] On the morning of January 7, 2011, Chief Buffalo received a brief text message on her cell phone saying that there was to be a debriefing concerning the events of January 6, 2011. Chief Buffalo was unable to attend the debriefing as she was accompanying her handicapped child to the hospital.

[13] During the meeting, Councillor Rema Rabbit moved a motion to temporarily suspend Chief Buffalo and Councillor StandingontheRoad from their respective offices of Chief and Councillor. Councillor Bradley Rabbit seconded the motion.

[14] Shortly after the meeting, Chief Buffalo was informed by Councillor Bradley Rabbit that a vote had been held, resulting in the suspension from office of both herself and Councillor StandingontheRoad.

[15] Subsequently, Chief Buffalo received a letter dated January 8, 2011 confirming that she had been suspended from her position as Chief until further notice for having brought onto the Montana

Reserve significant quantities of contraband cartons of cigarettes for resale or delivery purposes.

The letter also indicated that she had breached section 22.1 and several sub-sections of section 22.2 of the *Montana Tribal Council Regulations* (the Regulations). Councillor StandingontheRoad received a similar letter on the same day.

[16] By letter dated January 10, 2011, Councillor Garry Louis advised the Council members that he was rescinding his vote on the suspension of Chief Buffalo and Councillor StandingontheRoad.

[17] On February 8, 2011, Chief Buffalo received another letter signed by Councillors Rema Rabbit and Bradley Rabbit, advising her that her suspension had been extended until further notice. This second suspension was not supported by Councillor Garry Louis. By the end of February, the Nation's administration building locks were changed.

[18] On February 11, 2011, both Chief Buffalo and Councillor StandingontheRoad delivered letters to all the other members of the Council appealing their suspensions on the basis that they were invalid.

[19] By notice dated March 2, 2011, signed by George Addai, Interim Administrator, the members of the Nation were advised that a referendum would take place in order to have an election for all positions on the Council including that of the Chief. The notice also advised that the election would be held in accordance with the Montana First Nation election laws and regulations.

[20] The respondent, Geraldine Hill, was the Electoral Officer for the referendum held on March 16, 2011. The election was scheduled to take place on April 1, 2011 but, as explained above, the election has been postponed and it has now been re-scheduled to take place on April 8, 2011.

The Test for Injunctive Relief

[21] The tripartite test to apply in determining whether the applicants are entitled to injunctive relief was established by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 and *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.*, [1987] 1 SCR 110. The applicants must therefore establish the following:

- (a) That there is a serious issue to be tried on the underlying application for judicial review (the applicant must have a *prima facie* case);
- (b) That the applicant will suffer irreparable harm not compensable in damages if an interlocutory injunction is not granted; and
- (c) That the balance of convenience favours the granting of the relief sought.

[22] The tripartite test is conjunctive, and the applicants accordingly have to satisfy all three elements before they will be entitled to relief.

Analysis

[23] By this motion, the applicants seek an interlocutory injunction to preserve the *status quo* of the Nation's governance, i.e. governance by the existing elected Chief and Council, pending resolution of the underlying application for judicial review.

(a) Is there a serious issue to be tried?

[24] The applicants have identified a number of issues which they argue meet the low threshold necessary to satisfy the serious issue component of the *RJR-MacDonald* test. In particular, the applicants maintain that there is an issue of a breach of natural justice in the circumstances. The applicants allege that Chief Buffalo and Councillor StandingontheRoad were not entitled to a fair hearing and basic rights - such as a notice and a right to make representations. More particularly, the notice provided to Chief Buffalo prior to the January 7, 2011 meeting is at issue. Further, the decision taken at that meeting led to drastic consequences for both Chief Buffalo and Councillor StandingontheRoad: they were both ultimately suspended indefinitely without pay.

[25] Against this background, the Court is cognizant that the duty to act fairly is a principle that has been applied consistently in the context of the removal or suspension of a Chief or a Band Councillor (*Orr v Fort McKay First Nation*, 2011 FC 37, [2011] FCJ No 47).

[26] Further, it is alleged that sections of the Regulations - i.e. sections 24.1 and 24.2 - were not properly followed and that some requirements including “the unanimous opinion of the Council members” were not met.

[27] Finally, there is contradicting evidence as to whether all eligible voters received proper notice of the referendum in order to set the election.

[28] In these circumstances, the Court is of the view that there is clearly a serious issue which will have to be determined by the judge hearing the merits of the application for judicial review. The

Court is therefore satisfied that the applicants have met the first part of the test in establishing that there is a strong *prima facie* case.

(b) Will the applicants suffer irreparable harm?

[29] The applicants claim that they will suffer irreparable harm if an interlocutory injunction is not granted. It is important to recall that the Courts have held on many occasions that the threshold of irreparable harm is very high since an injunction consists of an extraordinary remedy. Irreparable harm is harm that cannot be quantified in monetary terms, or which cannot be cured by an award of damages (*RJR-MacDonald* at para 59). The burden is on the party seeking the injunction to provide clear and non-speculative evidence that irreparable harm will follow if the motion is not granted.

[30] As mentioned by the Supreme Court of Canada in *RJR-MacDonald*, irreparable harm refers to the nature of the harm rather than to its magnitude.

[31] The applicants assert that if an interlocutory injunction is not granted, not only will this result in the disruption of the rule of law upon the governance of the Montana First Nation, but it will also result in the loss of the applicants' prestige, reputation and stature within the community, notwithstanding the erosion of their electoral terms. This, the applicants claim, cannot be compensated in damages.

[32] Furthermore, the applicant, Chief Buffalo, claims that she is suffering from irreparable harm due to her inability to perform her duties as Chief and because of her loss of wage and benefits. She contends that her loss of prestige cannot be compensated by damages and that she will be unable to

recover the wage loss she has suffered if successful with a judicial review. She adds that contrary to the respondents' allegations, there is uncertainty as to whether or not her loss of prestige and stature was due to the events leading up to her suspension or because the respondents misinformed the members of the Nation that she had acted in an illegal manner.

[33] As for the respondents, they submit that any irreparable harm that the applicants have suffered to their reputations and their ability to carry on elected duties was a direct result of their actions regarding the storage of tobacco on the reserve. The Court cannot agree with the respondents in this regard.

[34] The position of Chief is one of high prestige. Indeed, the role of a Chief is to provide opinion and direction on policies and issues affecting the community for which they have been elected by other members of the Nations (*Gabriel v Mohawk Council of Kanesatake*, 2002 FCT 483, [2002] FCJ No 635, at para 29). In *Gabriel*, Justice Tremblay-Lamer held that "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" (see also *Frank v Bottle*, [1993] FCJ No 670, 65 FTR 89, at para 27-28).

[35] The Court is of the view that the position of Councillor is also a position of prestige (*Orr*) and that similar considerations accordingly apply when considering the suspension of the applicant StandingontheRoad.

[36] In this case, the Court is therefore satisfied that a vote on April 8, 2011 would cause some irreparable harm to Chief Buffalo and Councillor StandingontheRoad. If an injunction were not granted and the applicants were to succeed with the underlying application for judicial review, there would in fact be a disruption of the governance of the Nation and the inevitable loss of prestige could not be compensated in damages (*Gabriel*).

(c) Does the balance of convenience favour the applicants?

[37] The applicants assert that the balance of convenience lies with them in preserving the *status quo* governance of the Montana First Nation with their reintegration to their positions. As mentioned by Justice Blanchard in *Duncan v Behdzi Ahda First Nation Band (Council)*, 2002 FCT 581, [2002] FCJ No 764, when assessing the balance of convenience, the Court must take into account the needs and best interest of the Nation in question. Here, the Court must consider the best interest of the members of the Montana First Nation.

[38] Should members of the Montana First Nation be asked to vote in an election when there is a strong *prima facie* case that the process leading to the suspension of Chief Buffalo and Councillor StandingontheRoad may be flawed? The Court does not believe so.

[39] In *Francis v Mohawks of Akwesasne Band of Indians*, 62 FTR 314, [1993] FCJ No 369, Justice M. Noël (as he then was) determined that it was more favourable to grant the motion for interlocutory injunction and prevent the holding of the election until its legality was confirmed. In his decision, Justice Noël explained the importance of preserving the *status quo* of a Nation. The Court adopts his observations *mutatis mutandis*:

[...] The Council charged with the responsibility of governing that community is already in an uncertain and somewhat chaotic state which, in my view, must not be further exacerbated.

By granting an interim order prohibiting the holding of the by-election until the matter of its legality is resolved, I would, from the respondents' point of view, temporarily suspend the holding of validly called elections. On the other hand, by granting the interim order, I would preserve the status quo until the issue of the propriety of the by-election is determined. It seems to me that while the present state of affairs is obviously less than desirable, the one which would result if elections were held and were subsequently declared invalid, would be immeasurably worse.

The further disruption which would result in the Akwesasne community if elections, otherwise validly and democratically held, were voided because of an absence of proper authority to hold them could be substantial. Those elected in accordance with the perceived will of the people would be forced to abandon their seats on the Council in favour of members who no longer hold the trust of the community. This would add considerable difficulty to an already difficult situation.

In contrast, preventing the holding of the election until its legality is confirmed would prevent the immediate resolution of the impasse without, however, adding any more fuel to the fire.

[Emphasis added]

[40] In this case, when considering that Chief Buffalo and Councillor StandingontheRoad were to be reinstated by the Court hearing the judicial review, the validity of the decisions taken by the Council following the April 8, 2011 elections would ultimately be questioned. This Court is of the opinion that the balance of convenience favours the applicants, the members of the Montana First Nation and the democratic process. Accordingly, the Court favours the *status quo*.

[41] In the interest of the parties and the Nation, the application for judicial review should be resolved as soon as possible. The Court finds that this case should continue as a specially managed proceeding and on an expedited basis.

ORDER

THIS COURT ORDERS:

1. The motion for interlocutory injunction is granted.
2. The reinstatement of Carolyn Buffalo as Chief of the Montana First Nation and Leonard StandingontheRoad as Councillor with access to their offices and with pay.
3. The respondents are enjoined, whether directly or indirectly from holding the election planned for April 8, 2011, or any other by-election or general election of the Montana First Nation except in accordance with the Regulations.
4. The proceeding shall continue as a specially-managed proceeding and on an expedited basis.
5. The whole with costs.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-515-11

STYLE OF CAUSE: CHIEF CAROLYN BUFFALO et al
v. REMA RABBIT et al

**MOTION CONSIDERED AT OTTAWA, ONTARIO BY WAY OF
TELECONFERENCE**

DATE OF HEARING: April 1, 2011

**REASONS FOR ORDER:
AND ORDER** BOIVIN J.

DATED: April 5, 2011

APPEARANCES:

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