Date: 20080619

Docket: A-44-08

Citation: 2008 FCA 221

CORAM: **LINDEN J.A.**
SHARLOW J.A.
TRUDEL J.A.

BETWEEN:

SALT RIVER NATION #195 ALSO KNOWN AS SALT RIVER INDIAN BAND #759 SALT RIVER FIRST NATION COUNCIL AND COUNCILLORS CHRIS BIRD, TONI HERON, SONNY MCDONALD AND MIKE BEAVER

Appellants

and

FRIEDA MARTSELOS

Respondent

Heard at Vancouver, British Columbia, on June 18, 2008.

Judgment delivered at Vancouver, British Columbia, on June 19, 2008.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: LINDEN J.A.
SHARLOW J.A.

Date: 20080619

Docket: A-44-08

Citation: 2008 FCA 221

CORAM: **LINDEN J.A.**
SHARLOW J.A.
TRUDEL J.A.

BETWEEN:

SALT RIVER NATION #195 ALSO KNOWN AS SALT RIVER INDIAN BAND #759 SALT RIVER FIRST NATION COUNCIL AND COUNCILLORS CHRIS BIRD, TONI HERON, SONNY MCDONALD AND MIKE BEAVER

Appellants

and

FRIEDA MARTSELOS

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] Respondent Chief Frieda Martselos successfully challenged in Federal Court a decision of the Salt River First Nation Band's Council to remove her from office. This appeal focuses on the propriety of the Council's decision and the ensuing resolution it adopted.

Facts

[2] Salt River First Nation #195, also known as Salt River Indian Band #759 (SRFN), is an aboriginal First Nation and a band under the *Indian Act*, R.S.C. 1985, c. I-5 (the *Indian Act*) whose affairs are governed by a Council composed of one Chief and six councillors.

[3] On April 23, 2004, the SRFN adopted an election code to improve its governance following past events surrounding a November 2002 election which lead to the removal and reinstatement of the majority of a former Council (see *Salt River First Nation 195 (Council) v. Salt River First Nation 195*, 2003 FCT 670, affirmed 2003 FCA 385). It is common ground that the election code "stands between orderly governance of [the] community and chaos" (appellants' memorandum of fact and law at paragraph 3; respondent's memorandum of fact and law at paragraph 4).

[4] The code and the interpretation of its provisions form the basis of this appeal against the following background:

- On April 30, 2007, by a majority of 11 votes, the respondent Frieda Martselos (the Chief) won a by-election and was elected Chief of the SRFN for a term ending in August 2008.
- On May 7, 2007, four of the five elected members of the Council (the appellants) adopted a Band Council Resolution (the BCR) removing the Chief from her office.

[5] The BCR listed 21 grounds of removal:

> 1. Conducting herself in an autocratic manner without regard for the lawful authority of Council by arrogating to herself sole authority for the administration of the affairs of the SRFN contrary to the customs and constitution of the SRFN;

2. Disregarding and disowning the customary and constitutional right of the Council to govern the affairs of the SRFN through regular and democratic processes on the basis of one vote for each elected member of Council;

3. Refusing to contact Council members or call a meeting of Council to conduct the business of the SRFN;

4. Breaking into the office of the sub-chief without authorization of Council;

5. Terminating the lawfully appointed Band Auditors without authorization of Council and contrary to an existing valid Band Council Resolution appointing such Auditors;

6. Purporting to appoint a Band auditor without authorization of accreditation by Council and contrary to an existing valid Band Council Resolution appointing existing Band Auditors;

7. Removing or purporting to authorize the removal from the Band Office to Edmonton, or other unknown and unauthorized place, essential Band records including financial records, Band Council Resolutions, electronic files and a computer, all of which is essential for the due ongoing administration of the SRFN and due audit of the finances of the SRFN;

8. Wrongly informing the Band's bankers that she has sole responsibility for all administration and financial matters relating to he Band;

9. Attempting to obtain access to funds belonging to the Band and held in the Band's bank accounts without the knowledge or authority of the Council;

10. Wrongly and without justification threatening the Band's bankers with legal proceedings in the event that they continue to honour cheques duly written with the authority of Council, and thereby attempting to freeze the bank accounts of the Band;

11. Terminating the employment of the Financial Officer of the Band without authorization of Council;

12. Changing the locks of the Band Office and excluding the employees and Councillors of the SRFN from their offices and from access to their records;

13. Attempting through the aforesaid acts to frustrate the SRFN's responsibility to meet the payroll due on May 4, 2007 for approximately 15 employees and 30 students;

[14.] Hiring two persons as employees of the SRFN without authorization of Council;

[15.] Demoting Dave Poitras, Band Administrator, without the authorization of Council;

[16.] Purporting to cancel an upcoming by-election without authorization of Council;

> [17.] Calling a general meeting of members without authorization of Council;
>
> [18.] Terminating the employment of SRFN college student or students without authorization of Council;
>
> [19.] Terminating the position of sub-chief without authorization of Council;
>
> [20.] Terminating the services of […] attorneys Jerome Slavic and Gary Laboucan without authorization of Council;
>
> [21.] Swearing herself into the office of Chief without prior authorization of Council and with the intention of governing the SRFN in an autocratic manner contrary to the democratic principles of the constitution of the SRFN.

[6] The Chief sought to have the BCR quashed pursuant to subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[7] In response, the appellants requested a writ of *Quo Warranto* affirming their decision to remove her as the newly elected Chief of SRFN.

Decision of the Federal Court

[8] In a judgment dated January 8, 2008, Beaudry J. (the Judge) quashed the Band Council's resolution (the BCR) removing the Chief from office and dismissed the application for a writ of *Quo Warranto* (judgment cited as 2008 FC 8). Hence the within appeal.

[9] At the hearing in front of the Federal Court, the parties agreed on the issues (at paragraph 2 of the amended reasons for judgment).

[10] Procedural fairness best sums up the first issue regarding the convening of the May 7, 2007 meeting. The Chief submitted that the meeting was not duly convened in accordance with the principle mentioned in paragraph 2(3)(*b*) of the *Indian Act*. She raised three arguments to sustain her position, all of which were dismissed by the Judge on a standard of correctness. They were :

1. Failure to give notice to the Chief of the meeting and provide her with the opportunity to make representations on her own behalf;

2. Failure to proceed with the meeting in the absence of an agenda prepared by the Chief;

3. Failure to give notice to Councillor Joline Beaver.

[11] On the first argument, the Judge held that there was no requirement in the code or the *Indian Act* for the notice to take any specific form. He found that the Chief did receive both oral and written notice of the meeting and that she knew that the general purpose of the meeting was to discuss the issues the appellants had with her conduct (at paragraph 23 of the amended reasons for judgment).

[12] On the second argument, he held that the code allowed Council, in cases where the interests and priorities of Council may differ from those of the Chief, to make appropriate changes to the agenda in order to reflect the disparity. Beaudry J. concluded that “it would be antithetical to the democratic intent of the [code] for the Chief to be able to frustrate the attempts of the Council to meet by simply refusing to prepare and provide an agenda” (at paragraph 25 of the amended reasons for judgment).

[13] Finally, on the last one, the Judge held that “the presumption of regularity of process applies in this case [and that] it was open to the [Chief] to present evidence which might rebut the

presumption" (at paragraphs 27-28 of the amended reasons for judgment). He found that such evidence had not been presented to the Court (at paragraph 28 of the amended reasons for judgment).

[14] Again before this Court, the Chief raises the question of procedural fairness, but abandons her third and last ground of complaint.

[15] In turn, the legal interpretation of the code and its application to the facts of the case summarize the second issue framed by the parties as follows: "Were there any grounds for the removal of the Chief" (at paragraph 2 of the amended reasons for judgment)? At the hearing on appeal, the appellants reformulated the question at bar asking this Court to determine "whether the decision recorded in the BCR was one that the Council was empowered to make".

[16] In the Court below, the Chief submitted that none of the grounds listed in the impugned BCR were contemplated by section 19.1 of the code, which lists the grounds upon which a Chief or Councillor may be removed from office.

[17] The relevant sections read:

> 19. REMOVAL FROM OFFICE
>
> 19.1 Grounds for Removal
> The removal of a Chief or Councillor from office may be determined by the Council on the following grounds:
>
> 19.1.1 The are absent for three (3) consecutive meetings of the First Nation or the Council for which they have been given verbal and/or written notice and for

which no valid reason for their absence is provided in writing to the Council; or

19.1.2 The engage in drunk, drug related, disorderly, violent or other irresponsible conduct at Council meetings, community meetings, or in other public forums or functions which interferes with the conduct of business or brings the reputation of the Council or the First Nation into disrepute; or

19.1.3 They fail to perform duties and obligations as set out in Schedule "B" or breach the Conflict of Interest Guidelines for Chief and Council as set out in Schedules "C"; or

19.1.4 They have been charged with or convicted of an indictable offence under the Criminal Code; or

19.1.5 They had engaged in Corrupt Election practices, the evidence of which were discovered and proven after the Appeal Period; or

19.1.6 They failed to reside in the vicinity of Fort Smith during their term of office; or

19.1.7 They have been suspended three (3) times pursuant to s. 18 during his term of office; or

19.1.8 They have failed to resign or resume their duties after a sixty (60) day leave of absence as required, pursuant to s.16.3.

19.2 Upon satisfactory confirmation of the grounds for removal, the Council by Resolution which states the grounds for removal may remove the Chief or Councillor from their Office.

[18] In response, the appellants argued that the grounds for removal fell more specifically under section 19.1.3 of the code, which refers to the duties and obligations of the Chief and Council as set out in Schedule "B" of the same code, more particularly section 5 entitled "Administration" and its paragraph (a), which reads:

5. ADMINISTRATION

(a) The Council shall ensure the stable, competent, and efficient administration of the First Nation.

[19] Once again, reviewing the Council's decision on a standard of correctness, the Judge noted the severity of the conflict between the parties, and opined that it could not "be said that the Chief failed in her duty to 'ensure a stable, competent and efficient administration of the First Nation' within one week of her election, although she surely misinterpreted her functions as Chief" (at

paragraph 31 of the amended reasons for judgment). He agreed with the appellants that the Chief's misapprehension of her duties and obligations "created confusion, tension, and stress" but found, "in the end, [that] the Band did not suffer financial losses and [that] there was no misappropriation of funds" (at paragraph 31 of the amended reasons).

[20] The Judge concluded "that there were insufficient grounds for removing the [Chief] from the office of the Chief so soon following her election" [Emphasis added] (at paragraph 37 of the amended reasons).

[21] Therefore, as mentioned earlier, Beaudry J. granted the Chief's application and quashed the BCR without costs. The Judge's decision not to award costs to her is challenged by way of a cross-appeal (respondent's memorandum of fact and law at paragraphs 84-94), which will be discussed later.

[22] Finally, the Judge refused to issue the writ of *Quo warranto* sought by the appellants. They do not appeal that part of his judgment.

Issues

[23] The following issues are before this Court:

1. What are the proper standards of review?

2. Was the convening and holding of the May 7, 2007 meeting procedurally fair?

3. Based on a correct interpretation of the election code and the facts of this case, was it reasonable for the Council to remove Ms. Martselos from her office as Chief of the SRFN?

Analysis

Standards of review

[24] As this is an appeal from a decision of the Federal Court, the teachings of *Housen v. Nikolaisen*, 2002 SCC 33 apply. Determining the proper standard of review is a question of law, and if this Court identifies an error at this stage of the judge's analysis, it will become necessary to substitute the appropriate standard of review and to assess or remit the Council's decision on that basis (*Dr Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paragraph 43; *Nagalingam v. Minister of Citizenship and Immigration*, 2008 FCA 153 at paragraph 30).

[25] In choosing his standard of review, the Judge approached both issues agreed upon by the parties as one general question asking himself "whether the Council acted beyond its powers" (at paragraph 16 of the amended reasons for judgment).

[26] Having defined the issues as questions of jurisdiction and procedural fairness, he chose to review the Council's decision on a standard of correctness (*Canada (Attorney General) v. Clegg*, 2008 FCA 189 at paragraph 19; *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29). However, I disagree, in part, with the judge's characterization of the questions at bar.

[27] I am of the opinion that the question of whether there were grounds for removal is a mixed question of fact and law. It is not a pure question of jurisdiction as found by the Judge (at paragraph 18 of the amended reasons for judgment).

[28] Based on the standard of review analysis (*Dunsmuir v. New-Brunswick*, 2008 SCC 9, [*Dunsmuir*]), using the four well-known factors, I conclude that the Council's interpretation of the code attracts a standard of correctness while its examination of the facts and action taken pursuant to it call for a review on a standard of reasonableness.

[29] I note, first of all, the absence of a privative clause in the election code, which implies neither deference nor enhanced scrutiny.

[30] Secondly, although the Council has a greater expertise on matters such as knowledge of the Band's customs and factual determinations (see *Vollant v. Sioui*, 2006 FC 487 at paragraph 31; *Giroux v. Salt River First Nation*, 2006 FC 285 at paragraph 54, varied on other grounds in 2007 FCA 108 [*Giroux*]), the Councillors, who are elected by the members of the SRFN, have no particular expertise in interpreting the election code (see *Grand Rapids First Nation v. Nasikapow*, [2000] F.C.J. No. 1896 (F.C.) (QL) at paragraph 62, [*Grand Rapids*]; *Okeymow v. Samson Cree Nation***,** 2003 FCT 737 at paragraphs 27-28, [*Okeymow*]), and certainly no more than this Court.

[31] As for the third factor, I accept that the adoption of the Code is an exercise, by the SRFN, of its statutory rights. The Band has adopted provisions regulating its election procedures but the purpose of the election code does not require a careful balancing of a variety of interests. This evokes a lower standard of deference (see *Okeymow*, *supra* at paragraphs 30-31; *Grand Rapids*, *supra* at paragraph 63) but to the extent that the Council was adjudicating upon the Chief's rights to hold office, greater scrutiny is required (*Giroux*, *supra* at paragraph 54).

[32] Finally, the main issues require a proper interpretation of the code in order for the Council to act within its jurisdiction. This interpretation must be correct in law and no deference is warranted.

Once such interpretation is found to be correct in law, its application to the facts and the exercise of its discretion by the Council suggest more deference, attracting a standard of reasonableness.

[33] Having said this, I now turn to the remaining issues in appeal.

Was the convening and holding of the May 7, 2007 meeting procedurally fair?

[34] The record shows that on May 4, 2007, the appellants signed a document entitled "Notice to Frieda Martselos, Chief Elect" by which she was advised that Council was "considering her immediate removal from the office of Chief Elect on the grounds set out in the articles of impeachment below" (Appeal Book, vol. 2 at page 252). Those articles of impeachment set out the 21 grounds listed above at paragraph 5 of the present reasons for judgment. The appellants attempted twice to deliver the document through the RCMP and subsequently through an official from Indian and Northern Affairs Canada, but the Chief refused delivery and later refused to open the envelope.

[35] I agree with Beaudry J. when he states that "[t]he facts that [the Chief] refused to attend, or refused to accept service of the envelope containing the relevant information cannot subsequently be used to allow [her] to argue that her right to procedural fairness was not respected" (at paragraph 23 of the amended reasons for judgment).

[36] Had she opened the envelope, she would have been accurately informed of the Council's intentions. The content of the notice was complete and eloquent. Willful blindness estopped the Chief from pleading lack of notice.

[37] As for the Chief's argument that the meeting was not properly convened because she had not prepared an agenda, pursuant to paragraph 3(*a*) of the election code, I agree with Beaudry J. that it cannot succeed (see paragraph 25 of the amended reasons for judgment). The Chief correctly points out that the purpose of the agenda is to give advance notice to the Councillors to allow them to prepare. This is exactly what the notice enclosed in the unopened envelope purported to achieve.

[38] At the hearing, the Chief expanded on that argument, adding that as a logical consequence of paragraph 3(*a*) of the code, which imposes on the Chief the duty to prepare the agenda, only the Chief could call a meeting of the Council. I disagree.

[39] The Chief is asking this Court to find in the election code an unexpressed legislative intention. The code is silent on who holds the authority to convene a meeting of the Council (except for a "special meeting", see section 2.17 of the code). Therefore, she has not convinced me that Beaudry J. erred in his conclusion.

Based on a correct interpretation of the election code and the facts of this case, was it reasonable for the Council to remove Ms. Martselos from her office as Chief of the SRFN?

[40] It is common ground that a main objective of the election code is to effectively manage and administer the SRFN's financial and natural resources in a stable and responsible way with a strong "foundation of laws for good governance" (Notice to electors, Appeal Book, vol. 1 at page 109).

[41] The code clearly states in its preamble that it is in the SRFN's best interest to be guided by the values of democracy and that the customs and traditions of the band require democratic, fair and open Elections for Chief and Council.

[42] While I recognize that deference shall be afforded to findings of facts of the Band's Council, it must, nonetheless, operate according to the rule of law and for the protection of the Band (see *Long Lake Cree Nation v. Canada (Minister of Northern and Indian Affairs)*, [1995] F.C.J. No. 1020 (F.C.) (QL) at paragraph 21; *Qualicum First Nation v. Recalma-Clutesi*, 2006 FC 854 at paragraph 28). Governing in an orderly fashion is part of the rule of law. This implies that when the Council exercises its authority, it must explain to the persons directly affected by its decisions, as well as to the Band members to whom it answers as an elected body, the rationale behind those decisions.

[43] The May 7, 2007 BCR states only that the Chief has engaged in conduct "contrary to the customs, constitution and orderly administration of the SRFN which comprises grounds for removal from office", i.e. the 21 grounds mentioned above (Appeal Book, vol. 1 at page 92).

[44] Most facts supporting the grounds for removal were strongly contested by the Chief and the record is unclear as to what really happened. What comes out clearly from the evidence, however, is the tension between the appellants and the Chief and her decision, after the by-election, to postpone meeting with the Council, formally or informally, until an independent audit was completed and a general meeting, convened for May 15, 2007, held (see the transcript of the May 3, 2007 meeting in Appeal Book, vol. 5 at page 807).

[45] I fail to see how the Council's decision, in this case, amounts to a reasonable exercise of its discretion. Based on the exact same grounds, the election code allowed the Council to either suspend (section 18) or remove (section 19) the Chief from her office.

[46] The BCR is completely silent on the Council's decision-making process. Neither the Chief, nor the membership knows from the BCR, how the Council determined what the accepted facts were, as opposed to the alleged facts and on what basis it chose the remedy it did. Neither the Chief, nor the membership could verify "the existence of justification, transparency and intelligibility within the decision-making process", which lead to the adoption of the impugned BCR (*Dunsmuir, supra* at paragraph 47). This is what reasonableness is mostly concerned with in the context of a judicial review (*Ibid.*). I therefore conclude that the Council's decision is unreasonable as it lacks justification, transparency and intelligibility.

[47] Under these circumstances, I find that it is unnecessary and inappropriate for this Court to comment on the merits of the grounds upon which the Council made its decision. I hasten to add that I do not endorse Beaudry J.'s findings on the sufficiency of the grounds for removal and the severity of the sanction imposed by the Council.

[48] I simply reiterate that the Council must exercise its authority respecting the rule of law, keeping in mind the primacy of the Band's interests. With respect, a more elaborate election code construed and applied in a fair and transparent manner would go a long way in achieving this noble goal and in avoiding, one would hope, situations like the present, which are counter-productive and extremely disturbing for all concerned.

[49] I would therefore dismiss the appeal with costs.

[50] I now turn to the cross-appeal.

Cross-Appeal: costs before the Federal Court

[51] The Chief (appellant on cross-appeal) contends that Beaudry J. erred in ignoring her claim for costs on a solicitor-and-client basis, which she sought arguing that the questions raised in her application were of "critical public importance" for the members of the SRFN. Alternatively, she submits that as a result of her success in the proceedings below she is, at least, entitled to costs on a party to party basis. I disagree.

[52] Pursuant to Rule 400 of the *Federal Courts Rules*, S.O.R./98-106, the matter of costs is left entirely to the Court's full discretion.

[53] The intervention of this Court is limited to those circumstances where the applications judge has clearly "failed to give sufficient weight to all relevant considerations, erred in law or misapprehended the facts" (*Little Sisters Book and Art Emporium v. Canada*, 2007 SCC 2 at paragraph 49). The Judge noted that the Chief had herself contributed some degree of "confusion, tension, and stress" to the situation at hand and declined to make an award of costs in her favour in spite of her success on her application (at paragraph 31 of the amended reasons for judgment). Having so decided, it was unnecessary, for Beaudry J., to examine the Chief's claim for costs on a solicitor-and-client basis. The Judge committed no error in concluding as he did.

[54] As far as the within appeal and cross-appeal go, the Chief renews her claim for costs on a solicitor-and-client basis. An award of costs on that scale is the exception rather than the rule (*Mackin v. New-Brunswick (Minister of Finance); Rice v. New-Brunswick*, 2002 SCC 13 at paragraph 86). Moreover, the Chief did not show that this case raised a point of public interest and importance. Both the nature of the litigation and the conduct of the Chief, as described by the Judge, militate against the conclusion sought.

[55] I would therefore dismiss the cross-appeal, with costs.

"Johanne Trudel"

J.A.

“I agree,
A. Linden J.A.”

“I agree,
K. Sharlow J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-44-08
STYLE OF CAUSE:	SALT RIVER NATION #195 ET AL. V. FRIEDA MARTSELOS
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	June 18, 2008
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	LINDEN J.A. SHARLOW J.A.
DATED:	June 19, 2008

APPEARANCES:

Christopher Harvey Q.C. Christopher Watson	FOR THE APPELLANTS
David C. Rolf K. Colleen Verville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MacKenzie Fujisawa LLP Barristers and Solicitors Vancouver, B.C.	FOR THE APPELLANTS
Parlee McLaws LLP Barristers and Solicitors Vancouver, B.C.	FOR THE RESPONDENT