Federal Court  Cour fédérale

Date: 20141015

Docket: T-1570-13

Citation: 2014 FC 981

Ottawa, Ontario, October 15, 2014

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

SALT RIVER FIRST NATION COUNCILLORS, JUDITH GALE AND CONNIE BENWELL

Applicants

and

FRIEDA MARTSELOS, CHRISTOPHER HUNTER, BETTY PHINNEY AND KEN LAVIOLETTE

Respondents

JUDGMENT AND REASONS

[1] This file involves an application for judicial review, originally brought by the above-named applicants and another individual, Ms. Joline Beaver. The Notice of Application was filed at the end of September 2013, pursuant to the September 3, 2013 Order of Justice Scott, extending the time for doing so.

[2] In their application, the applicants and Ms. Beaver sought to set aside three April 29, 2013 decisions removing the applicants and Ms. Beaver as Councillors of the Salt River First Nation [SRFN] and also requested a declaration to affirm a Band Council Resolution that the applicants allege was passed on May 13, 2013, purportedly removing the respondent, Frieda Martselos, as Chief of the SRFN. There is a dispute between the parties as to whether a meeting was properly called to pass the Resolution. The Resolution was not given any effect by the SRFN and Ms. Martselos accordingly remained in the position of Chief.

[3] The Court now has pending before it three different matters which are dealt with in these Reasons: first, a motion of the respondents to permanently stay this application for judicial review for several reasons, including the fact that it has become moot due to new elections having taken place for Chief and Councillors of the SRFN, or in the alternative, to require the applicant, Judith Gale, to provide security for costs; second, a motion by Ms. Gale to remove counsel for the respondents as counsel of record due to an alleged conflict of interest and for two other matters; and, finally, a request by the respondents for an order for costs.

[4] To understand these issues, it is necessary to review some of the procedural history in this matter.

I. Background

[5] Before the applicants perfected their application for judicial review, the respondents brought a preliminary motion to strike portions of the Notice of Application as being outside the jurisdiction of this Court, to sever the cases of the three applicants, to add the SRFN as a

respondent (or to substitute it as the sole respondent) and to rename the applicants. The motion was originally returnable on October 29, 2013 in Vancouver.

[6] During the first case management conference held in this file, the parties agreed to adjourn the respondents' motion to the first available date following November 18, 2013 to allow the applicants to file responding materials. They also agreed that the deadlines for filings in respect of the underlying judicial review application would be extended until after the respondents' motion was disposed of. These agreements were reflected in my Order of October 25, 2013, which provided for the rescheduling of the respondents' motion to the first available hearing date in Edmonton and extended the deadlines for serving and filing materials in respect of the judicial review application until after the decision on the respondents' motion.

[7] Ms. Beaver filed a Notice of Discontinuance in respect of this matter in November of 2013. The respondents have not moved to assess costs against Ms. Beaver following her discontinuance. Shortly thereafter, also in November 2013, Ms. Benwell and Ms. Gale filed Notices of Intention to Act in Person. The applicants filed responding materials in respect of the respondents' motion on November 19, 2013.

[8] A number of case conferences were subsequently held to schedule the cross-examinations of the affiants who had filed affidavits in connection with the motion and to set the motion down for hearing. At the request of the applicants, several extensions in the schedule were granted, and the applicants were afforded the opportunity to file additional materials. The cross-examinations were ultimately scheduled to take place on April 28 and 29, 2014 in Fort Smith, NT.

[9] Ms. Gale sought to adjourn theses dates due to difficulties she alleged she was experiencing in her personal life. By Order dated April 16, 2014, I refused the adjournment request, holding as follows:

> Ms. Gale has already been granted several extensions of time to file materials. If this latest request were granted, the cross-examinations that are set for April 28th and 29th, 2014 would need to be rescheduled, and there would be further delay in the pursuit of this Application. While sympathetic to the difficulties Ms. Gale is facing in searching for housing, she has had ample time to prepare her affidavit, and any further extension is not warranted.
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> Section 18.4 of the *Federal Courts Act*, R.S.C., 1985, c.F-7, requires that judicial review applications be heard and determined without delay. Moreover, litigation such as the present, which puts in issue the governance of a First Nation, has the potential for destabilizing effects on the community and therefore needs to proceed expeditiously.

[10] On April 25, 2014 Ms. Gale advised the Court and counsel for the respondents that one of the applicants' affiants, who was scheduled to be cross-examined, was no longer available on April 28 or 29, 2014. Counsel for the respondents proposed proceeding with the other cross-examinations as scheduled since plane tickets had already been purchased and a reporter booked to travel to Fort Smith. The respondents also proposed proceeding with the cross-examination of the unavailable witness via video conference at the first subsequent mutually convenient date.

[11] On April 28, 2014 Ms. Gale again wrote to the Court, stating that she had woken that day with a toothache and again requested an adjournment to enable her to travel to Hay River for a dental appointment. The respondents objected, noting that the examinations could nonetheless proceed as only Ms. Benwell had filed an affidavit and accordingly could be cross-examined as scheduled late in the day on April 28. They also argued that if Ms. Gale were unable to conduct

the cross-examinations of the respondents' affiants on the following day due to her toothache, Ms. Benwell could do so. The respondents also noted that the court reporter was leaving for the airport to travel to Fort Smith when the adjournment request was being considered.

[12] By Order dated April 28, 2014, I ordered that the cross-examinations of the witnesses who were available would proceed as scheduled on April 28 and 29, 2014 in Fort Smith.

[13] Counsel for the respondents, Ms. Benwell and Ms. Gale met as scheduled before the reporter on April 28, 2014 in Fort Smith for Ms. Benwell's cross-examination. The respondents have filed a transcript of their on-the-record discussions of April 28, 2014.

[14] During their discussions, Ms. Benwell indicated she wished to discontinue her involvement in the application for judicial review. In addition, both she and Ms. Gale concurred that Ms. Benwell's affidavit would be withdrawn. Ms. Benwell's affidavit was the principal evidence of the applicants in respect of the respondents' motion. In light of the decision to withdraw the affidavit, Ms. Benwell was not cross-examined. Ms. Gale also advised counsel for the respondents on April 28 that her toothache would likely prevent her from conducting the cross-examinations of the respondents' witnesses, which were scheduled for the following day. Ms. Gale did not attend on April 29, 2014.

[15] After canvassing and confirming the parties' availabilities, the Court scheduled a case conference for May 14, 2014, to be conducted via telephone. Notice of the conference and a call in number were provided to the applicants and counsel for the respondents. The applicants failed

to attend and were not reachable at the telephone number they had provided to the Court. I therefore proceeded to hear submissions from counsel for the respondents who advised as to what had transpired during the aborted cross-examinations.

[16] On May 14, 2014, I issued an Order, which set a timetable for Ms. Benwell to file a Notice of Discontinuance, if she wished to file one; for Ms. Gale to indicate her intentions with respect to the application; for the respondents, if they wished a costs award, to file submissions in respect of costs; and for replies to be filed in respect of the respondents' costs submissions.

[17] In accordance with the timetable, on May 23, 2014 Ms. Benwell filed a Notice of Discontinuance. On the same date, the Court received a letter from Ms. Gale, advising that she wished to pursue her application for judicial review.

[18] On June 6, 2014, the respondents filed materials in support of their claim for costs against Ms. Benwell. In their submissions, they contemplate a costs award also being made against Ms. Beaver and Ms. Gale. In terms of the award against Ms. Benwell, the respondents seek an award finding her:

1) jointly and severally liable with Judith Gale and Joline Beaver for $1807.50 for costs incurred up to November 8, 2013; and

2) jointly and severally liable with Judith Gale for $10,065.10 for costs incurred from November 8, 2013 to May 23, 2014.

[19] In June 2014, the respondents attempted to serve the applicants with their motion to stay this application but were unable to effect service. A case conference was subsequently held on

July 7, 2014, in which Ms. Gale and counsel for the respondents participated. Counsel for the respondents outlined the basis for their motion to stay, submitting that the application for judicial review had become moot as it could not be determined before the upcoming election at the SRFN, which was scheduled for the last week of September. Although confirming that this was in effect the scheduled election date, Ms. Gale was not prepared to concede that her application had become moot and counsel for the respondents therefore requested her address for service, which Ms. Gale provided. During this case conference, Ms. Gale advised that she intended to file a motion to remove counsel for the respondents as solicitors of record. During the case conference, I directed counsel for the respondents to canvass with their clients their willingness to participate in a mediation session. By letter dated July 10, 2014, the respondents indicated they were unwilling to participate in mediation. On July 18, 2014, I issued an Order that provided in operative part as follows:

> 1. Although the Court does possess jurisdiction under Rules 386, 387 and 389 to require parties to participate in mediation, given the steadfast refusal of the respondent to voluntarily engage in mediation, there is little likelihood of its leading to resolution of the issues that have arisen in this application. Therefore, no mediation is ordered;
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> 2. The respondent shall bring its motion for a stay under Rule 369 of the *Federal Courts Rules* and shall file its motion record by August 18, 2014;
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> 3. Ms. Gale shall likewise bring her motion to remove counsel as solicitors of record in writing under Rule 369 of the *Federal Courts Rules* by August 18, 2014;
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> 4. Responding materials shall be filed in respect of the two motions by August 31, 2014; and
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> 5. I shall dispose of these motions and the respondents' request for costs based on the written representations that have been and will be filed.

[20] The Court thus has pending before it three matters: first, the respondents' motion to stay the application, in respect of which it seeks a costs award of $1000.00, payable by Ms. Gale, or alternatively, an order requiring Ms. Gale to provide security for costs in the amount of $12,000.00; second, the respondents' request for cost orders against Ms. Benwell, finding her to be jointly and severally liable with Judith Gale and Joline Beaver for $1807.50 for costs incurred up to November 8, 2013, and jointly and severally liable with Judith Gale for $10,065.10 for costs incurred from November 8, 2013 to May 23, 2014; and, finally, Ms. Gale's motion.

[21] In her motion Ms. Gale seeks:

1) an order removing SRFN counsel Mr. David Rolf of Parlee McLaws LLP and Ms. Colleen Verville of Dentons Canada LLP as solicitors of record for the respondents due to an alleged conflict of interest between their duties to the SRFN and to Chief Martselos personally;

2) an order finding Chief Martselos and SRFN solicitors in contempt of the Federal Court and Federal Court of Appeal Judgments in *Salt River Indian Band #759 v Martselos*, 2008 FC 8 and 2008 FCA 221, in which they were not awarded costs;

3) an order requiring Chief Martselos to reimburse the SRFN for monies disbursed to her lawyers in this matter; and

4) in the alternative, an order requiring the SRFN fund Ms. Gale's legal fees as she claims her situation "constitutes a SLAPP scenario" .By this, Ms. Gale may be referring to the American constitutional law concept "Strategic Lawsuit Against

> Public Participation", which denotes lawsuits brought strategically with the intention of intimidating or silencing those who speak out on issues of public interest or controversy.

[22] I assess these various requests below.

II. Is this application for judicial review moot?

[23] Turning, first, to the respondents' motion for a stay, the doctrine of mootness was described by Justice Sopinka in the following terms in *Borowski v Canada (AG)*, [1989] 1 SCR 342, [1989] SCJ No 14 at para 15:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[24] In this application for judicial review, the applicants sought reinstatement on the SRFN Council for the remainder of the 2012-2014 term and the removal of Chief Martselos for the rest of that term. These claims are now moot as new elections were held in the SRFN during the last week of September of 2014, during which Council and Chief were elected for the upcoming 2014-2016 term. I therefore agree with the respondents that this application for judicial review has become moot as the remedies requested can no longer be awarded. I moreover note that the passage of time in this file has been largely, if not solely, attributable to the conduct of the

applicants, who failed to file materials and to proceed with cross-examinations in an expeditious fashion.

[25] As opposed to permanently staying this application, as the respondents request, I believe the more appropriate remedy is to dismiss the application by reason of mootness and have accordingly so ordered.

III. Should any of Ms. Gale's requested remedies be awarded?

[26] I turn next to consideration of the relief that Ms. Gale has requested in her motion.

[27] Given my determination that this application for judicial review will be dismissed for mootness, the request to remove counsel for the respondents as solicitors of record is likewise moot and need not be considered.

[28] As for the other remedies requested by Ms. Gale in her motion, Ms. Gale has filed no evidence in support of her claims. This is a sufficient basis for dismissing them.

[29] In addition, as the respondents correctly note, the SRFN Council's 2008 decision to compensate the Chief and other SRFN members for the legal expenses incurred in previous litigation does not constitute contempt of the orders made in *Salt River Indian Band #759 v Martselos*, 2008 FC 8, 163 ACWS (3d) 331 and 2008 FCA 221, 168 ACWS (3d) 224, declining to award costs. There is in this regard a distinction between a court order awarding or refusing costs and the decision of a First Nation to voluntarily reimburse individuals for their legal fees.

Moreover, the SRFN Band Council Resolutions approving payments to Chief Martselos and other SRFN members to cover their legal expenses were the subject of a judicial review application brought by Councillors Bird and Beaver in T-1582-08, which was subsequently dismissed by consent and without costs. There is accordingly no merit to Ms. Gale's request for a contempt order.

[30] As concerns her "SLAPP" request, the concept is inapplicable here as Ms. Gale's right to free speech is not at issue in this case and, moreover, as the respondents note in their written submissions at para 27, "this is not the case in which to consider importing into Canadian … law American constitutional practices" .

[31] If her request under this rubric is to be interpreted as a request simply for a costs award in the applicants' favour, there is no basis for such an award, and, rather, for the reasons that follow, I have determined that a costs award against the applicants is appropriate.

IV. What costs award is appropriate?

[32] In terms of costs, there may well be situations, especially in cases involving disputes regarding elections in a First Nation, where it is appropriate to either make no costs award against an unsuccessful applicant or, indeed, to provide for interim funding under the principles in *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371. This is not such a case.

[33] Here, even though Ms. Gale appears to be impecunious and Ms. Benwell appears to have very limited means, I believe a costs award must be made against them as their conduct in this litigation resulted in substantial unnecessary costs in connection with the aborted cross-examinations. That said, I do not believe it appropriate to award costs in respect of the present motions as they might have been avoided had the respondents been willing to engage in mediation. I also believe there is no basis for a costs award against Ms. Beaver, who discontinued her application shortly after delivery of the respondents' materials, which demonstrated the possible weaknesses in the applicants' positions.

[34] In terms of the quantum of the award, the presence of two counsel for the respondents was not necessary and I have accordingly determined that the award of costs and reasonable disbursements incurred in connection with this application shall be for one counsel for all steps in this application up to and including attendance at the case conference of July 7, 2014. I hereby fix this sum in the amount of $7000.00, which roughly corresponds to the costs and reasonable disbursements assessed at the lower potion of the range under Column III in Tariff B to the *Federal Courts Rules*, SOR/98-106.

[35] As Ms. Gale was the principal driver behind this application but appears to be currently impecunious, I do not believe it just to follow the habitual approach to costs against multiple parties and make Ms. Benwell and Ms. Gale jointly and severally liable for the costs award. I accordingly order each to pay the sum of $3500.00 in the exercise of my discretion under Rule 400 of the *Federal Courts Rules*. I note that other courts have likewise awarded costs on a several basis in somewhat similar circumstances (see e.g. *McAteer v Devoncroft Developments*

Ltd., 2003 ABQB 425, [2004] 4 WWR 667 (Alta QB) at paras 306-307; *Baldwin v Daubney* (2006), 21 BLR (4^{th}) 232, [2006] OJ No 3919 (Ont Sup Ct) at paras 59-66).

[36] I finally determine in the interests of justice and in exercise of my discretion under Rules 53 and 400 of the *Federal Courts Rules* that the costs award in this case should be in favour of the SRFN, the party the respondents wished to add or substitute as the respondent in their initial motion, and, in fact, the entity that has borne the respondents' costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed, with costs payable by the Applicant, Judith Gale to the SRFN, in the amount of $3500.00 and by the Applicant, Connie Benwell to the SRFN, in the amount of $3500.00.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1570-13
STYLE OF CAUSE:	SALT RIVER FIRST NATION COUNCILLORS, JUDITH GALE AND CONNIE BENWELL v FRIEDA MARTSELOS, CHRISTOPHER HUNTER, BETTY PHINNEY AND KEN LAVIOLETTE

MOTIONS IN WRITING CONSIDERED AT OTTAWA, ONTARIO

JUDGMENT AND REASONS:	GLEASON J.
DATED:	OCTOBER 15, 2014

WRITTEN REPRESENTATIONS BY:

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