Federal Court  Cour fédérale

**Date: 20120516**

**Docket: T-1356-11**

**Citation: 2012 FC 590**

**Ottawa, Ontario, May 16, 2012**

**PRESENT: The Honourable Mr. Justice de Montigny**

**BETWEEN:**

**ANDREW ORR**

**Applicant**

**and**

**CHIEF JAMES ALOOK AND PEERLESS TROUT FIRST NATION**

**Respondents**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Peerless Trout First Nation Council (the Council) not to remove Chief James Alook from office for conflict of interest, pursuant to section 20.1 of the *Customary Election Regulations of the Peerless Trout First Nation*, 2010 (Election Bylaws), or alternatively, the Council's failure to make a decision regarding Chief Alook's removal. The Applicant seeks an order declaring that the Council has refused to exercise its jurisdiction, and an order removing Chief Alook from office.

**Facts**

[2] The Applicant was the interim Chief of Peerless Trout First Nation (PTFN) until July 10, 2010. He is also a Director of both the Fifth Meridian Development Association (FMDA) and Fifth Meridian Enterprises Ltd. (FME). These two entities were incorporated as non-profit corporations to carry out functions and programs for the community until PTFN was recognized as a First Nation in 2010. On June 30, 2010, PTFN held its first election and James Alook, one of the Respondents, was elected Chief. Two unsuccessful candidates, Norman Okemow and Norman Gladue, launched election appeals which were dismissed in July 2010.

[3] The Applicant states that Chief Alook is the President of FMDA, and was the Vice President of FME until he was removed on July 18, 2011. The Applicant also alleges that after he was elected, Chief Alook continued to operate FME as a business, thus violating the conflict of interest provisions of the Election Bylaws.

[4] The Applicant states that Chief Alook was a Director and shareholder of Amber Oilfield Contracting Ltd. with his wife, until March 9, 2011 when his wife became the sole shareholder. The Applicant further alleges that after being elected, Chief Alook continued to direct that work be performed by Amber Oilfield Contracting Ltd., which was also in breach of the conflict of interest provisions of the Election Bylaws.

[5] The Applicant also alleges that Chief Alook is holding cheques from Athabasca Oil Sands Corporation and Coastal Resources Limited and he will not release these cheques.

[6] Mr. Okemow made the initial complaint to the Council regarding Chief Alook's alleged conflict of interest, and requested that Chief Alook be removed as Chief. A public meeting was held in March 2011, to address the allegations. The Council sought further information from members regarding the issue. The Council also commissioned two legal opinions on the issue, one from its legal counsel and one from outside counsel.

[7] The Council received further information from Mr. Okemow, and also received a response to the allegations from Chief Alook.

[8] Another public meeting was held on June 2, 2011, to consider the allegations. Brian Pitcairn, the Band Manager, attests in his affidavit that Mr. Okemow did not speak at the meeting. Other members, including the Applicant, did speak to the allegations at the meeting. The two legal opinions were also presented, both of which concluded that there was no evidence to support the allegations of conflict of interest.

[9] At the meeting, the Council announced it would wait a further two weeks before making its decision, and during that time it would accept any other evidence to support the allegations.

[10] Mr. Pitcairn attests by affidavit that the Council did not receive any further evidence during that two-week period, nor has it received any further evidence since that time. Mr. Pitcairn states that the Council has not yet made any decision in response to Mr. Okemow's allegation.

[11] In his Memorandum of Fact and Law, the Applicant states that further evidence was submitted to the Council; specifically, the Council was served with his first application for judicial review (T-959-11), and two supporting affidavits. However, the Applicant does not attest to this in his affidavit. Mr. Pitcairn acknowledges that the Notice of Application was received, as well as an affidavit of the Applicant. He notes that the Council received a Notice of Discontinuance regarding the T-959-11 application on June 9, 2011.

[12] The Applicant states in his Memorandum that the initial application for judicial review was withdrawn because it had been commenced before the end of the two-week period for receipt of further information. The Applicant commenced the current application once that period had elapsed.

**Issues**

[13] As a preliminary issue, the Respondents challenged the introduction into the evidence of the Affidavit of Andrew Orr filed in discontinued application T-959-11, since it had not been properly introduced in the current application before the Court.

[14] As for the substantive issues, they can be framed as follows:

(a) Does the Court have jurisdiction to order that Chief Alook be removed?

(b) Are the requirements met for the Court to order that the Council consider whether to remove Chief Alook?

**Analysis**

[15] Technically speaking, the Respondents are correct that the Affidavit of Andrew Orr that was sworn in discontinued application T-959-11, was not sworn in the within application and should therefore be disregarded. Rule 306 of the *Federal Courts Rules*, SOR/98-106, prescribes the manner in which evidence is to be submitted on an application, and states:

> Within 30 days after issuance of a notice of application, an applicant shall serve its supporting affidavits and documentary exhibits and file proof of service.

[16] The rationale behind the rule that evidence be put before the Court by means of affidavits, is that it must be open to cross examination by the opposing party. For that reason, evidence submitted in one application cannot be flipped over to another application, even if the same parties are involved (see *Kahnapace v Canada (Attorney General)*, 2010 FCA 70, 402 NR 61; *Tekyi v Canada (Minister of Citizenship and Immigration)* (1995), 90 FTR 300 at para 13, 53 ACWS (3d) 836; *Central Trust Co v 103702 Canada*, [1981] AJ no 1328 (ABQB) (QL)).

[17] In any event, counsel for the Applicant indicated at the hearing that this affidavit was incorporated in the Applicant's Record for the sole purpose of showing that it was served on Chief Alook and the Council, and that the information contained therein was received during the two-week period set by the Council, for submitting any further information relating to the allegations made by Mr. Okemow. The Court is therefore prepared to consider this affidavit for that limited purpose, and not for the truth of what is alleged.

**(a) Does the Court have jurisdiction to order that Chief Alook be removed?**

[18] Counsel for the Respondents submit that this Court has no jurisdiction to order the removal of Chief Alook from his elected office, part-way through his term of office, as requested by the Applicant. It is at the Council's discretion, pursuant to s. 20 of its Election Bylaws, to decide whether removal of one of its members or of the Chief is warranted.

[19] The relevant portion of section 20 of the Election Bylaws states:

> The removal of a Chief or Councillor from office shall be determined by the Council on the following grounds:
>
> …
>
> (e) They breach the Conflict of Interest Guidelines for Chief and Council as set out in Schedule "C"

[20] As for Schedule "C", it states in part:

> Council must not directly or indirectly engage in any personal or business activity which competes or conflicts with the interests of the Peerless Trout First Nation (hereinafter "the Nation") or compromises their ability to serve the interests of the Nation. These activities include, but are not limited to, the following:
>
> …
>
> 2. PERSONAL BENEFITS
>
> The Council will not make decisions or use their office or powers to provide extraordinary benefits for themselves personally or for their immediate family members.
>
> …
>
> 4. OUTSIDE BUSINESS
>
> a) Council must promptly divulge, in writing, the nature and extent of their outside employment and business interests to the Council.

> b) Each Chief and Councillor must not deprive the Nation of their best efforts in performing their duties as a Chief and/or Councillor and if they do it is considered a conflict of interest unless it is deemed necessary for health, personal or family reasons.
>
> c) Each member of Council is expected to devote full time to his or her duties on Council and shall not participate in any outside business while they are an elected member of Council.
>
> d) LOANS, GIFTS, AND ENTERTAINMENT
>
> e) The Council must be beyond challenge or reproach in every business transaction. They must not allow themselves to be put into a position where their judgments may appear to be unduly influenced by personal considerations.
>
> f) The Council shall not accept any extraordinary gifts, personal loans, or other special considerations from any Members or an individual, business or organization doing business with the Nation.
>
> g) Any member of Council who is offered or receives payments or gifts of more than a nominal value shall refuse it or return it to the giver in a tactful and dignified manner, advising the giver of this policy prohibiting its acceptance.
>
> h) Members of the Council are not eligible to receive loans from the Nation or any of its entities while in office.

[21] I agree with the Respondents that it is not for this Court to usurp the role of the Council. Paragraph 20(1) of the Election Bylaws makes it clear that it is up to the Council to determine whether the Chief or one of its members has breached the Conflict of Interest Guidelines. Moreover, paragraph 20(2) entrusts to the elected Council the unqualified, absolute and unfettered discretion to decide whether or not to remove a member of Council even if the events or misdeeds

that may justify removal are confirmed. It states unequivocally that, "[u]pon confirmation of the grounds for removal, the Council by Resolution may remove the Chief or Councillor from their Office" (emphasis added). It would be quite inappropriate to step into the shoes of Council and to rule on the removal of the Chief even before Council makes its own decision (see, by analogy, *Bruno v Samson Cree Nation*, 2006 FCA 249 at para 23, 149 ACWS (3d) 810)).

[22] The same is true with respect to this Court's jurisdiction to grant a writ of *quo warranto* pursuant to subsection 18(1)(a) of the *Federal Courts Act*, RSC 1985, c F-7. First of all, there is some authority in support of the proposition that *quo warranto* does not extend to cases of alleged conflict of interest committed by an elected official in connection with the performance of his functions after he has taken office (see, for ex., *Re Bruce et al and Reynatt et al*, [1979] 2 FC 697 at para 14, 104 DLR (3d) 11 (FCTD); *Bird v Salt River First Nation*, 2009 FC 25 at para 13, 93 Admin LR (4th) 90).

[23] Further, Chief Alook's election was challenged in two election appeals filed in accordance with the Election Bylaws, and both election appeals were dismissed in July 2010. There is no allegation before this Court that Chief Alook was not eligible to run as a candidate for Chief in the June 2010 election, nor is there any evidence before this Court to support such an allegation.

[24] More importantly, it is well established that *quo warranto* is not available to contest an election where the law provides another remedy, as it does under the Election Bylaws (see *Jock v Canada (Minister of Indian & Northern Affairs)*, [1991] 2 FC 355 at paras 63-66 (FCTD) (QL)).

[25] Finally, the Court also agrees with the Respondents that the Court cannot, by issuing a writ of *mandamus* (assuming the requirements for such a writ have been met, which shall be discussed in the next section), dictate the result of the Council's discretionary decision (*Kahlon v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 386 at para 3 (FCA) (QL); *St. Brieux (Town) v Canada (Minister of Fisheries and Oceans)*, 2010 FC 427 at para 57, 370 FTR 8). The Court finds that, pursuant to section 20 of the Election Bylaws, the Council's decision whether to remove Chief Alook remains within its discretion, even if it accepts the allegations of conflict of interest. Thus, even if the facts alleged by the Applicant were true and were found to amount to a conflict of interest, the remedy sought by the Applicant is not available from this Court.

**(b) Are the requirements met for the Court to order that the Council consider whether to remove Chief Alook?**

[26] *Mandamus* is an extraordinary, discretionary remedy and the Federal Court of Appeal has laid down the requirements that must be satisfied before the Court may issue a writ of *mandamus*, saying:

> 1. There must be a public legal duty to act: …
>
> 2. The duty must be owed to the applicant: …
>
> 3. There is a clear right to performance of that duty, in particular:
>
>  (a) the applicant has satisfied all conditions precedent giving rise to the duty; …
>
>  (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; …

> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>
> (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
>
> (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
>
> (e) *mandamus* is only available when the decision-maker's discretion is "spent", i.e., the applicant has a vested right to the performance of the duty. …
>
> 5. No other adequate remedy is available to the applicant: …
>
> 6. The order sought will be of some practical value or effect: …
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought: …
>
> 8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.
>
> *Apotex v Canada (Attorney General)*, [1994] 1 FC 742 at para 45 (FCA) (QL) [*Apotex*]

[27] The Respondents concede that the Council has a duty to consider whether to exercise its discretion and remove a Chief or Council member, if a member has formally submitted a request for such consideration.

[28] In their factum, the Respondents submitted that the duty is not owed to the Applicant in this case, but rather to Mr. Okemow, who submitted the initial complaint about the alleged conflict of interest. At the hearing, however, counsel relented somewhat on that position, and in my view, appropriately so.

[29] There is no formal requirement in the Election Bylaws with respect to the decision sought from the Council, and the Respondents have not submitted any evidence of any formal procedural requirements. Furthermore, Mr. Pitcairn acknowledged in his affidavit that members other than Mr. Okemow, including the Applicant, made submissions regarding the conflict of interest allegations at the June 2, 2011 meeting. As a result, the Court does not accept the argument that the Council's duty is not owed to the Applicant. Not only is he a member of PTFN, but he was also an interested party who participated in the process.

[30] As for the third requirement, counsel for the Respondents submit that it is only in his Memorandum of Fact and Law dated September 28, 2011 that Mr. Orr says, for the first time, that his affidavit filed in the now discontinued application T-959-11 is his further information, as requested by Council at its June 2, 2011 meeting. Furthermore, counsel argues that even if the Applicant's Memorandum of Fact and Law may be considered Mr. Orr's prior demand of Council to perform its duty, such demand had not been made when he commenced the within application on August 22, 2011. As a result, it cannot be said that there is an unreasonable delay on the part of the Council.

[31] I find this argument without merit. According to the affidavit of Mr. Pitcairn, the Council announced at the end of the meeting held on June 2, 2011 that it would wait two more weeks before making its decision, and that in those two weeks, it would accept any other evidence in support of the allegations of conflict of interest. There was therefore no need for a further request that Council exercise its duty to come to a decision with respect to the allegation made against Chief Alook. The Applicant and all other members of PTFN were entitled to a decision, and therefore the only issue is whether a reasonable time was allowed to comply with the demand.

[32] It may be that when the application was commenced on August 22, 2011, there had not yet been any unreasonable delay on the part of the Council. It is now almost a year since the Council committed to determine whether Chief Alook breached the Conflict of Interest Guidelines and, if so, whether he should be removed. No decision has yet been made, to the Court's knowledge. In those circumstances, an order of *mandamus* is clearly warranted. Indeed, counsel for the Respondents readily admitted at the hearing that there is no discretion for the Council to come to a decision, whatever that decision may be.

[33] Being of the view that all the other requirements set out in *Apotex*, above, are met, an order in the nature of *mandamus* requiring the Council to come to a decision with respect to the allegations of conflict of interest that have been made against Chief Alook is warranted. The Council shall make a decision on the removal of James Alook from the office of Chief of PTFN no later than one month following the release of this Judgment. Costs are granted to the Applicant.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** Council shall make a decision on the removal of James Alook from the office of Chief of PTFN no later than one month following the release of this Judgment. Costs are granted to the Applicant.

"Yves de Montigny"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1356-11 |
| **STYLE OF CAUSE:** | ANDREW ORR v CHIEF JAMES ALOOK AND PEERLESS TROUT FIRST NATION |
| **PLACE OF HEARING:** | Edmonton, AB |
| **DATE OF HEARING:** | December 14, 2011 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | de MONTIGNY J. |
| **DATED:** | May 16, 2012 |

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| | |
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| David Rolf | FOR THE RESPONDENTS |

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