

Federal Court
of Appeal



CANADA

Cour d'appel
fédérale

Date: 20101001

Docket: A-273-10

Citation: 2010 FCA 253

Present: MAINVILLE J.A.

BETWEEN:

LITTLE RED RIVER CREE NATION #447

Appellants

and

JOHN M. LABOUCAN

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 1, 2010.

REASONS FOR ORDER BY:

MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] The Little Red River Cree Nation #447 is seeking a stay of the order of Justice Gauthier of the Federal Court pending its appeal of this order before this Court. This order quashed a decision taken by the Chief and five members of the Council to remove John M. Laboucan from the office of councillor to which he had previously been elected, as well as from his portfolios with the community.

[2] For the reasons set out below, the stay shall be denied.

[3] Justice Gauthier found that the meeting of October 19, 2009 at which the decision was made had been held in secret and for the sole purpose of removing Mr. Laboucan. She found that neither Mr. Laboucan, nor four other councillors opposed to Mr. Laboucan's removal, nor the band membership had been notified of the meeting. She also found that the meeting had been held far away from the community so as to impede knowledge of the meeting.

[4] Justice Gauthier also found that the decision was contrary to the policies adopted by the Council, and in clear breach of the duty of the Chief and Council to act fairly. She also noted the following at paragraph 54 of her reasons: "Having discussed the matter during the hearing, the Court is satisfied that the respondent understands that as the decision is quashed, the applicant should be put in the same position he would have been back in October 2009."

[5] In its motion, the Little Red River Cree Nation does not directly challenge any of the findings of Justice Gauthier. Rather, it argues that pursuant to section 35 of the *Constitution Act, 1982*, its Council is a legislative body equivalent to a provincial legislature. It adds that its Council is subject to parliamentary privileges and immunities and that, as a result, the expulsion of members from its Council is not subject to judicial review.

[6] Consistent with this position, the Little Red River Cree Nation asserts that an irreparable harm would befall it should the courts interfere with the operations of its Council and that alternatively, since the issue at hand is one of constitutional jurisdiction and of breach of

constitutional jurisdiction, irreparable harm must be presumed. Similar arguments are made in respect to the balance of convenience.

[7] The issue on this motion is whether the Little Red River Cree Nation can satisfy the well-established test for granting a stay, namely whether (a) there is a serious question to be determined in the appeal; (b) irreparable harm will be suffered should the stay not be granted; and (c) the balance of convenience favours granting the stay: *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

[8] I find that none of the elements of the test have been satisfied.

[9] Though the questions raised here by the Little Red River Cree Nation are innovative and bold, this does not necessarily mean they are serious for the purposes of the test. In this case, the Little Red River Cree Nation has failed to show that the questions it raises here were addressed before the Federal Court. Justice Gauthier made no reference to any such questions in her reasons, and the Little Red River Cree Nation has failed to show in its motion record when and how such questions were put before her. The inescapable conclusion is that these questions were not addressed in the Federal Court.

[10] Though the Little Red River Cree Nation now asserts in its motion claims based on section 35 of the *Constitution Act, 1982*, no evidence was submitted to sustain such claims. As a general rule, a party may not raise in appeal a new argument which was not raised in the trial jurisdiction

and in relation to which it might have been necessary to adduce evidence at trial; this is so principally in order to avoid prejudice to the opposing party who could have adduced evidence concerning the argument: *S.S. "Tordenskjold" v. S.S. "Euphemia"*, (1908), 41 S.C.R. 154 at 163-167; *Fralick v. Grand Trunck Ry. Co.* (1910), 43 S.C.R. 494 at 519; *Adricon Ltée v. Town of East Angus*, [1978] 1 S.C.R. 1107 at 1116-17; *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 240. This principle applies where constitutional issues are raised for the first time in appeal: *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at paras. 58-59; *Pardham v. Coca-Cola Ltd.*, 2003 FCA 11 at para. 31; *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 268.

[11] In addition, the evidence does not support the claim that the Little Red River Cree Nation would suffer irreparable harm should Mr. Laboucan occupy the office of councillor to which he was elected.

[12] It is rather Mr. Laboucan who will suffer irreparable harm should a stay be granted. Moreover, the balance of convenience is overwhelmingly in favour of Mr. Laboucan.

[13] Indeed, Mr. Laboucan is being denied an office to which he has been duly elected. The Little Red River Cree Nation is not asserting in this case that he holds the office by electoral fraud or has committed some other serious misdeed affecting his office. Rather it asserts that he cannot hold his office because the Chief and five other councillors have so decided. In the particular circumstances of these proceedings, the continued denial of the office constitutes irreparable harm, not only to Mr. Laboucan, but also to the interests of the constituents he represents on the Council.

[14] In addition, the record shows that the term of office is approaching, and that elections for the Council should be held in the spring of 2011. If the stay is granted, it is likely that Mr. Laboucan will not occupy his office before the next election, thus depriving him of any meaningful remedy should the Little Red River Cree Nation not succeed in its appeal. This also weighs the balance of convenience in his favour.

[15] Mr. Laboucan submits that this is an appropriate case for an award of costs in his favour forthwith, and regardless of the outcome of the appeal, and he seeks a lump sum award of \$2,000, inclusive of disbursements, representing the approximate equivalent of the high end of column IV, and applicable disbursements, related to this motion. I agree.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-273-10

STYLE OF CAUSE: LITTLE RED RIVER CREE
NATION #447 v. JOHN M.
LABOUCAN

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: MAINVILLE J.A.

DATED: October 1, 2010

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Janet Hutchison

FOR THE RESPONDENT

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